

THE
ENGLISH AND EMPIRE DIGES
WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS.

VOLUME X.

THE ENGLISH AND EMPIRE DIGEST

WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED
FROM EARLY TIMES TO THE PRÉSENT DAY, WITH ADDITIONAL
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME X.

COMPANIES

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In this Volume English Cases reported up to 1st January, 1924, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.

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A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (<i>e.g.</i> , [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
. R.	Ontario Appeals	Can.
Ad. & El.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Adam	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Add.	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Agra	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra F. B.	Agra High Court	Ind.
lc. & N.	Agra High Court, Full Bench	Ind.
Alc. Reg. Cas.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Aleyn	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
All.	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
Alta. L. R.	New Brunswick Reports (Allen)	Can.
Amb.	Alberta Law Reports	Can.
	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
	Anderson's Reports, Common Pleas, fol., 2 parts in one vol.,	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	Architects' Law Reports, 4 vols., 1904—1909	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (<i>e.g.</i> , [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Eng.

XIV REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Bankr. & Ins. R.	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	Eng.
Bar. & Arn. ..	Barron and Arnold's Election Cases, 1 vol., 1843—1846	Eng.
Bar. & Aust. ..	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch. ..	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	Eng.
Barn. K. B. ..	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732	Eng.
	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	Ir.
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal. ...	Beavan and Walford's Railway Parliamentary Cases, 1 vol.,	Eng.
Beaw.	Beawes's Lex Mercatoria	Eng.
Bell, C. C. ...	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess.	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol.	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794	Scot.
Bell, Dict. Dec.	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App. ...	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.	Eng.
Belt's Sup. ...	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben.	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng.
Benl.	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
	New Brunswick Reports (Berton)	Can.
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	Eng.
Bing. N. C. ...	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	Eng.
Biss. & Sm. ...	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch.	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com.	Blackstone's Commentaries	Eng.
Bl. D. & Osb. ...	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S.	Bligh's Reports, House of Lords, New Series 11 vols., 1827—1837	Eng.
Bluett	Bluett's Isle of Man Cases	I. of M.
Bom.	Bombay High Court Reports	Ind.
Bom. A. C. ...	Bombay Reports, Appellate Jurisdiction	Ind.
Bom. Cr. Ca. ...	Bombay Reports, Crown Cases	Ind.
Bom. O. C. ...	Bombay Reports, Original Civil Jurisdiction	Ind.
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols, 1796—1804	Eng.
Bos. & P. N. R.	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	Eng.
Bott.	Bott's Laws Relating to the Poor, 2 vols.	Eng.
Bourke	Bourke's Reports	Ind.
Br. & Col. Pr. Cas.	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract.	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr.	Sir R. Brooke's Abridgement	Eng.
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep. ...	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C.	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas. ...	J. Brown's Cases in Parliament, 8 vols., 1702—1800	Eng.
Bro. Supp. to Mor.	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing. ...	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F.	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845	Scot.
Brown. & Lush.	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	Eng.
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715	Scot.
Buch.	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	S.
Buch. A. C.	Buchanan's Reports of Appeal Court (Cape)	S. Af.

Buchan. ...	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813 ...	Scot.
Buck ...	Buck's Cases in Bankruptcy, 1 vol., 1816—1820 ...	Eng.
Bull. N. P.	Buller's Nisi Prius (published, London, 1772) ...	Eng.
Bulst. ...	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626 ...	Eng.
Bunb. ...	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741 ...	Eng.
Burr. ...	Burrow's Reports, King's Bench, 5 vols., 1756—1772 ...	
Burr. S. C. ...	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776 ...	Eng.
Burrell ...	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840 ...	Eng.
C. A.	Court of Appeal Reports, 3 vols., 1867—1877 ...	N.Z.
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841 ...	Eng.
C. B. ...	Common Bench Reports, 18 vols., 1845—1856 ...	Eng.
C. B. N. S. ...	Common Bench Reports, New Series, 20 vols., 1856—1865 ...	Eng.
C. B. R. ...	Canadian Bankruptcy Reports Annotated, 1920—(current) ...	Can.
C. C. Ct. Cas. ...	Central Criminal Court Cases (Sessions Papers), 1834—(current) ...	Eng.
C. L. Ch. ...	Common Law Chambers ...	Can.
C. L. J. ...	Cape Law Journal ...	S. Af.
C. L. J. N. S. ...	Canada Law Journal, New Series, 1865—(current) ...	Can.
C. L. J. O. S. ...	Canada Law Journal, Old Series, 10 vols., 1855—1864 ...	Can.
C. L. R. ...	Common Law Reports, 3 vols., 1853—1855 ...	Eng.
C. L. R. ...	Commonwealth Law Reports ...	Aus.
C. L. R. ...	Calcutta Law Reporter ...	Ind.
C. L. R. ...	Cape Law Reports ...	S. Af.
C. L. T. ...	Canadian Law Times ...	Can.
C. L. T. Occ. N.	Canadian Law Times, Occasional Notes ...	Can.
C. P. ...	Upper Canada Common Pleas ...	Can.
C. P. D. ...	Law Reports, Common Pleas Division, 5 vols., 1875—1880 ...	Eng.
C. P. D. ...	Cape Provincial Division Reports ...	S. Af.
C. R. [date] A. C.	Canadian Reports, Appeal Cases ...	Can.
C. T. R. ...	Cape Times Reports of the Supreme Court of the Cape of Good Hope ...	S. Af.
C. W. N. ...	Calcutta Weekly Notes ...	Ind.
Cab. & El. ...	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885 ...	Eng.
Cald. Mag. Cas.	Caldecott's Magistrates' Cases, 1 vol., 1776—1785 ...	Eng.
Calth. ...	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618 ...	Eng.
Cam. Cas. ...	Cameron's Supreme Court Cases ...	Can.
Cam. Prac. ...	Cameron's Supreme Court Practice ...	Can.
Camp. ...	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816 ...	Eng.
Can. Com. Cas. ...	Commercial Law Reports of Canada ...	Can.
Can. Crim. Cas. ...	Canadian Criminal Cases, Annotated ...	Can.
Can. Gaz. ...	Canadian Gazette ...	Can.
Can. Ry. Cas. ...	Canadian Railway Cases ...	Can.
Car. & Kir. ...	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—	Eng.
Car. & M. ...	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842 ...	Eng.
Car. C. L. ...	Carrington's Treatise on Criminal Law ...	Can.
	New Brunswick Reports (Carleton) ...	Can.
Carp. Pat. Cas. ...	Carpmael's Patent Cases, 2 vols., 1602—1842 ...	Eng.
Cart. ...	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673 ...	Eng.
Cart. ...	Cases on British North America Act (Cartwright) ...	Can.
Carth. ...	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700 ...	Eng.
Cary ...	Cary's Reports, Chancery, 1 vol. ...	Eng.
Cas. in Ch. ...	Cases in Chancery, fol., 3 parts, 1660—1697 ...	Eng.
Cas. Pract. K. B.	Cases of Practice, King's Bench, 1 vol., 1655—1775 ...	Eng.
Cas. Sett. ...	Cases of Settlements and Removals, 1 vol., 1685—1727 ...	Eng.
Cas. temp. Finch	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680 ...	Eng.
Cas. temp. King	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733 ...	Eng.
Cas. temp. Talb.	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737 ...	Eng.
Cass. Dig. ...	Cassells' Digest ...	Can.
Ch. (preceded by date)	Law Reports, Chancery Division, since 1890 (<i>e.g.</i> , [1891] 1 Ch.) ...	Eng.
Ch. App. ...	Law Reports, Chancery Appeals, 10 vols., 1865—1875 ...	Eng.
Ch. Cas. in Ch. ...	Choyce Cases in Chancery, 1557—1606 ...	Eng.
Ch. Ch. ...	Upper Canada Chancery Chambers Reports ...	Can.
Ch. D. ...	Law Reports, Chancery Division, 45 vols., 1875—1890 ...	Eng.
Ch. Rob. ...	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808 ...	Eng.
Char. Cham. Cas.	Charley's Chamber Cases, 2 vols., 1875—1876 ...	Eng.
Char. Pr. Cas. ...	Charley's New Practice Reports, 3 vols., 1875—1876 ...	Eng.
Chip. ...	New Brunswick Reports (Chipman) ...	Can.
Chit. ...	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822 ...	Eng.
Cl. &	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—	Eng.

xvi REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Cl. & Sc. Dr. Cas.	Clark and Scully's Drainage Cases	...	...	...	...	Can.
Clay.	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	...	...	...	...	Eng.
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	...	...	...	...	Eng.
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	...	...	...	...	Eng.
Co. A.	Cook's Lower Canada Admiralty Court Cases	...	...	...	...	Can.
Co. Ent.	Coke's Entries	...	...	...	...	Eng.
Co. Inst.	Coke's Institutes	...	...	...	...	Eng.
Co. L. J.	Colonial Law Journal	...	...	...	...	N.Z.
Co. Litt.	Coke on Littleton (1 Inst.)	...	...	...	...	Eng.
Co. Rep.	Coke's Reports, 13 parts, 1572—1616	...	...	...	...	Eng.
Coch.	Nova Scotia Reports (Cochran)	...	...	...	...	Can.
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833	...	...	...	...	Eng.
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846	...	...	...	...	Eng.
Coll. Jurid.	Collectanea Juridica, 2 vols.	...	...	...	...	Eng.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713	...	...	...	...	Eng.
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885	...	...	...	...	Eng.
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	...	...	...	...	Eng.
Com. Cas.	Commercial Cases, 1895—(current)	...	...	...	...	Eng.
Com. Dig.	Comyns' Digest	...	...	...	...	Eng.
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	...	...	...	...	Eng.
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols.,	...	...	...	...	Ir.
Cong. Dig.	Congdon's Digest	...	...	...	...	Can.
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol.,	...	...	...	...	Ir.
Cooke, Pr. Cas.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	...	...	...	...	Eng.
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	...	...	...	...	Eng.
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	...	...	...	...	Eng.
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	...	...	...	...	Eng.
Coop. temp. Brough.	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834	...	...	...	...	Eng.
Coop. temp. Cott.	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	...	...	...	...	Eng.
Corb. & D.	Coryton's Reports	...	...	...	...	Ind.
Correspondances Jud.	Corbett and Daniell's Election Cases, 1 vol., 1819	...	...	...	...	Eng.
Couper	Correspondances Judiciaires	...	...	...	...	Can.
Cout.	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885	...	...	...	...	Scot.
Cout. Dig.	Coutlees' Unreported Cases	...	...	...	...	Can.
Cowp.	Coutlees' Digest	...	...	...	...	Can.
Cox & Atk.	Cowper's Reports, King's Bench, 2 vols., 1774—1778	...	...	...	...	Eng.
Cox, C. C.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	...	...	...	...	Eng.
Cox, Eq. Cas.	E. W. Cox's Criminal Law Cases, 1843—(current)	...	...	...	...	Eng.
Cox, M. & H.	S. C. Cox's Equity Cases, 2 vols., 1745—1797	...	...	...	...	Eng.
	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852	...	...	...	...	Eng.
	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	...	...	...	...	Eng.
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	...	...	...	...	Eng.
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841	...	...	...	...	Eng.
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1908—(current)	...	...	...	...	Eng.
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols.,	...	...	...	...	Eng.
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	...	...	...	...	Ir.
Craw. & D. Abr. C.	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	...	...	...	...	Ir.
Cress. Insolv. Cas.	Cresswell's Insolvency Cases, 1 vol., 1827—1829	...	...	...	...	Eng.
Cripps' Church Cas.	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	...	...	...	...	Eng.
Cro. Car.	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	...	...	...	...	Eng.
Cro. Eliz.	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	...	...	...	...	Eng.
Cro. Jac.	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625	...	...	...	...	Eng.
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.	...	...	...	...	Eng.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	...	...	...	...	Eng.
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844	...	...	...	...	Eng.
D.	Duxbury's Reports of the High Court of the South African Republic	...	...	...	...	S. Af.
D. C. A.	Dorion's Queen's Bench Reports	...	...	...	...	Can.
D. L. R.	Dominion Law Reports	...	...	...	...	Can.
Dal.	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574	...	...	...	...	Eng.
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol.,	Scot.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823	Eng.
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829	Eng.
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—	Eng.
Dav. Ir.	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—	Ir.
	1611	
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816	Eng.
Day	Day's Election Cases, 1 vol., 1892—1893	Eng.
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	Eng.
Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840	Eng.
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	Eng.
Dears. & B.	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858	Eng.
Dears. C. C.	Dearsley's Crown Cases Reserved, 1 vol., 1852—1856	Eng.
Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	Scot.
De G.	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848	Eng.
De G. & J.	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 ...	Eng.
De G. & Sm.	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852	Eng.
De G. F. & J.	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—	Eng.
De G. J. & Sm.	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—	Eng.
De G. M. & G.	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols.,	Eng.
	1851—1857	
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
	Denison's Crown Cases Reserved, 2 vols., 1844—1852 ...	Eng.
Dick.	Dickens' Reports, Chancery, 2 vols., 1559—1798 ...	Eng.
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol	Scot.
	1665—1677	
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822 ...	Eng.
Donnelly	Donnelly's Reports, Chancery, 1 vol., 1836—1837 ...	Eng.
Doug. El. Cas.	Douglas' Election Cases, 4 vols., 1774—1776 ...	Eng.
Doug. K. B.	Douglas' Reports, King's Bench, 4 vols., 1778—1785 ...	Eng.
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818 ...	Eng.
Dow & Cl.	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832	Eng.
Dow. & L.	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849	Eng.
Dow. & Ry. K. B.	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822	Eng.
	—1827	
Dow. & Ry. M. C.	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827	Eng.
Dow & Ry. N. P.	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823	Eng.
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841 ...	Eng.
Dowl. N. S.	Dowling's Practice Reports, New Series, 2 vols., 1841—1843	Eng.
Dr. & Wal.	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—	Ir.
	1841	
Dr. & War.	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—	Ir.
		Can.
Dra.	Draper's King's Bench Reports	Eng.
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859 ...	Eng.
Drew. & Sm.	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865	Eng.
Drinkwater	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841	Eng.
Drury temp. Nap.	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—	Ir.
Drury temp. Sug.	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841	Ir.
	—1844	
Dugd. Orig.	Dugdale's Origines Juridiciales	Eng.
Dunl. (Ct. of Sess.)	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols.,	Scot.
		Eng.
Dunning	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621	Scot.
		Eng.
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581 ...	Can.
E. & A.	Upper Canada Error and Appeal	Eng.
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—	Eng.
	1858	
E. & E.	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861	Eng.
E. B. & E.	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol.,	Eng.
		S. Af.
E. D. C.	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. D. L.	South African Law Reports, Eastern Districts Local Division...	Can.
E. L. R.	Eastern Law Reporter	Eng.
E. R. (or Eng. Rep.)	English Reports	Can.
E. R.	Ontario Election Reports	Eng.
Eag. & Y.	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825 ...	Eng.
East	East's Reports, King's Bench, 16 vols., 1800—1812 ...	Eng.
East, P. C.	East's Pleas of the Crown	Eng.
Ecc. & Ad.	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	Eng.

xviii **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

Eden	...	Eden's Reports, Chancery, 2 vols., 1757—1766	...	Eng.
Edgar	...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	...	Scot.
Edw.	...	Edwards' Reports, Admiralty, 1 vol., 1808—1812	...	Eng.
Elchies	...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—	...	Scot.
Emden's B. C.	...	Emden's Building Contracts, Building Leases and Building	...	Eng.
Eng. Pr. Cas.	...	Roscoe's English Prize Cases, 2 vols., 1745—1858	...	Eng.
Eq. Cas. Abr.	...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	...	Eng.
Eq. Rep.	...	Equity Reports, 3 vols., 1853—1855	...	Eng.
Esp.	...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	...	Eng.
Ex. D.	...	Law Reports, Exchequer Division, 5 vols., 1875—1880	...	Eng.
Exch.	...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	...	Eng.
Exch. C. R.	...	Exchequer Court Reports	...	Can.
F. (Ct. of Sess.)	...	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	...	Scot.
F.	...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	...	S. Af.
F. & F.	...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	...	Eng.
F. N. D.	...	Finnemore's Notes and Digest of Natal Cases, 1863—1867	...	S. Af.
Fac. Coll.	...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	...	Scot.
Falc.	...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol. 1744—1751	...	Scot.
Falc. & Fitz.	...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	...	Eng.
Fenton	...	Fenton, Important Judgments	...	N.Z.
Ferg.	...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	...	Scot.
Fitz. Nat. Brev.	...	Fitzherbert's Natura Brevium	...	Eng.
Fitz-G.	...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	...	Eng.
Fl. &	...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	...	Ir.
Fonbl.	...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	...	Eng.
For.	...	Forrest's Reports, Exchequer, 1 vol., 1800—1801	...	Eng.
Forb.	...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705 —1713	...	Scot.
Fort. De Laud.	...	Fortesque, De Laudibus Legum Angliæ	...	Eng.
Fortes. Rep.	...	Fortescue's Reports, fol., 1 vol., 1692—1736	...	Eng.
Fost.	...	Foster's Crown Cases, 1 vol., 1708—1760	...	Eng.
Fount.	...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	...	Scot.
Fox & S. Ir.	...	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	...	Ir.
Fox & S. Reg.	...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886— 1895	...	Eng.
Fras.	...	Fraser (Simon), Election Cases, 2 vols., 1793	...	Eng.
Freem. Ch.	...	Freeman's Reports, Chancery, 1 vol., 1660—1706	...	...
Freem. K. B.	...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	...	Eng.
G.	...	Gregorowski's Reports of the High Court of the Orange Free State from 1883	...	S. Af.
G. & R.	...	Nova Scotia Reports (Geldert & Russell)	...	Can.
G. I. Dig.	...	General Index Digest	...	Can.
Gal. & Dav.	...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	...	Eng.
Gale	...	Gale's Reports, Exchequer, 2 vols., 1835—1836	...	Eng.
Gaz. L. R.	...	New Zealand Gazette Law Reports	...	N.Z.
Geld. Dig.	...	Geldert's Digest	...	Can.
Gib. Cod.	...	Gibson's Codex Juris Ecclesiastici Anglicani	...	Eng.
Giff.	...	Giffard's Reports, Chancery, 5 vols., 1857—1865	...	Eng.
Gilb.	...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	...	Eng.
Gilb. C. P.	...	Gilbert's History and Practice of the Court of Common Pleas	...	Eng.
Gilb. Ch.	...	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706— 1726	...	Eng.
Gilm. & F.	...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	...	Scot.
Gl. & J.	...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	...	Eng.
Glanv.	...	Glanville, De Legibus et Consuetudinibus Regni Angliæ	...	Eng.
Glanv. El. Cas.	...	Glanville's Election Cases, 1 vol., 1623—1624	...	Eng.
Glascoc	...	Glascoc's Reports (Ireland), 1 vol., 1831—1832	...	Ir.
Godb.	...	Godbolt's Reports, King's Bench, Common Pleas, and Exche- quer, 1 vol., 1574—1637	...	Eng.
Gouldsb.	...	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	...	Eng.
Gow	...	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	...	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Griffin's Patent Cases	...	Upper Canada Chancery (Grant)	Can.
Gwill.	...	Griffin's Patent Cases, 1884—1887	...	Eng.
	...	Gwillim's Tithe Cases, 4 vols., 1224—1824	...	Eng.
H.	...	Hertzog's Reports of the High Court of the South African Republic, 1893	...	S. Af.
H. & C.	...	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	...	Eng.
H. & N.	...	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—	...	Eng.
H. & Tw.	...	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	...	Eng.
H. & W.	...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—	...	Eng.
H. B. R. (preceded by date)	...	Hansell's Reports of Bankruptcy and Companies' Winding Up Cases, 3 vols., 1915—1917 (<i>e.g.</i> , [1915] H. B. R.)	...	Eng.
H. C.	...	Reports of the High Court of Griqualand West	...	S. Af.
H. E. C.	...	Hodgin's Election Reports	...	Can.
H. L. Cas.	...	Clark's Reports, House of Lords, 11 vols., 1847—1866	...	Eng.
Hag. Adm.	...	Haggard's Reports, Admiralty, 3 vols., 1822—1838	...	Eng.
Hag. Con.	...	Haggard's Consistorial Reports, 2 vols., 1789—1821	...	Eng.
Hag. Ecc.	...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	...	Eng.
Hailes	...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	...	Scot.
Hale, C. L.	...	Hale's Common Law	...	Eng.
Hale, P. C.	...	Hale's Pleas of the Crown, 2 vols.	...	Eng.
Han.	...	New Brunswick Reports (Hannay)	...	Can.
Har. & Ruth.	...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865	...	Eng.
Har. & W.	...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	...	Eng.
Harc.	...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	...	Scot.
Hard.	...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	...	Eng.
Hare	...	Hare's Reports, Chancery, 11 vols., 1841—1853	...	Eng.
Hawk. P. C.	...	Hawkins's Pleas of the Crown, 2 vols.	...	Eng.
Hay & Marr.	...	Hay's Reports	...	Ind.
Hayes	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	Eng.
Hayes & Jo.	...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	...	Ir.
	...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	...	Ir.
Hem. & M.	...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	...	Eng.
Hob.	...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	Eng.
Hodg.	...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	...	Eng.
Hog.	...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	...	Eng.
Holt, Adm.	...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	...	Ir.
	...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—	...	Eng.
Holt, Eq.	...	W. Holt's Equity Reports, 2 vols., 1845	...	Eng.
Holt, K. B.	...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	...	Eng.
Holt, N. P.	...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	...	Eng.
Home, Ct. of Sess.	...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	...	Scot.
Hong Kong L. R.	...	Hong Kong Reports	...	Hong Kong
Hop. & Colt.	...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	...	Eng.
Hop. & Ph.	...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	...	Eng.
Horn & H.	...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	...	Eng.
Hov. Supp.	...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	...	Eng.
How. C.	...	Howard's Chancery Practice	...	Ir.
How. C. S.	...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	...	Ir.
How. E. E.	...	Howard's Equity Exchequer	...	Ir.
How. P. L.	...	Howard on the Popery Laws	...	Ir.
Hud. & B.	...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	...	Ir.
Hudson's B. C.	...	Hudson on Building Contracts, 2 vols.	...	Eng.
Hume	...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	...	Scot.
Hut.	...	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	...	Eng.
Hy. Bl.	...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	...	Eng.
Hyde	...	Hyde's Reports	...	Ind.
I. C. L. R.	...	Irish Common Law Reports, 17 vols., 1849—1866	...	Ir.
I. Ch. R.	...	Irish Chancery Reports, 17 vols., 1850—1867	...	Ir.
I. Eq. R.	...	Irish Equity Reports, 13 vols., 1838—1851	...	Ir.
I. L. R.	...	Irish Law Reports, 13 vols., 1838—1851	...	Ir.
I. L. R. (Vol.) All.	...	Indian Law Reports, Allahabad	...	Ind.

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I. L. R. (Vol.) Bom.	...	Indian Law Reports, Bombay	Ind.
I. L. R. (Vol.) Calc.	...	Indian Law Reports, Calcutta	Ind.
I. L. R. (Vol.) Lah.	...	Indian Law Reports, Lahore	...	...	...	...	Ind.
I. L. R. (Vol.) Mad.	...	Indian Law Reports, Madras	...	...	...	...	Ind.
I. L. T. ...	...	Irish Law Times, 1867—(current)	...	...	...	...	Ir.
I. L. T. Jo.	...	Irish Law Times Journal, 1867—(current)	...	...	...	...	Ir.
I. R. (preceded by date)	...	Irish Reports, since 1893 (<i>e.g.</i> [1894] 1 I. R.)	...	...	...	...	Ir.
I. R. (Vol.) C. L.	...	Irish Reports, Common Law, 11 vols., 1866—1877	...	...	...	...	Ir.
I. R. Eq.	...	Irish Reports, Equity, 11 vols., 1866—1877	...	...	...	...	Ir.
Ind. Awards	...	Industrial Awards Recommendations	...	...	...	...	N.Z.
Ind. Jur. N. S.	...	Indian Jurist, New Series	...	...	...	...	Ind.
Ind. Jur. O. S.	...	Indian Jurist, Old Series	...	...	...	...	Ind.
Ir. Cir. Rep.	...	Reports of Irish Circuit Cases, 1 vol., 1841—1843	...	...	...	...	Ir.
Ir. Jur.	...	Irish Jurist, 18 vols., 1849—1866	...	...	...	...	Ir.
Ir. L. Rec. 1st ser.	...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	...	...	...	...	Ir.
Ir. L. Rec. N. S.	...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	...	...	...	...	Ir.
Irv.	...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	...	...	...	...	Scot.
J. Bridg.	...	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	...	...	...	...	Eng.
J. D. R.	...	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	...	...	...	...	S. Af.
J. P.	...	Justice of the Peace, 1837—(current)	...	...	...	...	Eng.
J. P. Jo.	...	Justice of the Peace (Weekly Notes of Cases)	...	...	...	...	Eng.
J. R.	...	Jurist Reports	...	...	...	...	N.Z.
J. R. N. S.	...	Jurist Reports, New Series	...	...	...	...	N.Z.
J. Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	...	...	...	...	Scot.
Jac.	...	Jacob's Reports, Chancery, 1 vol., 1821—1823	...	...	...	...	Eng.
Jac. & W.	...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	...	...	...	...	Eng.
James	...	Nova Scotia Reports (James)	...	...	...	...	Can.
Jebb & B.	...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1838—1841	...	...	...	...	Ir.
Jebb & S.	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1822—1840	...	...	...	...	Ir.
Jebb, C. C.	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	...	...	...	Ir.
Jebb, Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	...	...	...	Ir.
Jenk.	...	Jenkins' Reports, 1 vol., 1220—1623	...	...	...	...	Eng.
Jo. & Car.	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	...	...	...	...	Eng.
Jo. & Lat.	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	...	...	...	...	Ir.
Jo. Ex. Ir.	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	...	...	...	...	Ir.
John.	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	...	...	...	Eng.
John. & H.	...	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	...	...	...	...	Eng.
Jur.	...	Jurist Reports, 18 vols., 1837—1854	...	...	...	...	Eng.
Jur. N. S.	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	...	...	...	Eng.
K. & G.	...	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	...	...	...	...	S. Af.
K. & J.	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	...	...	...	Eng.
K. B. (preceded by date)	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	...	...	...	Eng.
Kames, Dict. Dec.	...	Law Reports, King's Bench Division, since 1900 (<i>e.g.</i> , [1901] 2 K. B.)	...	...	...	...	Eng.
Kames, Rem. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	...	...	...	Scot.
Kames, Sel. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	...	...	...	Scot.
Kay	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	...	...	...	Scot.
. W.	...	Kay's Reports, Chancery, 1 vol., 1853—1854	...	...	...	...	Eng.
Keny.	...	Keble's Reports, fol., 3 vols., 1661—1677	...	...	...	...	Eng.
Keny. Ch.	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	...	...	...	Eng.
Kerr	...	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	...	...	...	...	Eng.
Kilkerran	...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	...	...	...	Eng.
Kn. & Omb.	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	...	...	...	...	Eng.
Knapp	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	...	...	...	...	Eng.
Konst. & W. Rat. App.	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	...	...	...	...	Eng.
Konst. Rat. App.	...	New Brunswick Reports (Kerr)	...	...	...	...	Can.
	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	...	...	...	...	Scot.
	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	...	...	...	...	Eng.
	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	...	...	...	...	Eng.
	...	Knox's Reports	...	...	...	...	Aus.
	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	...	...	...	...	Eng.
	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	...	...	...	...	Eng.

L. & G. <i>temp.</i> Plunk.	...	Lloyd and Goold's Reports <i>temp.</i> Plunkett, Chancery (Ireland), 1 vol., 1834—1839	...	Ir.
L. & G. <i>temp.</i> Sugd.	...	Lloyd and Goold's Reports <i>temp.</i> Sugden, Chancery (Ireland), 1 vol., 1835	...	Ir.
L. & Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol.,	...	Eng.
L. C. & M. Gaz.	...	Local Courts and Municipal Gazette	...	Can.
L. C. J.	...	Lower Canada Jurist	...	Can.
L. C. L. J.	...	Lower Canada Law Journal	...	Can.
L. C. R.	...	Lower Canada Reports	...	Can.
L. G. R.	...	Local Government Reports, 1902—(current)	...	Eng.
L. J. Adm.	...	Law Journal, Admiralty, 1865—1875	...	Eng.
L. J. Bcy.	...	Law Journal, Bankruptcy, 1832—1880	...	Eng.
L. J. C. C.	...	Law Journal (County Courts Reporter), 1912—(current)	...	Eng.
L. J. C. P.	...	Law Journal, Common Pleas, 1831—1875	...	Eng.
L. J. Ch.	...	Law Journal, Chancery, 1831—(current)	...	Eng.
L. J. Eccl.	...	Law Journal, Ecclesiastical Cases, 1866—1875	...	Eng.
L. J. Ex.	...	Law Journal, Exchequer, 1831—1875	...	Eng.
L. J. Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841	...	Eng.
L. J. K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	...	Eng.
L. J. M. C.	...	Law Journal, Magistrates' Cases, 1831—1896	...	Eng.
L. J. N. C.	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	...	Eng.
L. J. O. S.	...	Law Journal, Old Series, 10 vols., 1822—1831	...	Eng.
L. J. P.	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	...	Eng.
L. J. P. & M.	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	...	Eng.
L. J. P. C.	...	Law Journal, Privy Council, 1865—(current)	...	Eng.
L. J. P. M. & A.	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	...	Eng.
L. Jo.	...	Law Journal Newspaper, 1866—(current)	...	Eng.
L. L. R.	...	Leader Law Reports	...	S. Af.
L. M. & P.	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	...	Eng.
L. N.	...	...	...	Can.
L. R. A. & E.	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865	...	Eng.
L. R. C. C. R.	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	...	Eng.
L. R. C. P.	...	Law Reports, Common Pleas, 10 vols., 1865—1875	...	Eng.
L. R. Eq.	...	Law Reports, Equity Cases, 20 vols., 1865—1875	...	Eng.
L. R. Exch.	...	Law Reports, Exchequer, 10 vols., 1865—1875	...	Eng.
L. R. H. L.	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	...	Eng.
L. R. Ind. App.	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	...	Eng.
L. R. Ind. App. Supp. Vol.	...	Law Reports, India Appeals, Privy Council, Supplementary Volume, 1872—1873	...	Eng.
L. R. Ir.	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	...	Ir.
L. R. P. & D.	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	...	Eng.
L. R. P. C.	...	Law Reports, Privy Council, 6 vols., 1865—1875	...	Eng.
L. R. Q. B.	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	...	Eng.
L. R. Sc. & Div.	...	Quebec Reports, Queen's Bench	...	Can.
L. T.	...	Law Reports, Scotch and Divorce Appeals, House of Lords, 2 vols., 1866—1875	...	Eng.
L. T. Jo.	...	Law Times Reports, 1859—(current)	...	Eng.
L. T. O. S.	...	Law Times Newspaper, 1843—(current)	...	Eng.
L. Th.	...	Law Times Reports, Old Series, 34 vols., 1843—1860	...	Eng.
Lane	...	La Themis	...	Can.
Laws. Reg. Cas.	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	...	Eng.
Ld. Raym.	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	...	Eng.
Le. & Ca.	...	Lawson's Registration Cases, 1895—(current)	...	Eng.
Leach	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	...	Eng.
Lee <i>temp.</i> Hard.	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	...	Eng.
Leg. Rep.	...	Leach's Crown Cases, 2 vols., 1730—1814	...	Eng.
Legge	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	...	Eng.
Leon.	...	T. Lee's Cases <i>temp.</i> Hardwicke, King's Bench, 1 vol., 1733—1738	...	Eng.
Lev.	...	Legal Reporter	...	Ir.
Lew. C. C.	...	Legge's Reports	...	Aus.
	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	...	Eng.
	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols.,	...	Eng.
	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	Eng.
	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	Eng.

xxii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Lib. Ass.	Liber Assisarum, Year Books, 1—51 Edw. III.	Eng.
Lilly	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	Eng.
	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Lloyd, L. R.	Lloyd's List Law Reports, 1919—(current)	Eng.
Lloyd, Pr. Cas.	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	Eng.
Lofft	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	Eng.
Long. & T.	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol.,	Ir.
Lords Journals	Journals of the House of Lords	Eng.
Lud. E. C.	Luder's Election Cases, 3 vols., 1784—1787	Eng.
Lumley, P. L. C.	Lumley's Poor Law Cases, 2 vols., 1834—1842	Eng.
Lush.	Lushington's Reports, Admiralty, 1 vol., 1859—1862	Eng.
Lut.	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols 1682—1704	Eng.
Lut. Reg. Cas.	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	Eng.
Lynd.	Lyndwood, Provinciale, fol., 1 vol.	Eng.
	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
M. & S.	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	Eng.
M. & W.	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	Eng.
M. C. R.	Montreal Condensed Reports	Can.
M. H. C. R.	Madras High Court Reports	Ind.
M. L. R. (Vol.) K. B. or Q. B.	Montreal Law Reports, King's Bench or Queen's Bench	Can.
M. L. R. (Vol.) S. C.	Montreal Law Reports, Superior Court	Can.
M. M. Cas.	Martin's Reports of Mining Cases	Can.
	Macassey's New Zealand Reports	N.Z.
Mac. & G.	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849— 1852	Eng.
Mac. & H.	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	Eng.
M'Cle.	M'Cleland's Reports, Exchequer, 1 vol., 1824	Eng.
M'Cle. & Yo.	M'Cleland and Younge's Reports, Exchequer, 1 vol., 1824—1825	Eng.
Macfarlane	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	Scot.
Macl. & Rob.	Macleane and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	Scot.
Macph. (Ct. of Sess.)	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	Scot.
Macq.	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	Scot.
	Macrory's Patent Cases, 2 parts, 1847—1856	Eng.
Mad.	Madras High Court Reports	Ind.
Madd.	Maddock's Reports, Chancery, 6 vols., 1815—1821	Eng.
Madd. & G.	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	Eng.
Madox	Madox's Formulæ Anglicanum	Eng.
Madox, Exch.	Madox's History and Antiquities of the Exchequer, 2 vols.	Eng.
Mag.	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	Eng.
Man. & G.	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—	Eng.
Man. & Ry. K. B.	Manning and Ryland's Reports, King's Bench, 5 vols., 1827— 1830	Eng.
Man. & Ry. M. C.	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	Eng.
Man. L. J.	Manitoba Law Journal	Can.
Man. L. R.	Manitoba Law Reports	Can.
Man. R. temp. Wood	Manitoba Reports temp. Wood	Can.
	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	Eng.
Mar. L. C.	Maritime Law Reports (Crockford), 3 vols., 1860—1871	Eng.
	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	Eng.
Marr.	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	Eng.
	Marshall's Reports	Ind.
Mayn.	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	Eng.
	Megone's Companies Acts Cases, 2 vols., 1889—1891	Eng.
Men.	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
	Merivale's Reports, Chancery, 3 vols., 1815—1817	Eng.
Milw.	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	Ir.
Mod. Rep.	Modern Reports, 12 vols., 1669—1755	Eng.
Mol.	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831	Ir.
Mont.	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	Eng.
Mont. & A.	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Mont. & B. ...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch. ...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M. ...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
Mont. D. & De G.	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P. ...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S. ...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App.	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	Eng.
Moo. P. C. C.	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. C. N. S.	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M.	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R.	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C.	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P.	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B.	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict.	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr. ...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos. ...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep.	Municipal Reports	Can.
Murd. Epit.	Murdoch's Epitome	Can.
Murp. & H.	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr. ...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr.	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K.	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
A. C. ...	Native Appeal Cases	S. Af.
N. & S. ...	Nichols and Stop's Reports (Tasmania)	Tasmania.
N. B. Dig.	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep.	New Brunswick Equity Reports	Can.
N. B. R.	New Brunswick Reports	Can.
N. B. R. (All.)	New Brunswick Reports (Allen)	Can.
N. B. R. (Ber.)	New Brunswick Reports (Berton)	Can.
N. B. R. (Carl.)	New Brunswick Reports (Carleton)	Can.
N. B. R. (Chip.)	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.)	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr)	New Brunswick Reports (Kerr)	Can.
N. B. R. (P. & B.)	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.)	New Brunswick Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.)	New Brunswick Reports (Pugsley)	Can.
N. B. R. (Tru.)	New Brunswick Reports (Trueman)	Can.
N. L. R.	Natal Law Reports	S. Af.
N. S. R.	Nova Scotia Reports	Can.
N. S. R. (Coch.)	Nova Scotia Reports (Cochran)	Can.
N. S. R. (G. & R.)	Nova Scotia Reports (Geldert & Russell)	Can.
N. S. R. (James)	Nova Scotia Reports (James)	Can.
N. S. R. (Old.)	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.)	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.)	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.)	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad.	New South Wales Reports, Admiralty	Aus.
N. S. W. B.	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas.	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq.	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtrn. Cas.	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R.	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts.	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R.	New South Wales Supreme Court Reports	Aus.
N. S. W. S. C. R. N. S.	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N.	New South Wales Weekly Notes	Aus.
N. W.	North-Western Provinces High Court Reports	Ind.
N. W. T. R.	North-West Territories Reports	Can.
N. Z. Jur.	New Zealand Jurist	N.Z.
N. Z. Jur. Mining Law	New Zealand Jurist Mining Law	N.Z.
N. Z. Jur. N. S.	New Zealand Jurist, New Series	N.Z.
N. Z. L. R.	New Zealand Law Reports, 1883—(current)	N.Z.
N. Z. L. R. C. A.	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
Nels.	Nelson's Reports, Chancery, 1 vol., 1625—1693	Eng.
Nev. & M. K. B.	Neville and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. C.	Neville and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B.	Neville and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. C.	Neville and Perry's Magistrates' Cases, 1 vol., 1836—1837	Eng.
New Mag. Cas.	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850	Eng.
New Pract. Cas.	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.

xxiv REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

New Rep. ...	New Reports, 6 vols., 1862—1865 ...	Eng.
New Sess. Cas. ...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851 ...	Eng.
Nfld. L. R. ...	Newfoundland Reports ...	Nfld.
Nolan ...	Nolan's Magistrates' Cases, 1 vol., 1791—1793 ...	Eng.
Notes of Cases ...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850 ...	Eng.
Noy ...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649 ...	Eng.
O. B. & F. ...	Ollivier Bell and Fitzgerald's Reports ...	N.Z.
O. B. S. P. ...	Old Bailey Session Papers ...	Eng.
O. Bridg. ...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—	Eng.
O. F. S. ...	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R. ...	Ontario Law Reports ...	Can.
O'M. & H. ...	O'Malley and Hardcastle's Election Cases, 1869—(current) ...	Eng.
O. P. D. ...	South African Law Reports, Orange Free State Provincial Division ...	S. Af.
O. R. ...	Ontario Reports ...	Can.
O. R. ...	Official Reports of the South African Republic, 1894—1899 ...	S. Af.
O. R. C. ...	Reports of the High Court of the Orange River Colony ...	S. Af.
O. S. ...	Upper Canada Queen's Bench, Old Series ...	Can.
O. W. N. ...	Ontario Weekly Notes ...	Can.
O. W. R. ...	Ontario Weekly Reporter ...	Can.
Old. ...	Nova Scotia Reports (Oldrights) ...	Can.
Ont. Dig. ...	Digest of Ontario Case Law, 4 vols., 1823—1900 ...	Can.
Owen ...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614 ...	Eng.
P. (preceded by date) ...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (<i>e.g.</i> , [1891] P.) ...	Eng.
P. & B. ...	New Brunswick Reports (Pugsley and Burbidge) ...	Can.
P. & T. ...	New Brunswick Law Reports (Pugsley and Trueman) ...	Can.
P. ...	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922 ...	Eng. & Col.
P. D. ...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890 ...	Eng.
P. E. I. ...	Prince Edward Island Reports ...	Can.
P. R. ...	Ontario Practice ...	Can.
P. Wms. ...	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735 ...	Eng.
Palm. ...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629 ...	Eng.
Park. ...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717 ...	Eng.
Pat. App. ...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Pater. App. ...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake, Add. Cas. ...	Peake's Reports, Nisi Prius, 1 vol., 1790—1794 ...	Eng.
	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812 ...	Eng.
	Peckwell's Election Cases, 2 vols., 1803—1806 ...	Eng.
Pelham ...	Pelham (S. A.) Reports ...	Aus.
Per. & Dav. ...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn. ...	Perry and Knapp's Election Cases, 1 vol., 1833 ...	Eng.
Per. C. S. ...	Perrault's Conseil Supérieur ...	Can.
Per. P. ...	Perrault's Prévosté de Quebec, 1726—1756 ...	Can.
Ph. ...	Phillips' Reports, Chancery, 2 vols., 1841—1849 ...	Eng.
Phil. El. Cas. ...	Philipps' Election Cases, 1 vol., 1780 ...	Eng.
Phillim. ...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821 ...	Eng.
Phillim. Eccl. Jud. ...	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip. ...	Phipson's Digest of Natal Reports, 1858—1859 ...	S. Af.
Pig. & R. ...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845 ...	Eng.
Plowd. ...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624 ...	Scot.
	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I. ...	Eng.
Poll. ...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682 ...	Eng.
Poph. ...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627 ...	Eng.
Pow. R. & D. ...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.
Prec. Ch. ...	Precedents in Chancery, fol., 1 vol., 1689—1722 ...	Eng.
Price ...	Price's Reports, Exchequer, 13 vols., 1814—1824 ...	Eng.
Price ...	Price's Mining Commissioners' Cases ...	Can.
Pug. ...	New Brunswick Reports (Pugsley) ...	Can.
Py. R. ...	Pykes' Lower Canada Reports ...	Can.
B. ...	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852 ...	Eng.
Q. B. (preceded by date) ...	Law Reports, Queen's Bench Division, 1891—1901 (<i>e.g.</i> , [1891] 1	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Q. B. D.	Law Reports, Queen's Bench Division, 25 vols., 1875—1890 ...	Eng.
. J. P.	Queensland Justice of Peace Reports	Aus.
L. J.	Queensland Law Journal and Reports, 11 vols., 1879—1901 ...	Aus.
	Quebec Law Reports	Can.
Q. L. R. (Beor)	Queensland Law Reports by Beor, 1876—1878	Aus.
Q. P. R.	Quebec Practice Reports	Can.
Q. R. (Vol.) K. B. or Q.	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892— (current)	Can.
Q. R. (Vol.) S. C.	Rapports Judiciaires de Québec, Cour Supérieure, 1892— (current)	Can.
Q. S. C. R.	Queensland Supreme Court Reports, 5 vols., 1860—1881 ...	Aus.
Q. S. R.	Queensland State Reports	Aus.
Q. W. N.	Weekly Notes, Queensland	Aus.
	The Reports, 15 vols., 1893—1895	Eng.
	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	S. Af.
R. (Ct. of Sess.)	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	Scot.
R. A. C.	Ramsay, Appeal Cases	Can.
R. & C.	Nova Scotia Reports (Russell & Chesley)	Can.
R. & G.	Nova Scotia Reports (Russell and Geldert)	Can.
R. C.	La Revue Critique de Législation et de Jurisprudence de Canada	Can.
R. de J.	Revue de Jurisprudence	Can.
R. de L.	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	Can.
R. E. D.	New South Wales, Reserved and Equity Decisions	Aus.
R. E. D.	Ritchie's Equity Decisions (Russell)	Can.
R. J. R. Q.	Quebec Revised Reports	Can.
R. L. N. S.	Revue Légale, New Series, 1895—(current)	Can.
R. L. O. S.	Revue Légale, Old Series, 21 vols., 1869—1892	Can.
R. P. C.	Reports of Patent Cases, 1884—(current)	Eng.
R. R.	Revised Reports	Eng.
	Rastell's Entries	Eng.
	Rayner's Tithe Cases, 3 vols., 1575—1782	Eng.
Real Prop. Cas.	Real Property Cases, 2 vols., 1843—1847	Eng.
Rep. Ch.	Reports in Chancery, fol., 3 vols., 1615—1710	Eng.
Rep. in C. of A.	Reports in Courts of Appeal	N.Z.
Res. & Eq. Jud.	New South Wales Reserved and Equity Judgments	Aus.
Reserv. Cas.	Reserved Cases	Ir.
Rick. & M.	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	Eng.
Rick. & S.	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890— 1894	Eng.
Ridg. L. & S.	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793— 1795	Ir.
Ridg. Parl. Rep.	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784— 1796	Ir.
Ridg. temp. H.	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	Eng.
Ritch. Eq. Rep.	Ritchie's Equity Reports	Can.
Rob. Eccl.	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853 ...	Eng.
Rob. L. &	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol.,	Eng.
Robert. App.	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	Scot.
Robin. App.	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	Scot.
Roll. Abr.	Rolle's Abridgment of the Common Law, fol., 2 vols.	Eng.
Roll. Rep.	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625 ...	Eng.
Rom.	Romilly's Notes of Cases in Equity, 1 part, 1772—1787 ...	Eng.
Roscoe's B. C.	Roscoe, Digest of Building Cases	Eng.
Rose	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	Eng.
Ross, L. C.	Ross's Leading Cases in Commercial Law (England and Scot- land), 3 vols.	Eng.
	Rowe's Reports (England and Ireland), 1 vol., 1798—1823 ...	Eng.
Rul. Cas.	Campbell's Ruling Cases, 25 vols.	Eng.
Russ.	Russell's Reports, Chancery, 5 vols., 1824—1829	Eng.
Russ. & M.	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833 ...	Eng.
Russ. & Ry.	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R.	Russell's Election Reports	Can.
Ry. & Can. Cas.	Railway and Canal Cases, 7 vols., 1835—1854	Eng.
Ry. & Can. Tr. Cas.	Railway and Canal Traffic Cases, 1855—(current)	Eng.
Ry. & M.	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ...	Eng.
Ryde & K. Rat. App.	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894— 1904	Eng.
Ryde, Rat. App.	Ryde's Rating Appeals, 3 vols., 1871—1893	Eng.
S.	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	South African Law Journal	S. Af.

xxvi REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

S. A. L. R.	South Australian Law Reports	...	...	...	...	Aus.
S. A. L. R.	South African Law Reports	...	...	...	...	S. Af.
S. A. R. ...	Reports of the High Court of the South African Republic, 1881	...	...	...	...	S. Af.
S. A. S. R.	South Australian State Reports, since 1921 (<i>e.g.</i> , [1921] S. A. S. R.)	...	...	...	...	Aus.
	Reports of the Supreme Court of the Cape of Good Hope from 1880	...	...	...	...	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	...	...	...	...	Scot.
S. C. (H. L.) (preceded by date).	Court of Session Cases (Scotland) (House of Lords), since 1906 (<i>e.g.</i> , [1906] S. C. (H. L.))	...	...	...	...	Scot.
S. C. (J.) (preceded by date).	Court of Justiciary Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	...	...	...	...	Scot.
S. C. R. ...	Canada, Supreme Court Reports	...	...	...	...	Can.
S. L. T. ...	Scots Law Times, 1893 (current)	...	...	...	...	Scot.
S. Q. R. ...	Queensland State Reports	...	...	...	...	Aus.
S. R. ...	Reports of the High Court of Southern Rhodesia	...	...	...	...	S. Af.
S. R. C. ...	Stuart's Lower Canada Reports	...	...	...	...	Can.
S. R. N. S. W. ...	New South Wales, State Reports	...	...	...	...	Aus.
S. R. Q. ...	Queensland Reports, Supreme Court	...	...	...	...	Aus.
S. V. A. R. ...	Stuart's Vice-Admiralty Reports	...	...	...	...	Can.
Saint ...	Saint's Digest of Registration Cases, 1843—1906, 1 vol.	...	...	...	...	Eng.
	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	...	...	...	...	Eng.
Sask. L. R.	Saskatchewan Law Reports	...	...	...	...	Can.
Sau. & Sc.	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	...	...	...	...	Ir.
Saund. ...	Saunders's Reports, King's Bench, 2 vols., 1666—1672	...	...	...	...	Eng.
Saund. & A.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	...	...	...	...	Eng.
Saund. & B.	Saunders and Bidder's Locus Standi Reports, 1905—(current)	...	...	...	...	Eng.
Saund. & C.	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848	...	...	...	...	Eng.
Saund. & M.	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols.,	...	...	...	...	Eng.
Sav. ...	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591	...	...	...	...	Eng.
Say. ...	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756	...	...	...	...	Eng.
Sc. Jur. ...	Scottish Jurist, 46 vols., 1829—1873	...	...	...	...	Scot.
Sc. L. R. ...	Scottish Law Reporter, 1865—(current)	...	...	...	...	Scot.
Sc. R. R. ...	Scots Revised Reports	...	...	...	...	Scot.
Sch. & Lef. ...	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	...	...	...	...	Ir.
Scott ...	Scott's Reports, Common Pleas, 8 vols., 1834—1840	...	...	...	...	Eng.
Scott, N. R. ...	Scott's New Reports, Common Pleas, 8 vols., 1840—1845	...	...	...	...	Eng.
Sea. & Sm. ...	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—	...	...	...	...	Eng.
Sel. Cas. Ch. ...	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	...	...	...	...	Eng.
Selwyn's N. P.	Selwyn's Abridgement of the Law of Nisi Prius	...	...	...	...	Eng.
Sess. Cas. K. B.	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	...	...	...	...	Eng.
Sett. & Rem. ...	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742	...	...	...	...	Eng.
Sh. (Ct. of Sess.)	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols.,	...	...	...	...	Scot.
Sh. & MacI. ...	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838	...	...	...	...	Scot.
Sh. Dig. ...	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	...	...	...	...	Scot.
Sh. Just. ...	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	...	...	...	...	Scot.
Sh. Sc. App. ...	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	...	...	...	...	Scot.
Sh. Teind Ct. ...	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	...	...	...	...	Scot.
Shep. Touch. ...	Sheppard's Touchstone of Common Assurances	...	...	...	...	Eng.
Show. ...	Shower's Reports, King's Bench, 2 vols., 1678—1695	...	...	...	...	Eng.
Show. Parl. Cas.	Shower's Cases in Parliament, fol., 1 vol., 1694—1699	...	...	...	...	Eng.
Sid. ...	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	...	...	...	...	Eng.
Sim. ...	Simons' Reports, Chancery, 17 vols., 1826—1852	...	...	...	...	Eng.
Sim. & St. ...	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826	...	...	...	...	Eng.
Sim. N. S. ...	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852	...	...	...	...	Eng.
Skin. ...	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697	...	...	...	...	Eng.
Sm. & Bat. ...	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	...	...	...	...	Ir.
Sm. & G. ...	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857	...	...	...	...	Eng.
Smith, K. B. ...	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1906	...	...	...	...	Eng.
Smith, L. C. ...	Smith's Leading Cases, 2 vols.	...	...	...	...	Eng.
Smith, Reg. Cas.	C. L. Smith's Registration Cases, 1895—(current)	...	...	...	...	Eng.
Smythe ...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	...	...	...	...	Ir.
l. Jo. ...	Solicitors' Journal, 1856—(current)	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Spence	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
St. R. Qd. (preceded date)	Queensland State Reports, since 1902 (<i>e.g.</i> , [1902] St. R. Qd.)	Aus.
Stair Rep.	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681	Scot.
Stark.	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr.	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S. ...	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton	Stockton's Vice-Admiralty Report and Digest	Can.
Story	Story's Commentaries on Equity Jurisprudence	Eng.
Stra.	Strange's Reports, 2 vols., 1716—1747	Eng.
Stu. M. & P.	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851— 1853	Scot.
Stuart	Sessions Cases (Stuart)	Scot.
Stuart, Adm.	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S.	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859 —1874	Can.
Stuart, K. B.	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	Can.
Sty.	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
Sw.	Swabey's Reports, Admiralty, 1 vol., 1855—1859	Eng.
Sw. & Tr.	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swan.	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Swin.	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M.	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	Eng.
T. H.	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	S. Af.
T. Jo.	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L.	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	S. Af.
T. L. R.	The Times Law Reports, 1884—(current)	Eng.
T. P.	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D.	South African Law reports, Transvaal Provincial Division ...	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—	Eng.
T. S.	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml.	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Tas. L. R.	Tasmanian Law Reports	Aus.
Taunt.	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tay.	Tax Cases, 1875—(current)	Eng.
Temp. Wood	Taylor's King's Bench Reports	Can.
Term Rep.	Manitoba Reports <i>temp.</i> Wood	Can.
Terr. L. R.	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Thom.	Territories Law Reports	Can.
Toth.	Nova Scotia Reports (Thomson)	Can.
Town. St. Tr.	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
Trem. P. C.	Townsend, Modern State Trials	Eng.
Trist.	Tremaine Pleas of the Crown, 1 vol., 1667	Eng.
Tru.	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Tudor, L. C. Merc. Law.	New Brunswick Reports (Trueman)	Can.
Tudor, L. C. Real. Prop.	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Turn. & R.	Tudor's Leading Cases on Real Property	Eng.
Tyr.	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr. & Gr.	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur.	Upper Canada Jurist	Can.
U. C. L. J. N. S. ...	Canada Law Journal, New Series, 1865—(current)	Can.
U. C. L. J. O. S. ...	Canada Law Journal, Old Series, 10 vols., 1855—1864 ...	Can.
U. C. R.	Upper Canada Reports, Queen's Bench	Can.
Udal	Fiji Law Reports (Udal)	Fiji.
V. L. R.	Victorian Law Reports	Aus.
V. R.	Victorian Reports	Aus.
V. R. (Adm.)	Victorian Reports (Admiralty)	Aus.
V. R. (Eq.)	Victorian Reports (Equity)	Aus.
V. R. (Law)	Victorian Reports (Law)	Aus.
Vaugh.	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673 ...	Eng.
Vent.	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	Eng.

xxviii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Vern. ...	Vernon's Reports, Chancery, 2 vols., 1680—1719 ...	Eng.
Vern. & Scr.	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788 ...	Ir.
Ves. ...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817 ...	Eng.
Ves. & B.	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814 ...	Eng.
Ves. Sen.	Vesey Sen.'s Reports, 2 vols., 1747—1756 ...	Eng.
Vin. Abr.	Viner's Abridgment of Law and Equity, fol., 22 vols. ...	Eng.
Vin. Supp.	Supplement to Viner's Abridgment of Law and Equity, 6 vols. ...	Eng.
W. ...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857 ...	S. Af.
W. A. L. R.	West Australian Law Reports ...	Aus.
W. A'B. & W.	Webb, A'Beckett and Williams' Victorian Reports ...	Aus.
W. & W.	Wyatt and Webb ...	Aus.
W. C. C.	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907 ...	Eng.
W. H. C.	South African Law Reports, Witwatersrand High Court ...	S. Af.
W. Jo. ...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640 ...	Eng.
W. L. D. ...	South African Law Reports, Witwatersrand Local Division ...	S. Af.
W. L. R. ...	Western Law Reporter ...	Can.
W. L. T. ...	Western Law Times ...	Can.
W. N. (preceded by date)	Law Reports, Weekly notes, 1866—(current) (<i>e.g.</i> , [1866] W. N.)	Eng.
W. N. ...	Calcutta Weekly Notes ...	Ind.
W. R. ...	Weekly Reporter, 54 vols., 1852—1906 ...	Eng.
W. R. ...	Sutherland's Weekly Reporter ...	Ind.
W. R. ...	Weekly Reporter, reporting cases in the Cape Provincial Division ...	S. Af.
W. W. & A'B. ...	Wyatt, Webb and A'Beckett ...	Aus.
W. W. R. ...	Western Weekly Reports ...	Can.
Wallis by Lyne ...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791 ...	Ir.
Web. Pat. Cas. ...	Webster's Patent Cases, 2 vols., 1602—1855 ...	Eng.
Welsh, Reg. Cas. ...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840 ...	Ir.
Went. Off. Ex. ...	Wentworth's Office and Duty of Executors ...	Eng.
West ...	West's Reports, House of Lords, 1 vol., 1839—1841 ...	Eng.
West <i>temp.</i> Hard.	West's Reports <i>temp.</i> Hardwicke, Chancery, 1 vol., 1736—1740 ...	Eng.
West. Tithe Cas.	Western's London Tithe Cases, 1 vol., 1592—1822 ...	Eng.
White ...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893 ...	Scot.
White & Tud. L. C.	White and Tudor's Leading Cases in Equity, 2 vols. ...	Eng.
Wight. ...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811 ...	Eng.
Will. Woll. & Dav.	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837 ...	Eng.
Will. Woll. & H.	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839 ...	Eng.
Willes ...	Willes' Reports, Common Pleas, 1 vol., 1737—1758 ...	Eng.
Wilm. ...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770 ...	Eng.
Wils. ...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774 ...	Eng.
Wils. & S. ...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835 ...	Scot.
Wils. Ch. ...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819 ...	Eng.
Wils. Ex. ...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817 ...	Eng.
Win. ...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625 ...	Eng.
Wm. Bl. ...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779 ...	Eng.
Wm. Rob. ...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850 ...	Eng.
Wms. Saund. ...	Williams' Notes to Saunders' Reports, 2 vols. ...	Eng.
Wolf. & B. ...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864 ...	Eng.
Wolf. & D. ...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858 ...	Eng.
Woll. ...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841 ...	Eng.
Wood ...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798 ...	Eng.
Y. A. D. ...	Young's Vice-Admiralty Reports ...	Can.
Y. & C. Ch. Cas.	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—	Eng.
Y. & C. Ex. ...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841 ...	Eng.
Y. & J. ...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830 ...	Eng.
Y. B. ...	Year Books ...	Eng.
You.	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613 ...	Eng.
	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832 ...	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xiii.—xxviii., *ante*.)

A.-G.	.	.	.	.	for Attorney-General.
Act.	.	.	.	.	„ Actiengesellschaft.
Admlty.	.	.	.	.	„ Admiralty.
Affd.	.	.	.	.	„ Affirmed.
Affg.	.	.	.	.	„ Affirming.
Akt.	.	.	.	.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon.	.	.	.	.	„ Anonymous.
Apld.	.	.	.	.	„ Applied.
Appct.	.	.	.	.	„ Applicant.
Appln.	.	.	.	.	„ Application.
Appln.	.	.	.	.	„ Application to Register a Trade Mark.
Applt.	.	.	.	.	„ Appellant.
Apprvd.	.	.	.	.	„ Approved.
Arbn.	.	.	.	.	„ Arbitration.
Archbp.	.	.	.	.	„ Archbishop.
Art.	.	.	.	.	„ Article.
Assce.	.	.	.	.	„ Assurance.
Assocn.	.	.	.	.	„ Association.
B. C.	.	.	.	.	„ Borough Council.
Bkpcy.	.	.	.	.	„ Bankruptcy.
Bkpt.	.	.	.	.	„ Bankrupt.
Bldg. Soc.	.	.	.	.	„ Building Society.
Bp.	.	.	.	.	„ Bishop.
C. A.	.	.	.	.	„ Court of Appeal.
C. & S. L. Ry. Co.	.	.	.	.	„ City & South London Railway Co.
C. C. A.	.	.	.	.	„ Court of Criminal Appeal.
C. C. R.	.	.	.	.	„ County Court Rules.
C. C. R.	.	.	.	.	„ Court of Crown Cases Reserved.
C. L. P. Act.	.	.	.	.	„ Common Law Procedure Act.
C. L. Ry. Co.	.	.	.	.	„ Central London Railway Co.
C. O. R.	.	.	.	.	„ Crown Office Rules.
C. S. U. C.	.	.	.	.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	.	.	.	.	„ <i>Capias ad satisfaciendum</i> .
Cale. Ry. Co.	.	.	.	.	„ Caledonian Railway Co.
Ch.	.	.	.	.	„ Chancery.
Ch. Div.	.	.	.	.	„ Chancery Division.
Co.	.	.	.	.	„ Company.
Co-op. Assocn.	.	.	.	.	„ Co-operative Supply Association.
Comrs.	.	.	.	.	„ Commissioners.
Consd.	.	.	.	.	„ Considered.
Corpn.	.	.	.	.	„ Corporation.
Ct.	.	.	.	.	„ Court.
Ct. of Ch.	.	.	.	.	„ Court of Chancery.
Ct. of Eq.	.	.	.	.	„ Court of Equity.
Ct. of R.	.	.	.	.	„ Court of Review.
D. C.	.	.	.	.	„ Divisional Court.
Dbtd.	.	.	.	.	„ Doubted.
Deft.	.	.	.	.	„ Defendant.

Distd. .	for Distinguished.
Div. Ct.	„ Divisional Court.
Eccl. Comrs.	„ Ecclesiastical Commissioners.
Eccl. Ct.	„ Ecclesiastical Court.
Ex. Ch.	„ Exchequer Chamber.
<i>Ex p.</i> .	„ <i>Ex parte</i> .
Exch. .	„ Exchequer.
Exor. .	„ Executor.
Exorship.	„ Executorship.
Expld. .	„ Explained.
Extd. .	„ Extended.
Extrix. .	„ Executrix.
<i>Fi. fa.</i> .	„ <i>Fieri facias</i> .
Folld. .	„ Followed.
G. & S. W. Ry. Co. . . .	„ Glasgow & South Western Railway Co.
G. C. Ry. Co. . . .	„ Great Central Railway Co.
G. E. Ry. Co. . . .	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co. .	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co. . . .	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co. . . .	„ Great Western Railway Co.
Govt. . . .	„ Government.
Grdns. . . .	„ Guardians or Guardians of the Poor.
H. C. of A. .	„ High Court of Australia.
H. L. . .	„ House of Lords.
I. R. Comrs. .	„ Inland Revenue Commissioners.
Insce. . .	„ Insurance.
JJ. . .	„ Justices.
Jud. Act . .	„ Judicature Act.
K. B. Div. .	„ King's Bench Division.
L. & B. Ry. Co. .	„ London & Brighton Railway Co.
L. & N. E. Ry. Co. .	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co.	„ London & North Western Railway Co.
L. & S. W. Ry. Co.	„ London & South Western Railway Co.
L. & Y. Ry. Co. .	„ Lancashire & Yorkshire Railway Co.
L. B. . . .	„ Local Board.
L. B. & S. C. Ry. Co	„ London, Brighton & South Coast Railway Co.
L. C. . . .	„ Lord Chancellor.
L. C. & D. Ry. Co.	„ London, Chatham & Dover Railway Co.
L. C. C. . .	„ London County Council.
L. Elec. Ry. Co.	„ London Electric Railway Co.
L. G. Board .	„ Local Government Board.
L.J. . . .	„ Lord Justice.
L.JJ. . . .	„ Lords Justices.
L. M. & S. Ry. Co.	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co.	„ London, Tilbury & Southend Railway Co.
M. S. Act . . .	„ Merchant Shipping Act.
M. S. & L. Ry. Co.	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags. . . .	„ Magistrates.
Mentd. . . .	„ Mentioned.
Met. Dist. Ry. Co. .	„ Metropolitan District Railway Co.
Met. Ry. Co. . .	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co.	„ Midland Great Western Railway Co.
Mid. Ry. Co. . .	„ Midland Railway Co.
Mtge. . . .	„ Mortgage.
Mtgee. . . .	„ Mortgagee.
Mtgor. . . .	„ Mortgagor.
N. B. Ry. Co.	„ North British Railway Co.
N. E. Ry. Co.	„ North Eastern Railway Co.
N. F. . . .	„ Not Followed.
N. P. . . .	„ Nisi Prius.
Ord. . . .	„ Order.
Overd. . . .	„ Overruled.

ABBREVIATIONS.

xxx1

P. C.	for Privy Council.
Petn.	„ Petition or Election Petition.
Pltf.	„ Plaintiff.
Q. B. Div.	„ Queen's Bench Division.
Qu.	„ <i>Quære</i> .
R. C.	Rural Council.
R. D. C.	Rural District Council.
R. S. A.	„ Rural Sanitary Authority.
R. S. C.	Revised Statutes of Canada.
R. S. C.	Rules of the Supreme Court, 1883.
Refd.	Referred.
Regn. of Trade Mk.	Registration of Trade Mark.
Regr. of Trade Mks.	„ Registrar of Trade Marks.
Resp.	„ Respondent.
Restg.	„ Restoring.
Revsd.	„ Reversed.
Revsg.	„ Reversing.
Ry. Co.	„ Rail. Co. or Railway Co.
S. C.	„ Same Case.
S. C. (name of colony following)	„ Supreme Court of a Colony.
S. E.	„ Settled Estates.
S. E. & C. Ry. Co.	„ South Eastern & Chatham Railway Co.
S. E. Ry. Co.	„ South Eastern Railway Co.
S. P.	„ Same Point.
S.S.	„ Steamship.
Sched.	„ Schedule.
<i>Sci. fa.</i>	„ <i>Scire facias</i> .
Sect.	„ Section.
Set. Land Act	„ Settled Land Act.
Settlmt.	„ Settlement.
Soc.	„ Society.
Soc. Anon.	„ Société Anonyme, etc.
Solr.	„ Solicitor.
Trade Mk.	„ Trade Mark.
Tram. Co.	„ Tramways Company.
U. C.	„ Urban Council.
U. D. C.	„ Urban District Council.
U. S. A.	„ United States of America.
Union Assmt. Com.	„ Union Assessment Committee.
Urban S. A.	„ Urban Sanitary Authority.
V.-C.	„ Vice-Chancellor.
Workmen's Comp. Act	„ Workmen's Compensation Act.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

"APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.

"APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.

"CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.

"DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.

"DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.

"EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.

"EXTENDED" (Extd.).—Compare "APPLIED," *supra*.

"FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.

"NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.

"OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.

"REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.

"MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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PART II. DOMICIL, RESIDENCE AND NATIONALITY OF COMPANIES.
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Part III.—Companies under Companies (Consolidation) Act, 1908, and Similar Acts (*Continued*).

SECT. 34.—BORROWING AND SECURING MONEY.

SUB-SECT. 1.—POWER TO BORROW.

A. *Implied Powers.*

(a) *In General.*

4568. General principles of ascertainment.]—In considering the borrowing powers of a corpn. which has been formed by statute or otherwise, the matter depends entirely upon what is the construction of the statute or document, & it has to be ascertained whether there is power given to the co. either expressly or by reasonable implication. If a co. or corpn. is formed for the purpose of a particular undertaking, which undertaking it is obvious cannot be carried out without the expenditure of money, & if by the statute or document no means are given to the co. which will give them money in hand, or will give them express power to raise money, a reasonable implication would necessarily arise that they must have power to borrow, because otherwise the statute which created them is a futile document; it would pretend to give them powers to do things, but would give them no means of doing those things. But where in the statute or other document which forms the co. means are put into the hands of the co., that is, either by raising capital or by calling up more capital, or by a limited power of borrowing, or by any other way, as by a power to sell lands, which may be within reason sufficient for the purpose of enabling them to carry on the undertaking, then no ct. can measure whether those means will in the event be absolutely sufficient or not. Those means being put in their hands it cannot be inferred that they have at the same time the power to borrow.—*WENLOCK (BARONESS) v. RIVER DEE Co.* (1883), 36 Ch. D. 675, n.; 57 L. T. 402, n., C. A.; *affd.* (1885), 10 App. Cas. 354, H. L.

Annotations:—Consd. General Auction Estate & Monetary Co. v. Smith, [1891] 3 Ch. 432. *Refd. Sinclair v. Brougham*, [1914] A. C. 398. *Mentd. Pollock v. Lands Improvement Co.* (1888), 58 L. T. 374; *Wenlock v. River Dee Co.* (1888), 38 Ch. D. 534; *Putney Overseers v. L. & S. W. Ry.*, [1891] 1 Q. B. 440; *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396; *A.-G. v. L. C. C.*, [1901] 1 Ch. 781; *A.-G. v. De Winton*, [1906] 2 Ch. 106; *Corbett v. S. E. & C. Ry's. Managing Committee*, [1906] 2 Ch. 12; *Amalgamated Soc. of Ry. Servants v. Osborne*, [1910] A. C. 87; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354; *Re Home & Foreign Investment & Agency Co.*, [1912] 1 Ch. 72; *Re Woking Urban Council (Basingstoke Canal) Act*, 1911, [1914]

PART III. SECT. 34, SUB-SECT. 1.—A. (a).

4568 i. General principles of ascertainment.]—A co. cannot make promissory notes or other negotiable instruments unless it is expressly or impliedly empowered to do so by its memorandum of assocn. If the power is not expressly given it can only be implied where, upon a reasonable construction of the memorandum, it appears that it was intended to be conferred. If it is a trading co. the power is implied on the broad ground of convenience.—*KERR v. UNIVERSITY PRESS, LTD.*, [1923] 2 D. L. R. 948; 2 W. W. R. 187.—*CAN.*

4569 i. On mortgage of property.]—

1 Ch. 300; *Jenkin v. Pharmaceutical Soc. of Great Britain*, [1921] 1 Ch. 392; *A.-G. v. Liverpool Corpn.*, [1922] 1 Ch. 211; *Re Jubilee Cotton Mills*, [1923] 1 Ch. 1.

4569. On mortgage of property.]—(1) A co. in difficulties, but not in the immediate prospect of a winding up, deposited the deeds of some freehold property with their bankers, to secure their current account, then largely overdrawn. They afterwards continued to draw upon their account, & to pay in moneys for a period of two months until the bank stopped payment. The co. resolved upon a voluntary winding up rather more than six months after the transaction:—*Held*: the mtge. was valid.

The arts. of assocn. provided that the co. might, with the sanction of a general meeting, borrow money not exceeding in amount one half of the nominal capital, upon mtge.:—*Held*: (2) the express power did not negative the general power, the rule being that a co. may mortgage its property unless expressly prohibited by its arts. from so doing; (3) such security did not operate as a fraudulent preference, & the bank were entitled to the full benefit of it.—*Re PATENT FILE Co.*, *Ex p. BIRMINGHAM BANKING Co.* (1870), 6 Ch. App. 83; 40 L. J. Ch. 190; 23 L. T. 484; 19 W. R. 193, L. JJ.

Annotations:—As to (2) Refd. Re General Provident Assoc. Co., *Ex p. National Bank* (1872), L. R. 14 Eq. 507; *General Auction Estate & Monetary Co. v. Smith*, [1891] 3 Ch. 432. *Generally, Mentd. R. v. Reed* (1880), 5 Q. B. D. 384; *Re Clough, Bradford Commercial Banking Co. v. Cure* (1885), 31 Ch. D. 324.

4570. Borrowing necessary for purpose of business.]—*Re HAMILTON'S WINDSOR IRONWORKS*, *Ex p. PITMAN & EDWARDS*, No. 4729, *post*.

(b) *Particular Companies.*

4571. Company without special articles—Borrowing authorised by special resolution.]—The M. co. was incorporated under 1856 Act as a limited co., for the purpose of conveying passengers & luggage in patent omnibuses. There were no special arts. of assocn. A majority of more than three-fourths in number & value of the shareholders present at a general meeting passed a special resolution, empowering the directors to borrow on debentures of the co. any sums not exceeding in the whole a certain amount. Some dissentient shareholders filed a bill on behalf of themselves & the other shareholders, except the directors, to prevent such borrowing, as being *ultra vires*:—*Held*: such

desired to purchase, & to include in such mtge. bonuses amounting in all to \$10,000:—*Held*: the co. was a trading corpn., & as such, had power to borrow money & to mortgage.—*FARRELL v. CARIBOU GOLD MINING Co.* (1897), 30 N. S. R. 199.—*CAN.*

PART III. SECT. 34, SUB-SECT. 1.—A. (b).

The directors of a co., incorporated under Act of 1862, c. 2, have power to mortgage the property of the co. to discharge obligations for which the shareholders are liable, & would continue liable in their own persons, if there were no mortgage. The power to borrow money implies the power to mortgage.—*Re NASH BRICK & POTTERY MANUFACTURING Co.* (1873), 3 N. S. R. 254.—*CAN.*

q. — Trading company.]—At a meeting of debt. co. a report was received & adopted authorising the directors to execute a mtge. to parties who had agreed to advance the sum of \$30,000 to enable the co. to acquire certain mining property which they

r. Trading company — To give security for existing debt.]—In an interpleader issue in which pl'ts. affirmed & debt. denied the validity of a chattel mtge. made by a co. to pl'ts.:—*Held*: Cos. Ordinance, s. 98, relating to the powers of a co. to borrow

borrowing was an act for which a special resolution was a sufficient authority, & the injunction ought to be refused.—*BRYON v. METROPOLITAN SALOON OMNIBUS Co., LTD.* (1858), 3 De G. & J. 123; 27 L. J. Ch. 685; 32 L. T. O. S. 5; 4 Jur. N. S. 1262; 6 W. R. 817; 44 E. R. 1215, L. JJ.

Annotations :—*Apld.* General Auction Estate & Monetary Co. v. Smith, [1891] 3 Ch. 432. *Reid.* Hutton v. Scarborough Cliff Hotel Co. B. (1865), 2 Drew. & Sm. 521; *Farmer v. Scottish North American Trust*, [1912] A. C. 118.

4572. Trading company.—A co. established under 1862 Act for the purpose of the sale & purchase of estates & property, the granting of advances on property intended for sale, & loans on deposit of securities, & the discounting of approved commercial bills, had under its memorandum & arts. of assocn. no express power to borrow money. The co. received deposits & discounted bills; & one of its directors, who was also a depositor, advanced money to the co. upon the security of an equitable charge on realty belonging to the co., in order to enable it to repay money due to himself & another depositor.

The co. was afterwards ordered to be wound up, & in an action by the liquidator to set aside the security as *ultra vires* the co. :—*Held* : (1) the co. was a trading co., & as such had an implied power to borrow money for the purposes of its business; (2) the borrowing which had taken place was one properly incident to the course & conduct of the business of the co. for its proper purposes; & accordingly, as the deposits were valid loans, it was competent for the co. to borrow for the purpose of repaying the depositors, & to give security to the person who made the advance, in the manner they had done.—*GENERAL AUCTION ESTATE & MONETARY Co. v. SMITH*, [1891] 3 Ch. 432; 60 L. J. Ch. 723; 65 L. T. 188; 40 W. R. 106; 7 T. L. R. 636.

Annotation :—*As to* (1) *Reid.* *Farmer v. Scottish North American Trust*, [1912] A. C. 118.

Banking company.—*See* BANKERS & BANKING, Vol. III., p. 145, No. 156.

4573. Estate company.—*GENERAL AUCTION ESTATE & MONETARY Co. v. SMITH*, No. 4572, *ante*, **Mining company.**—*See* Part VIII., Sect. 1, sub-sect. 2, B., *post*.

B. Express Powers.

4574. Effect of express limited power—Whether implied power to exceed.—The deed of settlement of a joint-stock co. established for erecting & maintaining a corn exchange, provided, that the capital of the co. should consist of a sum of £4,000 divided into shares of £5 each; & the directors were empowered from time to time to make calls

upon the shareholders not exceeding the amount of their shares unpaid, & also to borrow money to the extent of £2,000 for the purchase of the site & for erecting the building, instead of calling for instalments upon the shares. In the purchase of the site & the erection of the building the directors expended more than double the amount of the capital, having borrowed the money of the shareholders & of their bankers, one of whom was a director of the co. An order was made for winding up the co., & a general call was made upon all the shareholders :—*Held* : upon appeal, discharging the order for a call, (1) upon the construction of the deed, the directors had power to borrow only to the extent of the unpaid capital; (2) the liability of the shareholders was limited to the amount of their respective shares unpaid, & the directors were primarily answerable for the excess of expenditure; (3) the co. was not a trading partnership, & therefore the directors could not, in excess of their authority under the deed, pledge the credit of the shareholders even to a creditor who had no notice of the deed.—*Re WORCESTER CORN EXCHANGE Co.* (1853), 3 De G. M. & G. 180; 22 L. J. Ch. 593; 21 L. T. O. S. 38; 17 Jur. 721; 43 E. R. 71, L. C.

Annotations :—*As to* (2) *Consd.* *Re Cork & Youghal Ry.* (1869), 4 Ch. App. 752, n. *As to* (3) *Distd.* *Re German Mining Co., Ex p. Chippendale* (1854), 4 De G. M. & G. 19; *Re Norwich Yarn Co., Ex p. Bignold* (1856), 22 Beav. 143.

4575. — Power limited to £500—Bills given to secure overdraft.—By a clause in the arts. of assocn. of a co., the directors were prohibited from contracting any loan beyond £500 without the consent of the co. by special resolution :—*Held* : the clause did not preclude the directors from giving bills to the co.'s bankers without such consent, to secure the balance of an overdrawn account to a larger amount, & the excess could be proved as a debt in the winding up.—*Re CEFN OILCEN MINING Co.* (1868), L. R. 7 Eq. 88; 19 L. T. 593; *sub nom.* *Re CEFN OILCEN MINING Co., LTD., EDGORTH'S CLAIM*, 38 L. J. Ch. 78.

Annotations :—*Apld.* *Waterlow v. Sharp, Gardner v. Sharp* (1869), L. R. 8 Eq. 501. *Consd.* *Brooks v. Blackburn Benefit Soc.* (1884), 9 App. Cas. 857.

4576. To borrow up to amount of preference share capital—Whether power to borrow before preference capital issued.—(1) Three cos., each of which had general power to borrow on mtge. or debentures, issued 25 mtge. debentures for £1,000 each. The debentures were headed in the names of the three cos., & were stated to be an issue by the cos. jointly. The three cos. thereby jointly & severally agreed to pay to the debenture-holders the principal sum & interest, & they thereby charged with such payments their several undertakings & all their present & future properties

& mortgage, applies only to mtges. & other securities to secure money borrowed, & does not restrict the implied powers of a trading co. to give security for existing debts.—*BARTHELS, SHEWAN & Co. v. WINNIPEG CIGAR Co.* (1909), 10 W. L. R. 263.—CAN.

a. Rural telephone company—Promissory note.—A rural telephone co., that is, a co. incorporated merely for the purpose of constructing, maintaining & operating a rural telephone system under Rural Telephone Act, Sask., has not the power, under Companies Act, s. 14, or otherwise, to make a promissory note.—*CANADIAN BANK OF COMMERCE v. CUDWORTH RURAL TELEPHONE Co.*, [1923] 3 W. W. R. 458; 4 D. L. R. 16.—CAN.

PART III. SECT. 34, SUB-SECT. 1.—B.

t. Power to borrow on mortgage—Priority claimed by debenture-holder.—The co. being in liquidation under Dominion Winding-up Act, a claim was made on behalf of holders of the co.'s debentures that they were entitled to a charge on the assets of the co. in priority to depositors. The co. was formed on Oct. 19, 1871, under C. S. U. C., c. 53, by sect. 38 of which the right of a society formed under it to borrow money, if authorised by its rules to do so, was recognised. By rule 7 of the co., passed under sect. 2 of above Act, the directors were authorised to borrow money for the use & on the assets of the co., to receive money on deposit, & to loan or invest such money either on mtge. on real estate

or in any other way they might think best for the interests of the institution :—*Held* : the co. was invested with the power to borrow money for its purposes, & to give security upon its assets for the payment of the money borrowed.—*Re FARMERS' LOAN & SAVINGS Co., DEBENTURE HOLDERS' CASE* (1899), 30 O. R. 337.—CAN.

a. Power to issue bonds or debentures—Bye-law passed by provisional directors—Confirmed by company.—At a meeting of the provisional directors of a joint-stock co. incorporated under Ontario Companies Act, a bye-law was passed, under the power conferred by sect. 40 of the Act, authorising the directors from time to time to borrow money upon the credit of the co., to issue bonds or

Sect. 34.—Borrowing and securing money: Sub-sect. 1, B., C. & D. (a) & (b).]

& assets. The debentures were issued in pursuance of resolutions of the boards of directors of the three cos., who were in each case the same persons, & the moneys advanced were paid to a joint banking account & were appropriated in different amounts to each co. Orders had been made for the winding up of each co., & the debenture-holders had brought an action to enforce their security:—*Held*: having regard to the several obligations of the cos. respectively, assuming it was *ultra vires* the cos. to issue debentures jointly, the debentures were a valid charge against each co. to the extent to which the money advanced came to the coffers of that co.

(2) The arts. of one of the cos. gave the directors various powers, in addition to their general powers, & in particular power to borrow on the security of the property of the co. "any sum or sums of money not exceeding the amount of the preference share capital of the co.":—*Held*: this was not a prohibition of borrowing unless & until preference shares had been issued, but was intended for the protection of the preference shareholders if they existed, & until they came into existence the co. could borrow under its general powers without regard to this limitation.—*Re JOHNSTON FOREIGN PATENTS CO., LTD., Re JOHNSTON DIE PRESS CO., LTD., Re JOHNSTONIA ENGRAVING CO., LTD., J. P. TRUST, LTD. v. ABOVE COS.*, [1904] 2 Ch. 234; 73 L. J. Ch. 617; 91 L. T. 124; 53 W. R. 189; 48 Sol. Jo. 620; 11 Mans. 378, C. A.

4577. Successive articles giving general & express power.]—(1) The 78th clause of arts. of assocn. [of a co.] limited the powers of the directors of borrowing to £10,000, unless authorised by a general meeting. By the 35th clause, a special meeting might authorise the borrowing of such sums as it thought fit:—*Held*: the directors might be authorised to borrow beyond £10,000, either by a general or special meeting. (2) The principle of equity, that what is agreed to be done is considered as actually done, applies to the case of a public co. acting through its directors as completely as it does to dealings between individuals; & therefore, where directors had authority to create a charge upon their co.'s assets, & with a clear intention of creating such a charge, entered into an agreement to that effect, but the bonds given were in some respects defective or insufficient, & did not adequately carry the intention into effect, the motion of the official liquidator, appointed when the co. was ordered to be wound up, to discharge an order declaring that the amount borrowed was duly charged upon the estate, was refused by the Ct. of Appeal.—*Re STRAND MUSIC HALL CO.* (1865), 3 De G. J. & Sm. 147; 35 Beav. 153, 163; 13 L. T. 177; 14 W. R. 6; 46 E. R. 594, L. J.

Annotations:—As to (2) Apld. *Ross v. Army & Navy Hotel Co.* (1886), 34 Ch. D. 43; *Re Queensland, Land & Coal Co., Davis v. Martin*, [1894] 3 Ch. 181. *Distd.* *Re Johnston Foreign Patents Co., Re Johnston Die Press Co., Re*

Johnstonia Engraving Co., J. P. Trust v. The Cos. (1904), 91 L. T. 124. *Apld.* *Re Perth Electric Tramways, Lyons v. Tramways Syndicate & Perth Electric Tramways*, [1906] 2 Ch. 216. *Consd.* *Re Fireproof Doors, Umney v. Fireproof Doors*, [1916] 2 Ch. 142. *Reid.* *Brown, Shipley v. I. R. Comrs.* (1895), 64 L. J. M. C. 241; *Re Tasker, Hoare v. Tasker*, [1905] 2 Ch. 587.

4578. Power to borrow on mortgage—Prohibition against giving bills of exchange—Bills given & mortgage executed simultaneously to secure existing debt—Whether mortgage valid.]—Directors of a co. were prohibited giving bills of exchange; but they had powers to borrow on mtge. They however gave bills to secure an existing debt, & a mtge. was, at the same time, executed, under the seal of the co., which was made subject to redemption on payment of the bills:—*Held*: (1) the mtge. was given to secure the debt, & not the payment of the bills, & therefore was not invalid on that account; (2) upon a bill of foreclosure by the mtgee., the deed of the co. must be treated as valid, until set aside by an independent proceeding.—*SCOTT v. COLBURN* (1858), 26 Beav. 276; 28 L. J. Ch. 635; 33 L. T. O. S. 38; 5 Jur. N. S. 183; 7 W. R. 114; 53 E. R. 904.

4579. Power to raise money by mortgage or charge—Securities given for future advances.]—Where the arts. of assocn. of a co. empowered the directors to raise any sum or sums of money by mtge. or charge upon all or any of the co.'s estate or effects, a mtge. made by the directors to secure past & future advances by a banker to the contractor of the co., was set aside at the instance of the co. as *ultra vires*.—*CREWER & WHEAL ABRAHAM UNITED MINING CO., LTD. v. WILLYAMS* (1866), 14 W. R. 1003, L. J.J.; *previous proceedings, sub nom. CRENVER, ETC. MINING CO., LTD. v. WILLYAMS*, 35 Beav. 353.

Annotation:—Reid. *National Bank of Australasia v. United Hand in Hand & Band of Hope Co.* (1879), 4 App. Cas. 391.

4580. Power to mortgage any property—Book debts not yet accrued due.]—Under a power to raise money by mtge., with or without power of sale, of any of the property of the co., book debts of the co. not yet accrued due may be validly charged.—*BLOOMER v. UNION COAL & IRON CO.* (1873), L. R. 16 Eq. 383; 43 L. J. Ch. 96; 29 L. T. 130; 37 J. P. 822; 2 W. R. 821.

Annotation:—Reid. *Anderson v. Butlers Wharf Co.* (1879), 48 L. J. Ch. 824.

4581. Power to "issue" debentures or other securities—Creation of verbal charge.]—The memorandum of assocn. stated that one of the objects of the co. was to borrow money by the issue of debentures & other securities upon the co.'s property, or without any such security. By the arts., which were issued at the same time, the directors had power to borrow as they should think fit. On a claim by creditors in respect of a verbal charge on uncalled capital:—*Held*: owing to the use of the word "issue," it was not clear

debentures of the co. for the amounts borrowed, & to pledge the real or personal property, rights & powers, of the co., to secure such bonds or debentures. On the same day a meeting of the shareholders of the co. was held, at which all the shareholders were present, when this bye-law was confirmed, & all the provisional directors duly elected the directors of the co. This bye-law purported to be enacted by the directors, not the provisional directors, & had the seal of the co. affixed to it:—*Held*:

whether or not the provisional directors had power to pass the bye-law, it was a valid bye-law & sufficient authority for the subsequent issue of debentures by the directors.—*JOHNSTON v. WADE* (1908), 17 O. L. R. 372; 11 O. W. R. 598; 12 O. W. R. 951.—CAN.

b. Power to issue & hypothecate bonds—To secure existing debt.]—The bonds of a co. held to have been properly issued & hypothecated to a bank to secure an existing indebtedness, the powers of the company with respect

to the matter being governed by Companies Act, R. S. M., 1913, s. 71, & the shareholders having passed a bye-law enabling the directors to borrow, hypothecate, etc., & the directors by resolution having authorised the hypothecation of the bonds in question.—*Re REAL PROPERTY ACT & CAVEAT*, No. 103,969, [1922] 1 W. W. R. 1043; 66 D. L. R. 691.—CAN.

c. Within powers extended by later Acts—For object alleged to be ultra

from the memorandum that there was power to create a security verbally; the clause was ambiguous, & the arts. might be looked at for an interpretation of it; that the power in the articles was in general terms; & the memorandum, inasmuch as it ought, as far as possible, to be construed consistently with the arts., must therefore be held to authorise the creation of a verbal charge.—*Re TILBURY PORTLAND CEMENT CO., LTD.* (1893), 62 L. J. Ch. 814; 69 L. T. 495; 37 Sol. Jo. 683; 3 R. 709.

4582. Power to issue debenture-stock—Issue of irredeemable debenture-stock—Perpetual annuities.—By its memorandum of assocn. one of the objects of the co. was stated to be to borrow money by the issue of any mtges., debentures, debenture-stock, bonds, or obligations. By the arts. the board were authorised to issue debenture stock to be secured upon the property of the co., & to be irredeemable or redeemable as the board should determine. The co. issued irredeemable debenture-stock charged upon its assets as a floating charge. The undertaking of the co. had been sold & the co. was being wound up voluntarily. The liquidators proposed to pay off the debenture-stock at par, & a stockholder took out a summons to determine whether they were entitled to do so:—*Held*: (1) the co. had no power under their memorandum of assocn. to issue irredeemable debenture-stock, which was really equivalent to a perpetual annuity; the arts. might be referred to to explain the borrowing powers of the co., but the granting of perpetual annuities was not a borrowing within those powers; & the stockholder was only entitled to a return of his money paid to the co. & interest; (2) if this was really a borrowing upon the terms that the debenture-stock should not be repayable as long as the co. was a going concern, applt., now that the co. was in liquidation, was upon that view also only entitled to a return of his money paid to the co. with interest.—*Re SOUTHERN BRAZILIAN RIO GRANDE DO SUL RY. CO., LTD.*, [1905] 2 Ch. 78; 74 L. J. Ch. 392; 92 L. T. 598; 53 W. R. 489; 21 T. L. R. 451; 49 Sol. Jo. 446; 12 Mans. 323.

Power to charge uncalled capital.—*See* Subsect. 1, D. (b), *post*.

See, also, CORPORATIONS, Vol. XIII., p. 377, & compare Part IX., Sect. 14, *post*.

C. Joint Borrowing.

4583. Loan to companies jointly—Joint charge on separate assets.—*Re JOHNSTON FOREIGN PATENTS CO., LTD., Re JOHNSTON DIE PRESS CO., LTD., Re JOHNSTONIA ENGRAVING CO., LTD., J. P. TRUST, LTD. v. ABOVE COS.*, No. 4576, *ante*.

D. By Charging Uncalled Capital.

(a) What is Uncalled Capital.

4584. Unissued shares.—Among the objects of a co. was to purchase ships; & the directors were empowered to do all needful acts in furtherance

vires.]—To an action brought by a banking co. against a railway co., to recover the amount of advances made by the bank to the co. for the completion of a railway in the United States, connected in traffic with the railway co. the defence was, that the advances made by the banking co., though sanctioned by the shareholders, were foreign to the objects for which the railway co. was incorporated; *ultra vires* the authority of the directors of the co. & not binding upon the share-

holders. A verdict having been found for pltf. on the question of fact & law:—*Held*: though the railway co. had exceeded the borrowing powers given by their original Act of incorporation, yet that sufficient borrowing powers having been given by subsequent Acts, & their exercise having been sanctioned by the shareholders, the borrowing was not *ultra vires* the authority of the managers & directors & the grant of a new trial on the ground of misdirection, was correct.—*Com-*

of the objects of the co.; they were also expressly authorised to borrow, on the security of the property of the co., any sum of money not exceeding two-thirds of the capital of the co. not called up. The directors mortgaged a ship, the only property of the co., to secure the payment of a sum of money advanced to the co., & of unpaid purchase-money of the ship; the amount so secured much exceeding two-thirds of the amount not called up of the shares actually issued, but being within two-thirds of the whole nominal capital not called up:—*Held*: the mtge. was within the powers of the directors, & was valid; & the term "capital not called up" included shares which had not been issued.—*ENGLISH CHANNEL S.S. CO. v. ROLT* (1881), 17 Ch. D. 715; 44 L. T. 135.

4585. Where call made but not yet due.—Upon the understanding that a call should at once be made & the proceeds deposited to await the maturity of two promissory notes to be renewed in pursuance of the arrangement, a bank, the creditors of a co. for money properly borrowed, agreed to renew the notes of the co. The call was accordingly made, & the notes subsequently renewed:—*Held*: the mtge. to the bank, being of the proceeds of a call already determined upon, was distinguishable from an attempt to pledge future calls, & was valid.—*Re SANKEY BROOK COAL CO.* (1870), L. R. 9 Eq. 721; 39 L. J. Ch. 223; 22 L. T. 62; *sub nom. Re SANKEY BROOK COAL CO., Ex p. ALLIANCE BANK*, 18 W. R. 427.

Annotations:—*Appld. Re International Life Assco. Soc., Gibbs & West's Case* (1870), L. R. 10 Eq. 312. *Consd. Re Pyle Works* (1890), 44 Ch. D. 534. *Reid. New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock*, [1894] 1 Q. B. 622; *Jackson v. Rainford Coal Co.*, [1896] 2 Ch. 340.

—.]—*See, also*, No. 4600, *post*.

(b) Power to Charge.

4586. Power in memorandum—To mortgage any property—Power in articles to mortgage future calls.—The memorandum of assocn. of a limited co. stated one of the objects of the co. to be the raising of money for the purposes of the co. upon mtge. or charge of any property of the co., or upon debentures, bonds, bills, notes or any other security of the co., & the arts. gave express power to mtge. future calls:—*Held*: to authorise a mtge. of future calls.—*Re PHENIX BESSEMER STEEL CO.* (1875), 44 L. J. Ch. 683; 32 L. T. 854.

Annotations:—*Appld. Re Pyle Works* (1890), 44 Ch. D. 534. *Consd. Newton v. Anglo-Australian Investment Co. Debenture-Holders*, [1895] A. C. 244. *Reid. Fowler v. Broad's Patent Night Light Co.*, [1893] 1 Ch. 724; *Re Russian Spratts Patent, Johnson v. Russian Spratts Patent*, [1898] 2 Ch. 149.

4587. "Funds & property."—The directors of a co. had power, under the deed of settlement, to borrow money on the security of the funds or property of the co.:—*Held*: nevertheless, the directors could not grant a mtge. extending over unpaid calls, so as to give the mtgee. priority as

MERCIAL BANK OF CANADA v. GREAT WESTERN RY. CO. (1865), C. R. 5, A. C. 126.—CAN.

PART III. SECT. 34, SUB-SECT. 1. D. (b).

d. "All or any of the capital" "Property whatsoever & wheresoever present & future."—The memorandum of assocn. of a co. contained among its objects the mortgaging of all or any of the capital of the co. for any

Sect. 34.—Borrowing and securing money: Sub-sect. 1, D. (b), (c) & (d),

to them over other creditors.—*Re* BRITISH PROVIDENT LIFE & FIRE ASSURANCE SOCIETY, STANLEY'S CASE (1864), 4 De G. J. & Sm. 407; 4 New Rep. 255; 33 L. J. Ch. 535; 10 L. T. 674; 10 Jur. N. S. 713; 12 W. R. 894; 46 E. R. 976, L. JJ.

Annotations:—*Apld.* *Re* Sankey Brook Coal Co. (No. 2) (1870), L. R. 10 Eq. 381. **Consd.** *Re* Sankey Brook Coal Co., (1870) 39 L. J. Ch. 223; *Re* Phoenix Bessemer Steel Co. (1875), 44 L. J. Ch. 683. **Apprvd.** Bank of South Australia v. Abrahams (1875), L. R. 6 P. C. 265. **Distd.** *Re* Patent Ivory Manufacturing Co., Howard v. Patent Ivory Manufacturing Co. (1888), 38 Ch. D. 156. **Consd.** *Re* Pyle Works (1890), 44 Ch. D. 534; Newton v. Anglo-Australian Investment Co., Debenture-Holders, [1895] A. C. 244; Jackson v. Rainford Coal Co., [1896] 2 Ch. 340; *Re* Streatham & General Estates Co., [1897] 1 Ch. 15. **Apld.** *Re* Russian Spratts Patent, Johnson v. Russian Spratts Patent (No. 2) (1898), 42 Sol. Jo. 508. **Refd.** King v. Marshall (1864), 33 Beav. 565; *Re* Mayfair Property Co., Bartlett v. Mayfair Property Co., [1898] 2 Ch. 28.

4588. "Property & effects."—Under a power to "pledge, mtge., or charge the works, hereditaments, plant, property, & effects of the co.," in order to secure the repayment of moneys borrowed, the proceeds of a call already made, but not yet paid, may be charged, but not the proceeds of a future call.—*Re* SANKEY BROOK COAL CO. (No. 2) (1870), L. R. 10 Eq. 381; *sub nom.* *Re* SANKEY BROOK COAL CO., *Ex p.* ALLIANCE BANK OF LIVERPOOL, 22 L. T. 784; 18 W. R. 914.

Annotations:—**Consd.** *Re* Pyle Works (1890), 44 Ch. D. 534; Jackson v. Rainford Coal Co., [1896] 2 Ch. 340. **Refd.** New Zealand Gold Extraction Co. (Newbery-Vautin-Process) v. Peacock, [1894] 1 Q. B. 622.

4589. "In such manner as the company may determine."—The arts. of assocn. authorised the co. to borrow, upon mtge. of its freehold & leasehold hereditaments, works, & "other property & effects" for the time being of the co., or upon bonds or debenture-notes of the co., or "in such other manner as the co. may determine." The memorandum of assocn. contained no reference to any borrowing:—**Held:** the co. could under its arts. mtge. its uncalled capital; & had it been necessary so to do, the co. could by special resolution have extended its arts. so as to confer upon itself the power to charge its uncalled capital.—JACKSON v. RAINFORD COAL CO., [1896] 2 Ch. 340; 65 L. J. Ch. 757; 44 W. R. 554.

4590. "Property."—A power in a deed of settlement of a joint-stock co. authorising the directors to mtge. or charge the property of the co., does not authorise them to include in such mtge. or charge future calls, or, in other words, the unpaid capital of the co. The capital not paid up is, according to the usual forms of deeds of settlement, only *sub modo* the property of the co.; a precedent condition to the absolute proprietary right of the co. therein being the due making of a call by a resolution of the board of directors.—BANK OF SOUTH AUSTRALIA v. ABRAHAMS (1875),

L. R. 6 P. C. 265; 44 L. J. P. C. 76; 32 L. T. 277; 23 W. R. 668, P. C.

Annotations:—**Distd.** *Re* Patent Ivory Manufacturing Co., Howard v. Patent Ivory Manufacturing Co. (1888), 38 Ch. D. 156. **Consd.** *Re* Pyle Works (1890), 44 Ch. D. 534; Newton v. Anglo-Australian Investment Co., Debenture-Holders, [1895] A. C. 244; *Re* Streatham & General Estates Co., [1897] 1 Ch. 15.

4591. Any property of the company."

(1) In the memorandum of assocn., among the objects for which the co. was established were: to receive money on loan or deposit or otherwise, & upon any security of the co., or upon the security of any property of the co., or without giving security:—**Held:** these words authorised a charge on uncalled capital.

(2) A co. limited by shares can create a charge upon its uncalled capital so as to confer priority in the winding up.—NEWTON v. ANGLO-AUSTRALIAN INVESTMENT CO.'S DEBENTURE-HOLDERS, [1895] A. C. 244; 72 L. T. 305; 43 W. R. 401; 11 T. L. R. 278; 2 Mans. 246; 11 R. 438; *sub nom.* *Re* ANGLO-AUSTRALIAN INVESTMENT, FINANCE & LAND CO., LTD., NEWTON v. ANGLO-AUSTRALIAN INVESTMENT, FINANCE & LAND CO., LTD.'S DEBENTURE-HOLDERS, 64 L. J. P. C. 57, P. C.

Annotations:—*As to* (1) **Folld.** Jackson v. Rainford Coal Co., [1896] 2 Ch. 340. **Consd.** *Re* Streatham & General Estates Co., [1897] 1 Ch. 15. **Refd.** Bellerby v. Rowland & Marwood's S.S. Co., [1902] 2 Ch. 14. *As to* (2) **Consd.** *Re* Mayfair Property Co., Bartlett v. Mayfair Property Co., [1898] 2 Ch. 28. **Generally, Mentd.** Lock v. Queensland Investment & Land Mortgage Co., [1896] 1 Ch. 397.

4592. "Properties & rights."—The directors of a co. were authorised to mortgage all or any part of the co.'s "properties & rights":—**Held:** the directors had power to mortgage the capital of the co. for the time being uncalled.—*Re* PATENT IVORY MANUFACTURING CO., HOWARD v. PATENT IVORY MANUFACTURING CO. (1888), 38 Ch. D. 156; 57 L. J. Ch. 878; 58 L. T. 395; 36 W. R. 801.

Annotations:—**Apld.** *Re* Pyle Works (1890), 44 Ch. D. 534. **Refd.** Page v. International Agency & Industrial Trust (1893), 62 L. J. Ch. 610; Newton v. Anglo-Australian Investment Co. Debenture-Holders, [1895] A. C. 244; Seligman v. Prince, [1895] 2 Ch. 617; *Re* Russian Spratts Patent, Johnson v. Russian Spratts Patent, [1898] 2 Ch. 149. **Mentd.** Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co., [1902] 1 Ch. 146; Barker v. Stickney, [1918] 2 K. B. 356.

See, also, Nos. 4655, 4661, *post.*

4593. Capital only capable of being called up in winding up—Resolution under Companies Act, 1879 (c. 76), s. 5.—The M. P. Co., Limited, was registered in Aug., 1892, with a capital of £50,000 in 5,000 shares of £10 each, & both the memorandum of assocn. & the arts. authorised the creation of a charge on the unpaid capital for the time being. By a special resolution passed on Sept. 21, 1892, & confirmed on Oct. 12, 1892, it was declared, "That such portion of the co.'s capital as consists of £5 per share remaining uncalled upon all the ordinary shares of the co. shall not be capable of being called up, except in the event of & for the purposes of the co. being

purpose the board might consider advisable; & also the borrowing of money & the issue of debentures based upon all or any of the real or personal property or other assets of the co.:—**Held:** it gave power to mortgage uncalled capital.

Two series of debentures were issued, all of which on their face "charged by way of floating security" all the co.'s property whatsoever & wheresoever both present & future. By conditions endorsed on both series of debentures the charge thereby created was to be a floating security, & the power of the directors to call

up the capital in the case of the first series of debentures was restricted to the extent of the debenture debt for the time being, & in the case of the second series, half the subscribed capital, except for the purpose of payment of its debentures:—**Held:** reading the words "future property" with the conditions, the debentures constituted a valid charge over uncalled capital.—ANSTED v. LAND CO. OF AUSTRALASIA (1893), 14 N. S. W. L. R. (E.) 330.—AUS.

• *Assets "of every description."*
—Certain trading cos. agreed in

writing to mortgage, besides certain specified property, all their assets, real & personal, "of every description." The cos. were intended by the parties to, & actually did, continue to carry on their respective businesses, & consequently in the ordinary course of business disposed of some of their assets, & appropriated the proceeds to their own purposes:—**Held:** the security did not include the uncalled capital of the cos., as such were not "assets."—BANK OF NEW ZEALAND v. GUTHRIE (WALTER) & CO., LTD. (1897), 16 N. Z. L. R. 484.—N.Z.

wound up in accordance with the provisions of the Companies Act 1879." In June, 1894, the co. issued 160 first mtge. debentures of £10 each to appct., purporting to be a charge on all its property whatsoever & wheresoever, both present & future, including its uncalled capital for the time being. On Aug. 8, 1896, the present action was commenced on behalf of all the debenture-holders & a receiver was appointed on Aug. 12. On Aug. 8, a compulsory winding-up order was made against the co.; at that time only £5 per share remained uncalled. This was an application by a debenture-holder to have it declared that these debentures were a first charge on £5 per share which had been called up by the official receiver & liquidator in the winding up:—*Held*: the language of sect. 5 of the above Act created a statutory disability in a certain event to call up capital for any purpose except winding up, & the uncalled capital mentioned in the special resolution passed under that sect. was to be preserved intact for the purposes of the liquidation.—*Re MAYFAIR PROPERTY CO., BARTLETT v. MAYFAIR PROPERTY CO.*, [1898] 2 Ch. 28; 67 L. J. Ch. 337; 78 L. T. 302; 46 W. R. 465; 14 T. L. R. 336; 42 Sol. Jo. 430; 5 Mans. 126, C. A.

Annotation:—*Apld. Re Irish Club Co.*, [1906] W. N. 127.

See, now, 1908 Act, s. 59.

4594. ——— *Company limited by guarantee.*—*Re IRISH CLUB CO., LTD.*, [1906] W. N. 127.

4595. *Power to confer priority in winding up.*—*NEWTON v. ANGLO-AUSTRALIAN INVESTMENT CO.'S DEBENTURE-HOLDERS*, No. 4591, *ante*.

(c) Effect of Charge.

4596. *Whether calls by liquidator included.*—Where, by the memorandum & arts. of assocn. of a limited co., there is power to mortgage unpaid capital, a mtge. of future calls is effectual on calls made by the liquidator in the winding up of the co.—*Re PYLE WORKS* (1890), 44 Ch. D. 534; 59 L. J. Ch. 489; 62 L. T. 887; 38 W. R. 674; 6 T. L. R. 268; 2 Meg. 83, C. A.; *subsequent proceedings*, [1891] 1 Ch. 173.

Annotations:—*Consd.* Page v. International Agency & Industrial Trust (1893), 62 L. J. Ch. 610. *Apprvd.* Newton v. Anglo-Australian Investment Co., Debenture-Holders, [1895] A. C. 244. *Consd.* *Re Mayfair Property Co., Bartlett v. Mayfair Property Co.*, [1898] 2 Ch. 28. *Refd.* Fowler v. Broad's Patent Night Light Co. (1893), 68 L. T. 576; New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock, [1894] 1 Q. B. 622; *Re Russian Spratts, Johnson v. Russian Spratts* (1898), 78 L. T. 480; Bellerby v. Rowland & Marwood's S.S. Co., [1902] 2 Ch. 14. *Mentd.* London Provident Bldg. Soc. v. Morgan, [1893] 2 Q. B. 266; Lock v. Queensland Investment & Land Mortgage Co. (1896), 65 L. J. Ch. 301; *Re Auriferous Properties*, [1898] 1 Ch. 691.

4597. *Enforcement of charge—In favour of debenture-holders—Whether by receiver or liquidator.*—When a co. is ordered to be wound up, the power of its directors, under its constitution,

to make calls on shares *ipso facto* comes to an end, & the only power to make calls is that which is by statute given to the liquidator acting in the winding up.

Therefore, where uncalled capital has been charged by the co. in favour of debenture-holders, & the co. is ordered to be wound up, the ct. has no jurisdiction to order either a receiver appointed in an action brought to enforce the debentures, or the liquidator, to make a call in the action, but can only order the liquidator to make the call in the winding up. The receiver in the action may, however, be empowered to take proceedings in the name of the liquidator for getting in the call.—*FOWLER v. BROAD'S PATENT NIGHT LIGHT CO.*, [1893] 1 Ch. 724; 62 L. J. Ch. 373; 68 L. T. 576; 41 W. R. 247; 37 Sol. Jo. 232; 3 R. 295.

4598. ——— ——— ———.]—The ct. approved the practice of allowing, in proper cases, the receiver, who has been appointed in a debenture-holders' action against a co. in liquidation whose uncalled capital is included in the debenture-holders' security, to use the name of the liquidator, upon giving him a proper indemnity, for the purpose of recovering the calls made by him. The ct. refused to sanction the application of a debenture-holder, whose security was upon the uncalled capital of a co., that a person nominated by him with the approval of subsequent debenture-holders should be allowed to recover calls made by the liquidator.—*Re WESTMINSTER SYNDICATE, LTD.* (1908), 99 L. T. 924; 25 T. L. R. 95.

4599. ——— ——— ——— *By nominee of debenture-holder.*—*Re WESTMINSTER SYNDICATE, LTD.*, No. 4598, *ante*.

Priorities in winding up.—*See* No. 4591, *ante*.

Charge on call made but not due.—*See* No. 4600, *post*.

(d) Effect of Appointment of Receiver or Liquidator.

See Nos. 4597, 4598, *ante*.

E. By Charging Unpaid Calls.

4600. *No express power of borrowing — Power to do all things necessary for carrying on business of company—Loan to meet pressing demands.*—The deed of settlement of an insurance co. contained no express power of borrowing, but empowered the directors to do & execute all acts, deeds, & things necessary, or deemed by them proper or expedient, for carrying on the concerns & business of the co., & to do, enforce, perform, & execute all acts & things in relation to the co. & to bind the co., as if the same were done by the express assent of the whole body of members thereof:—*Held*: the directors acted within their powers in borrowing money from the bankers of the co. to meet pressing demands upon the co.,

PART III. SECT. 34, SUB-SECT. 1.— D. (c).

1. *Notice of assignation to shareholders—Ineffectual unless given.*—A club incorporated under Companies Acts, in security of obligations undertaken by the club in the lease of the club premises, by relative minute of agreement assigned to the landlord the uncalled capital on its shares issued or to be issued. At a subsequent general meeting of the club, at which all the members were not present, the secretary read a report which contained a summary of the provisions of the lease & relative

minute of agreement, & set forth that in security of these obligations the committee had assigned the uncalled capital to the landlord:—*Held*: the assignation to the landlord of the uncalled capital had not been validly intimated to the shareholders, the members of the club, & no preference had thereby been constituted in favour of the landlord.—*UNION CLUB, LTD. (LIQUIDATOR) v. EDINBURGH LIFE ASSURANCE CO.* (1906), 8 F. (Ct. of Sess.) 1143; 43 Sc. L. R. 801; 14 S. L. T. 314.—*SCOT.*

create a security over the uncalled capital of a co. in favour of debenture holders by debenture bonds purporting to charge the whole property of the co. present & future, including its uncalled capital, with the amount of the debentures:—*Held*: ineffectual, no proper assignation of the uncalled capital having been made in favour of the debenture holders, & no proper intimation having been given to the shareholders of the co. personally.—*BALLACHULISH SLATE QUARRIES v. MENZIES* (1908), 45 Sc. L. R. 667.—*SCOT.*

—.]—An attempt to

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& charging the proceeds of a call already made, but not immediately payable, with the repayment of the loan; & two of the directors who had become sureties for the co., & had repaid the loan, were entitled to the benefit of the charge on the call.—*Re INTERNATIONAL LIFE ASSURANCE SOCIETY, GIBBS & WEST'S CASE* (1870), L. R. 10 Eq. 312; 39 L. J. Ch. 667; 23 L. T. 350; 18 W. R. 970.

Annotations:—*Fold.* *Re Hamilton's Windsor Ironworks, Ex p. Pitman & Edwards* (1879), 12 Ch. D. 707. *Reid.* *English Channel S.S. Co. v. Rolt* (1881), 17 Ch. D. 715; *Wheatley v. Silkstone & Haigh Moor Coal Co.* (1885), 29 Ch. D. 715; *General Auction Estate & Monetary Co. v. Smith*, [1891] 3 Ch. 432. *Mentd.* *Re Liverpool Civil Service Supply Assn.*, *Ex p. Greenwood* (1874), 22 W. R. 636; *Re Whitehouse* (1878), 9 Ch. D. 595; *Re West of England & South Wales District Bank, Ex p. Branwhite* (1879), 48 L. J. Ch. 463.

4601. Under express power to borrow—Power to charge property & effects.]—*Re SANKEY BROOK COAL CO. (No. 2)*, No. 4588, *ante*.

4601a. Effect of charge—Second call made including first—Payment by contributory less than first call.]—A co. made a call on their shareholders, & then mortgaged the call to secure a debt. Before this call was fully paid by the shareholders, the co. was ordered to be wound up. A further call being necessary to pay the debts of the co., it was arranged that, in order to save the expense of bringing separate actions against each shareholder for the arrears of the first call, a new call should be made so as to include the first call & the further sum required. This was accordingly done. A contributory paid, on account of this new call, a sum which did not amount to what he owed in respect of the first call:—*Held*: there could be no apportionment, but the whole of the sum so paid belonged to the mtgees. of the first call.—*Re HUMBER IRONWORKS CO., Ex p. WARRANT FINANCE CO.* (1868), 16 W. R. 667, L. J. J.

See, also, No. 4589, *ante*.

F. Loans by Directors to Company.

Director's right of indemnity.]—*See* Sect. 28, sub-sect. 4, F., *ante*.

Director's right to profits.]—*See* No. 3479, *ante*.

Contracts between directors & company generally.]—*See* Sect. 28, sub-sect. 6, D. (d), *ante*.

G. Loss of Power.

4602. Issue of writ in debenture-holders' action—Issue of authorised debentures before appointment of receiver.]—Where a co. has resolved to raise a sum of money by the issue of debentures constituting a floating charge on its undertaking & assets, & has issued a part only of such series, the co. is not debarred from issuing the remaining debentures of the series by the fact that the earlier debenture-holders have called in the principal & issued a writ to enforce their security, provided they have not at the date of the further issue obtained the appointment of a receiver.

Semle: it is in the "ordinary course of business" for a co. which has power under its memorandum & arts. of assocn. to issue debentures,

to issue debentures to its solr. as security for his costs of defending an action brought by debenture-holders.—*Re HUBBARD & CO., LTD., HUBBARD v. HUBBARD & CO., LTD.* (1898), 68 L. J. Ch. 54; 79 L. T. 665; 5 Mans. 860.

Appointment of liquidator or receiver—Effect on power to charge uncalled capital.]—*See* Sub-sect. 1, D. (d), *ante*.

SUB-SECT. 2.—EXERCISE OF POWER.

A. What constitutes Borrowing.

4603. Purchase by company of bonds in consideration of debentures & shares credited as paid up—Sale of such bonds to a director—Fictitious transaction.]—An agreement was entered into between P. & the L. Co., represented by B., one of their directors, whereby P. agreed to sell, & B. to purchase, certain bonds in consideration of the sum of £4,000, & debenture-notes of the co. for £2,500, & also 3,500 shares in the co., on which £1 should be considered to have been paid. B. then took the bonds at £5,750, their market value, & after paying the £4,000 to P., paid over the remainder for the use of the co. P. sold his interest in the debenture-notes to W. & A., who, upon the winding up of the co., brought in their claims:—*Held*: the whole transaction was invalid & must be set aside, it being neither a borrowing nor a purchasing under the powers given to the directors by their deed of settlement.—*Re LONDON & COUNTY ASSURANCE CO., WOOD'S CLAIM, BROWN'S CLAIM* (1861), 30 L. J. Ch. 373; 3 L. T. 878; 9 W. R. 366; *subsequent proceedings* (1862), 7 L. T. 236; 10 W. R. 662.

4304. Bills of exchange given to secure overdraft.]—*Re CEFN CILCEN MINING CO.*, No. 4575, *ante*.

4605. Overdraft—On bank in regular course of business.]—A banking co. permitted their customers, a railway co., to draw cheques against a sum entered in the books of the bank under the title "Loan Account." The co. being insolvent, the claim of the bank was disputed as being an unauthorised loan:—*Held*: a mere overdrawing in the regular course of a banking business, & not a borrowing or loan, in the proper sense of the word.—*WATERLOW v. SHARP, GARDNER v. SHARP* (1869), L. R. 8 Eq. 501; 20 L. T. 902, 903.

Annotations:—*Reid.* *Colonial Bank of Australasia v. William* (1874), L. R. 5 P. C. 417; *Looker v. Wighley, Leigh v. Wighley* (1882), 9 Q. B. D. 397. *Mentd.* *Brooks v. Blackburn Benefit Bldg. Soc.* (1884), 9 App. Cas. 857.

4606. —.]—Two directors gave promissory notes to their co.'s bankers to secure an overdraft on the current account, & also gave guarantees to railway cos., who carried the co.'s goods on credit. The directors incurred these liabilities on the understanding that they were to have a mtge. upon the uncalled capital of the co. to indemnify them against loss, & such mtge. was accordingly executed to them. The co. had power under its memorandum & arts. to mortgage its uncalled capital to secure money borrowed:—*Held*: the mtge. in question was valid.—*Re PYLE WORKS (No. 2)*, [1891] 1 Ch. 173; 60 L. J. Ch. 114; 63 L. T. 628; 39 W. R. 235; *sub nom. Re PYLE*

PART III. SECT. 34, SUB-SECT. 2.—A.

h. "Loan of money"—Issue of debenture by company.]—Trustees being indebted to plffs. & holding stock in debt. co. assigned the stock to the latter in consideration of a sum expressed to be paid by them for the

trustees to plffs. The sum was paid by the issue of debts. debenture to plffs.:—*Held*: the transaction did not constitute a "loan of money" from the plffs. to debts. within 31 Vict. c. 52,

s. 12, & the issue of the debenture was therefore *ultra vires*.—*TORONTO BANK v. BEAVER & TORONTO MUTUAL INSURANCE CO.* (1880), 28 Gr. 87.—**CAN.**

WORKS, LTD., MCILWRAITH & GOTTO'S CASES, 2 Mag. 327.

Compare BUILDING SOCIETIES, Vol. VII., p. 487, No. 199.

4607. Sale of assets—Simultaneous hiring agreement—Option to repurchase.]—A railway co. being in want of money, & being advised that they had no power to borrow, sold part of their rolling-stock to a wagon co. for £30,000, at the same time making a contract with the wagon co. for the hire of the same rolling-stock at a rent which would repay the £30,000, with interest, in five years, & then for its re-purchase at a nominal price. At the same time three of the directors guaranteed to the wagon co. the payment of the rent. The wagon co. brought an action against the railway co. & the sureties for non-payment of rent due:—*Held*: the transaction was not a borrowing of money, but a *bond fide* sale & hiring of the rolling-stock, and was valid both against the railway co. & the sureties.—**YORKSHIRE RAILWAY WAGON CO. v. MACLURE** (1882), 21 Ch. D. 309; 51 L. J. Ch. 857; 47 L. T. 290; 30 W. R. 761, C. A.

Annotations:—**Consd.** Beckett v. Tower Assets Co., [1891] 1 Q. B. 1. **Folld.** Re Eastern & Midlands Ry. (1891), 65 L. T. 668. **Refd.** Madell v. Thomas (1890), 60 L. J. Q. B. 227; British Ry. Traffic & Electric Co. v. Kahn, [1921] W. N. 52. **Mentd.** Re Cornwall Minerals Ry. (1882), 48 L. T. 41; Re Yarrow, Collins v. Weymouth (1889), 59 L. J. Q. B. 18; Re Watson, *Ex p.* Official Receiver in Bankruptcy (1890), 25 Q. B. D. 27; Phillips v. London School Board, Cockerton v. London School Board (1897), 77 L. T. 397; Re Liskeard & Caradon Ry., [1903] 2 Ch. 681; Wauthier v. Wilson (1912), 28 T. L. R. 239.

4608. —.]—The B. Co., being in want of money & being in possession of certain wagons in which they had an interest, applied to resps. who agreed to buy the wagons for £1,000, & advanced that sum, £257 thereof being paid to the owners of the wagons & the rest, £743, to the B. Co. Resps. received from the B. Co. an invoice for the wagons & a receipt for the £743, & from the owners of the wagons a receipt for the £257. At the same time resps. leased the wagons to the B. Co. for three years, at a yearly rent payable quarterly & calculated to replace the £1,000 with 7 per cent. interest, upon the terms that if all the payments were duly made the B. Co. should have the option of purchasing the wagons at the end of the the lease for a nominal sum, & that if the rent was not duly paid after demand resps. should be entitled to re-possess & enjoy the wagons as in their former estate, & that the agreement should thereupon cease & determine. The B. Co. having made default in payment of the rent, resps. claimed the wagons from a railway co. into whose possession they had come, but were resisted on the ground that the transaction was void under the Bills of Sale Acts, 1878 & 1882 (cc. 31, 43), the documents not being in the form prescribed by those Acts for bills of sale:—*Held*: the transaction was in fact a purchase by resps., & was not a mtge. by the B. Co. nor a security for the payment of money; the documents in question were not bills of sale within the above Acts, but even if they had been, resps. had made an independent title to the wagons.—**MANCHESTER SHEFFIELD & LINCOLNSHIRE RY. CO. v. NORTH CENTRAL WAGON CO.** (1888), 13 App. Cas. 554; 58 L. J. Ch. 219; 59 L. T. 730; 37 W. R. 305; 4 T. L. R. 728, H. L.; *affg.* S. C. *sub nom.* NORTH CENTRAL WAGON CO. v. MANCHESTER SHEFFIELD & LINCOLNSHIRE RY. CO. (1887), 35 Ch. D. 191, C. A.

Annotations:—**Consd.** Beckett v. Tower Assets Co., [1891] 1 Q. B. 1. **Mentd.** French v. Bombernard, Tower Fur-

nishing & Finance Co. Claimants (1888), 60 L. T. 48; Haydon v. Brown, Eyre Claimant (1888), 59 L. T. 810; Newlove v. Shrewsbury (1888), 21 Q. B. D. 41; Redhead v. Westwood (1888), 59 L. T. 293; Re Yates, Batcheldor v. Yates (1888), 38 Ch. D. 112; Jones v. Tower Furnishing Co. (1889), 61 L. T. 84; Re Yarrow, Collins v. Weymouth (1889), 59 L. J. Q. B. 18; Re Watson, *Ex p.* Official Receiver in Bankruptcy (1890), 25 Q. B. D. 27; Grigg v. National Guardian Assce., [1891] 3 Ch. 206; Secretary of State in Council of India v. British Empire Mutual Life Assce. (1892), 67 L. T. 434; Re Whiteley, *Ex p.* Smith (1892), 66 L. T. 291; Re Hood, *Ex p.* Blandford (1893), 41 W. R. 558; Re Hood, *Ex p.* Burgess (1893), 9 T. L. R. 541; Re Hood, *Ex p.* Trustee v. Burgess (1893), 68 L. T. 591; Ramsay v. Margrett, [1894] 2 Q. B. 18; Clapham v. Ives, Holmes Claimant (1904), 91 L. T. 69; National Provincial & Union Bank of England v. Lindsell (1921), 91 L. J. K. B. 196.

4609. Loan from individual applied in reduction of bank overdraft—Company's borrowing powers exhausted.]—Re HARRIS CALCULATING MACHINE CO., SUMNER v. HARRIS CALCULATING MACHINE CO., No. 4904, *post*.

B. Time for Exercise and Compliance with Formalities.

4610. Before nominal capital subscribed.]—A joint-stock co., established with limited liability, under 1862 Act, may lawfully commence business & exercise their borrowing powers before the whole of the nominal capital has been subscribed; & a representation by prospectus issued on behalf of a co., that the capital consists of a given sum, in shares of a certain amount, does not imply that the whole capital named is to be raised at once, & that the borrowing powers are to be suspended until the whole of such capital has been subscribed.—**MACDOUGALL v. JERSEY IMPERIAL HOTEL CO., LTD.** (1864), 2 Hem. & M. 528; 4 New Rep. 497; 34 L. J. Ch. 28; 10 L. T. 843; 28 J. P. 708; 10 Jur. N. S. 1043; 12 W. R. 1142; 71 E. R. 568.

Annotations:—**Distd.** Elder v. New Zealand Land Improvement Co. (1874), 30 L. T. 285. **Mentd.** Lambert v. Northern Ry. of Buenos Ayres Co. (1869), 18 W. R. 180; Re Alexandra Palace Co. (1882), 21 Ch. D. 149; Guinness v. Land Corp'n. of Ireland (1882), 22 Ch. D. 349.

4611. Necessity for compliance with articles of association.]—A charge upon the assets of a co. will not bind the co. unless created in the mode & executed with the formalities prescribed by their arts. of assocn.

B. advanced money to a co. upon the deposit of certain title deeds, accompanied by a memorandum of charge signed by the general manager, but not under the seal of the co., nor executed with other requisite formalities. There was evidence that the manager had been authorised by the directors to effect the loan & sign the memorandum, but no entry of any resolution for that purpose was made in the books of the co. In the winding up R.'s claim was disallowed.—**Re GENERAL PROVIDENT ASSURANCE CO., LTD.** (1869), 38 L. J. Ch. 320; 17 W. R. 514.

Annotations:—**Consd.** Re General Provident Assce. Co., *Ex p.* National Bank (1872), L. R. 14 Eq. 507. **Refd.** Re Wynn Hall Coal Co., *Ex p.* North & South Wales Bank (1870), L. R. 10 Eq. 515.

See, further, Nos. 4619–4621, 4624, 4927, *post*.

Duty of lender to inquire.]—*See* Sub-sect. 2, C. (b), ii., *post*.

C. Ultra vires or Irregular Borrowing.

(a) Directors acting ultra vires.

i. Liability.

Liability to lender—On breach of warranty of authority.]—*See* Sect. 28, sub-sect. 6, F. (e), *ante*.

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Right to indemnity—Against company.]—See Sect. 28, sub-sect. 4, F., ante.

Directors of building society.]—See BUILDING SOCIETIES, Vol. VII., p. 491, Nos. 221–226.

ii. Ratification by Company.

4612. What amounts to—Acquiescence by company.]—By a co.'s deed of settlement power was given to a meeting of two-thirds in number & value of the shareholders to authorise the directors to borrow on debentures. The directors raised money on debentures upon the resolution of a meeting at which the requisite number of shareholders was not present. The debentures were issued to persons actually present at the meeting, & the money raised was applied in payment of the debts of the co. Interest was duly paid on the loans for two years:—*Held*: the original issue of debentures was invalid, but the subsequent acquiescence of the co. had cured their invalidity, & they could not now be disputed.—*Re MAGDALENA STEAM NAVIGATION CO.* (1860), John. 690; 29 L. J. Ch. 667; 3 L. T. 147; 6 Jur. N. S. 975; 8 W. R. 329; 70 E. R. 597.

Annotation:—*Consd. Re Cork & Youghal Ry.* (1869), 4 Ch. App. 52, n.

4613. Effect of—Whether authority for further borrowing.]—The ratification by the shareholders of a co. of a particular act of the directors in excess of their authority does not authorise them to do similar acts in future.

One of the arts. of assocn. of a registered co. provided that the directors' power of borrowing on the credit of the co. should be limited, so that "the total amount should not exceed in the aggregate, as an existing debt at the same time, one-half of the then actually paid up capital of the co." The arts. contained no restriction on the borrowing powers of the co., & the directors' power of borrowing was capable of being extended by the votes of one-half of all the shareholders at a general meeting. The directors obtained a letter of credit for an amount exceeding one-half of the then paid-up capital of the co., which was ratified by a general meeting. The letter subsequently expired, & was renewed, & a second letter was obtained. These latter acts were never ratified:—*Held*: though the limitation above-mentioned was merely a limitation of the powers of the directors, & not of the general powers of the co., so that the acts of the directors were capable of ratification, yet the ratification of the first letter of credit did

not authorise its renewal, nor the obtaining of the second letter.—*IRVINE v. UNION BANK OF AUSTRALIA* (1877), 2 App. Cas. 366; L. R. 4 Ind. App. 86; 46 L. J. P. C. 87; 37 L. T. 176; 25 W. R. 682, P. C.

Annotations:—*Reid. Grant v. United Kingdom Switchback Rys.* (1888), 40 Ch. D. 135; *Re London & New York Investment Corp.*, [1895] 2 Ch. 860; *Boschoek Proprietary Co. v. Fuke*, [1906] 1 Ch. 148. *Mentd. Melbourne Banking Corp. v. Brougham* (1879), 4 App. Cas. 156.

(b) Position of Lender.

i. In General.

4614. Where no power of borrowing—Money applied to purposes of company.]—When directors of a co. have no power to borrow, a person lending money to the co. cannot enforce payment of it against the co. unless it has been *bonâ fide* applied to the purposes of the co.

The directors of a co. having no borrowing powers, being pressed for money by their contractor, obtained for him, on credit, £2,000 at a banker's upon their guarantee. The contractor afterwards agreed to abandon the plant, etc., to the co., on receiving £600 & being indemnified against the banker's claim. Subsequently to this, the secretary of the co., with the sanction of the directors, borrowed £500 in his own name for the co., which was applied in paying the banker & a judgment debt of the co. The co. had the benefit of the plant, etc.:—*Held*: the secretary could recover the amount from the co. of the money *bonâ fide* applied for its benefit, with interest.—*ELECTRIC TELEGRAPH CO. OF IRELAND, TROUP'S CASE* (1860), 29 Beav. 353; 7 Jur. N. S. 901; 9 W. R. 878; 54 E. R. 664.

Annotations:—*Folld. Re Electric Telegraph Co. of Ireland, Hoare's Case* (1861), 30 Beav. 225; *Re Cork & Youghal Ry.* (1869), 4 Ch. App. 752, n. *Reid. Chambers v. Manchester & Milford Ry.* (1864), 5 B. & S. 588.

4615. .]—Money borrowed for a co. & *bonâ fide* applied for its benefit:—*Held*: recoverable, though the directors had no borrowing powers.—*Re ELECTRIC TELEGRAPH CO. OF IRELAND, HOARE'S CASE* (1861), 30 Beav. 225; 7 Jur. N. S. 901; 9 W. R. 878; 54 E. R. 836.

Annotation:—*Folld. Re Cork & Youghal Ry.* (1869), 4 Ch. App. 752, n.

4616. Subrogation of lender to rights of creditors paid off.]—The principle that where a co. has no power of borrowing, a person lending money to it which has been applied in paying debts recoverable by law against it, may yet in equity stand in the place of the creditors whose

PART III. SECT. 34, SUB-SECT. 2.—C. (a) ii.

k. What amounts to—Subsequent resolution of shareholders.]—*ADAMS v. BANK OF MONTREAL* (1901), 32 S. C. R. 719.—*CAN.*

l. Whether possible—Power ultra vires directors & company.]—By the memorandum of assocn. of a co. the co. were empowered to borrow. By a clause in the arts. of assocn., it was provided that the directors might, from time to time at their discretion, borrow any sum or sums of money for the purposes of the co., but so that the money at one time owing should not, without the sanction of a general meeting, exceed one-fifth of the nominal amount of the capital, or, with such sanction, one-third of such nominal amount. The directors issued debentures to the amount of £3,050, of

which A. held £1,650, the nominal capital of the co. being £10,000, & mortgaged to A., for money advanced, lands & other property of the co. for £3,950, & the mtge. was sanctioned at a general meeting of the co.:—*Held*: the restriction in the clause of the arts. of assocn. was imposed on the co. itself, & not merely on the directors; the sanction of the mtge. by the co. was *ultra vires*, & the security void as to the excess over one-third of the nominal capital.—*Re BANSHA WOOLLEN MILLS CO., LTD.* (1887), 21 L. R. 1r. 181.—*IR.*

m. Effect of—Waiver of irregularity.]—Subsequent action on the part of shareholders confirming the action of directors in borrowing may be a waiver of the irregularity in the internal management of the co., which arose by reason of the authority from the shareholders not being previously given.—*NORTHERN CROWN BANK v.*

GREAT WEST LUMBER CO. (1914), 6 W. W. R. 528; 28 W. L. R. 708; 17 D. L. R. 593; 7 Alta. L. R. 183.—*CAN.*

PART III. SECT. 34, SUB-SECT. 2.—C. (b) i.

n. Formalities as to mortgage not complied with—Sanction of shareholders—Objection by execution creditor.]—Pltf. as mtgee. of debts. by an instrument, purporting to be duly executed by pltf., commenced an action for the sale of the mortgaged property. The writ issued duly indorsed under Rule 17, O. S. A., & default being made, judgment was obtained under Rule 78, O. S. A., referring it to the master to make & take inquiries & accounts. The master gave certain execution creditors, who had been made parties in his office & proved their claims, priority over pltf. on the ground that the instrument in question

debts have been thereout paid, is not to be extended one iota.—*Re NATIONAL PERMANENT BENEFIT BUILDING SOCIETY, Ex p. WILLIAMSON* (1869), 5 Ch. App. 309; 22 L. T. 284; 34 J. P. 341; 18 W. R. 388, L. J.

Annotations:—*Consd. Yorkshire Ry. Wagon Co. v. Maclure* (1881), 19 Ch. D. 478. *Apld. Reversion Fund & Insee. v. Malson Cosway*, [1913] 1 K. B. 364. *Reid. Re Victoria Permanent Benefit Bldg. Investment & Freehold Land Soc., Hill's Case, Jones Case* (1870), L. R. 9 Eq. 605; *Chapleo v. Brunswick Benefit Bldg. Soc.* (1880), 5 C. P. D. 331; *Blackburn Bldg. Soc. v. Cunliffe, Brooks* (1882), 22 Ch. D. 61; *Murray v. Scott, Agnew v. Murray, Brimelow v. Murray* (1884), 9 App. Cas. 519; *Sinclair v. Brougham*, [1914] A. C. 398. *Mentd. Re South Wales Atlantic S.S. Co.* (1876), 2 Ch. D. 763.

4617. Where borrowing power exceeded—Whether security void or voidable.—By the arts. of assocn. of a co., extended by a special resolution, the directors were empowered to incur debts & to borrow on mtge. & other securities to an amount not exceeding £8,000. They issued a number of debentures at a time when the liabilities of the co. exceeded £8,000:—*Held*: the debentures were not voidable, but absolutely void, & the holders of them could only come in *pari passu* with the simple contract creditors for the amounts secured by their debentures.—*Re POOLEY HALL COLLIERY CO.* (1869), 21 L. T. 690; 18 W. R. 201.

Annotation:—*Distd. English Channel S.S. Co. v. Rolt* (1881), 17 Ch. D. 715.

4618. Formalities as to mortgage not complied with—Absence of seal.—*Re GENERAL PROVIDENT ASSURANCE CO., LTD.*, No. 4611, *ante*.

4619. Debenture irregularly issued—Minute of authorising resolution unsigned—No quorum of directors.—A co. issued debentures to shareholders upon the terms of receiving for the same half the amount thereof in cash & half in fully paid-up shares of the co. There were no signed minutes authorising the issue of the debentures, & a quorum of directors was not present when the question was considered:—*Held*: the issue of the debentures was *ultra vires* & invalid.—*EDWARDS v. DUPLEX ELECTRIC LIGHT, POWER & STORAGE CO., LTD.* (1885), 1 T. L. R. 210.

4620. Improperly sealed—No meeting of directors to sanction issue—Irregularity cured by special clause in articles.—Arts. of assocn. of a co. empowered its directors to secure the repay-

ment of money by debentures. The common seal of the co. was not to be affixed to any document except in the presence of two directors, or of one director & the secretary, & in pursuance of a resolution of the directors. No director was to vote in respect of any contract in which he was personally interested, & if he should vote his vote was not to be counted. But one of the arts. (115) provided that any debenture bearing the common seal, & issued for valuable consideration, should bind the co. notwithstanding any irregularity touching the authority of the directors or officers or servants of the co. to issue the same. The co. had agreed to pay B. who was a director, a sum of money with interest at 6 per cent., & B. owed D. a smaller sum. On D. pressing for payment it was arranged that the co. should issue to B. a debenture for the amount owing by him to D., with interest at 5 per cent., & that B. should transfer it to D. Prior to the debenture being issued D.'s solrs. were furnished with a print of the arts. The debenture bore the seal of the co., which was stated to be affixed in the presence of B. as a director, & was signed by him & counter-signed by M. the secretary of the co.

No meeting of directors was called to sanction the issuing of the debenture, but there were minutes of a meeting held about the same time which stated that B. & M. were present, & that a resolution was passed authorising the issuing & sealing of the debenture:—*Held*: (1) the debenture was given for valuable consideration, & the irregularities attending its issue were cured by art. 115; (2) there being nothing on the face of the debenture to show that the arts. had not been complied with, D. was not affected with notice of its infirmities by the fact of his solrs. having seen a print of the memorandum & arts. prior to the transfer to him.—*DAVIES v. BOLTON (R.) & Co.*, [1894] 3 Ch. 678; 63 L. J. Ch. 743; 71 L. T. 336; 43 W. R. 171; 10 T. L. R. 604; 38 Sol. Jo. 650; 1 Mans. 444; 8 R. 685.

Annotation:—*Mentd. Wigan v. English & Scottish Law Life Assce. Asscn.* (1908), 78 L. J. Ch. 120.

4621. — Issue without authority—Debentureholder without notice of irregularity—Priority as against execution creditor.—The rights of a *bond fide* holder for value of a debenture, which is in proper form & charges all the property of the co.,

was invalid, the terms Canada Joint Stock Co.'s Act, 1877, s. 85, which required the sanction of a two-thirds vote of the shareholders not having been complied with:—*Held*: under the decree the master had no power to adjudicate upon the validity of the instrument in question as a mtge., & the execution creditors not having moved against the judgment, by virtue of which they were made parties were also bound by the decree.—*McDOUGALL v. LINDSAY PAPER MILL CO.* (1884), 10 P. R. 247.—CAN.

o. Debenture irregularly issued—No quorum of directors—Lender with knowledge of irregularity.—A co. was managed by a board of five directors. A bank advanced money to a co. on the drafts of the manager authorised on that behalf by a meeting of the board at which less than a quorum of the directors attended as the bank knew. A meeting of a quorum subsequent to the loan acknowledged it without consideration:—*Held*: the co. were not bound by the loan either as originally authorised by a board less than a quorum nor as subsequently without consideration acknowledged by a quorum.—*COLONIAL BANK OF AUSTRALASIA v. LOCH FYNE*

GOLD MINING CO. (1866), 3 W. W. & A'B. 168.—AUS.

p. — — — Issue to interested directors—Issue to outsiders without notice.—*COX v. DUBLIN CITY DISTILLERY (No. 2)*, [1915] 1 I. R. 345.—IR.

q. — — — Foreign trustee not entitled to hold property—Equitable rights of lender.—A mtge. was given by a co., to secure a certain bond issue, the trustee under the mtge. was a foreign corpn. not having a licence to do business within the province of New Brunswick, & therefore, was unable to take or hold property in New Brunswick. After the bonds were issued & the mtge. executed, the co. went into liquidation, & a liquidator was appointed:—*Held*: while the mtge. was not effectual to convey to the foreign corpn. the property it was intended or purported, to convey, yet, inasmuch as it was clear upon the face of the bonds that the bondholders acquired the bonds under an agreement that they were to be secured by a mtge. upon the property of the co., the bondholders, who were not responsible for the failure of the co. to appoint a competent trustee, were

entitled in equity as against the co. & its liquidator, to a first charge, as security for the payment of such bonds, upon all the property of the co. specified as intended to be so charged in the bonds themselves & in the ineffectual mtge.—*HARRISON v. NEPESQUIT LUMBER CO.* (1911), 11 E. L. R. 314.—CAN.

r. — — — Lender with notice of irregularity for purposes of company—Lender with notice of irregularity for purposes of company.—*BANK OF IRELAND v. COGRY SPINNING CO., LTD.*, [1900] 1 I. R. 219.—IR.

s. Ultra vires borrowing—Loan by broker to buy company's own shares.—The vice-president & the manager of a co. instructed a broker to buy shares of the co.'s stock "to keep it up." He did so, paying a ten per cent margin upon the purchase with the funds of the co. paid to him by cheque, & the balance by a loan obtained on the shares bought, which were transferred to the lender. This was without the knowledge or sanction of the board of directors. Just before proceedings were taken to wind up the co. the manager signed his name as manager & affixed the seal of the co. to a writing addressed to the lender acknowledging

Sect. 34.—Borrowing and securing money: Sub-sect. 2, C. (b) i. & ii.]

as security for the debenture debt prevail over those of an execution creditor, even where the debenture is issued without authority, no directors of the co., having been appointed & no resolution to issue debentures passed; provided that the holder had no notice of any irregularity in the issue of the debenture.

It is not incumbent on the holder of such a document purporting to be issued by a co. to inquire whether the persons pretending to sign as directors have been duly appointed (LORD ALVERSTONE, C.J.).—*DUCK v. TOWER GALVANIZING CO.*, [1901] 2 K. B. 314; 70 L. J. K. B. 625; 84 L. T. 847, D. C.

Annotation:—*Reid. Re London Pressed Hinge Co.*, Campbell v. London Pressed Hinge Co., [1905] 1 Ch. 576.

— **Number of directors below minimum.**—*See No. 4636, post.*

4622. Imperfection in register of debentures—Priority as against general creditors.—*Re GENERAL SOUTH AMERICAN CO.*, No. 4927, *post.*

Compare BUILDING SOCIETIES, Vol. VII., pp. 489 *et seq.*

ii. Notice.

4623. Duty to inquire—As to compliance with formalities—Authority of directors.—In an action against a joint-stock co. upon a bond executed by the directors:—*Held*: (1) pltf. must be assumed to know whether by the deed of settlement constituting the co. the directors could have power, under any circumstances, to enter into such a bond binding on the co.; (2) as by the deed the directors could, under certain circumstances, have authority to bind the co. by such a deed, pltf. was not bound to inquire whether all acts had been done in this particular case to justify the directors, as between them & the co., in entering into such a bond.—*ROYAL BRITISH BANK v. TURQUAND* (1856), 6 E. & B. 327; 25 L. J. Q. B. 317; 2 Jur. N. S. 663; 119 E. R. 886, Ex. Ch.

Annotations:—*As to (1) Apprvd. & Apld. Agar v. Athenaeum Life Assce. Soc.* (1858), 3 C. B. N. S. 725. *Apld. Prince of Wales Assce. v. Harding* (1858), E. B. & E. 183. *Consd. Re Athenaeum Life Assce. Soc.*, *Ex p. Eagle Insce.* (1858), 4 K. & J. 549; *Athenaeum Life Insce. v. Pooley* (1858), 28 L. J. Ch. 119; *Totterdell v. Fareham Blue Brick & Tile Co.* (1866), L. R. 1 C. P. 674; *East Holyford Mining Co. v. Costelloe* (1871), 19 W. R. 1010. *Distd. Re County Palatine Loan & Discount Co.*, *Cartmell's Case* (1874), 9 Ch. App. 691. *Consd. Mahony v. East Holyford Mining*

the indebtedness of the co. to the lender:—*Held*: the manager & vice-president had no power by delegation or otherwise to borrow money for the co., & the affixing of the seal to the document referred to was an unauthorised act of the manager; & therefore, the claim of the lender to prove as a creditor of the co. for the amount advanced upon the stock could not be allowed.—*Re FARMERS' L. & S. CO.*, *Ex p. HOME S. & L. CO.*, 21 C. L. T. Occ. N. 383.—CAN.

t. — Money used to discharge existing debts—Whether lender may recover on equitable grounds.—*NORTHERN CROWN BANK v. GREAT WEST LUMBER CO.* (1913), 17 D. L. R. 593; 28 W. L. R. 708.—CAN.

a. — — — — —.—*Re LOUGH NEAGH SHIP CO.*, *Ex p. WORKMAN*, [1895] 1 I. R. 533.—IR.

b. — Limit exceeded—Security void as to excess—Though sanctioned by shareholders.—*Re BANSHA WOOLLEN MILLS CO., LTD.* (1887), 21 L. R. Ir. 181.—IR.

PART III. SECT. 34, SUB-SECT. 2.—C. (b) ii.

c. Duty to inquire—As to compliance with formalities—Indoor management.—The directors of a co. borrowed money from a bank, mortgaged the property of the co. to secure a portion of the debt, repaid the debt, incurred fresh debts & at last owed the bank a balance unsecured of £1,044 4s. 8d. No extraordinary meeting of the shareholders was ever called to enable the co. or authorise the directors to borrow money of the bank or to mortgage the co.'s property; & the majority of the shareholders never authorised or ratified any loan by the bank:—*Held*: on the question whether the debt was incurred by the directors in such a way as to bind the co., where the incurring of a debt is not *ultra vires* of the directors under the statute or deed of the co. but some preliminaries are omitted, there, inasmuch as the public are only supposed to be acquainted with the statute or deed & not with the *modus operandi* it must be assumed that all the preliminaries have been complied with; & the

Co. (1875), L. R. 7 H. L. 869. *Distd. Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366. *Apld. Re Briton Medical & General Life Asscn.* (1889), 5 T. L. R. 502. *Consd. Dey v. Pullinger Engineering Co.*, [1921] 1 K. B. 77. *Reid. Curtels v. Anchor Insce.* (1857), 2 H. & N. 537; *Balfour v. Ernest* (1859), 5 C. B. N. S. 601; *Commercial Bank of Canada v. G. W. Ry. of Canada* (1865), 3 Moo. P. C. C. N. S. 295; *Re Land Credit Co. of Ireland, Ex p. Overend, Gurney* (1869), 4 Ch. App. 460; *Guest v. Poole & Bournemouth Ry.* (1870), L. R. 5 C. P. 553; *Re London, Hamburg, & Continental Exchange Bank, Zulueta's Claim* (1870), 5 Ch. App. 444; *Re Bank of Hindustan, China, & Japan, Campbell's Case, Hippley's Case, Alison's Case* (1873), 9 Ch. App. 1; *Riche v. Ashbury Ry. Carriage & Iron Co.* (1874), L. R. 9 Exch. 224; *Melbourne Banking Corp. v. Brougham* (1879), 4 App. Cas. 156; *Yorkshire Ry. Wagon Co. v. Maclure* (1881), 30 W. R. 288; *County of Gloucester Bank v. Rudry Merthyr Steam & House Coal Colliery Co.*, [1895] 1 Ch. 629; *Re Hampshire Land Co.*, [1896] 2 Ch. 743. *As to (2) Consd. Re Athenaeum Life Assce. Soc., Ex p. Eagle Insce.* (1858), 4 K. & J. 549; *Fountaine v. Carmarthen Ry.* (1868), L. R. 5 Eq. 316; *Re Land Credit Co. of Ireland, Ex p. Overend, Gurney* (1869), 4 Ch. App. 460; *Colonial Bank of Australasia v. Willan* (1874), L. R. 5 P. C. 417; *Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869; *Re Briton Medical & General Life Asscn.* (1889), 5 T. L. R. 502; *Premier Industrial Bank v. Carlton Manufacturing Co. & Crabtree*, [1909] 1 K. B. 106; *Dey v. Pullinger Engineering Co.*, [1921] 1 K. B. 77. *Reid. Riche v. Ashbury Ry. Carriage & Iron Co.* (1874), L. R. 9 Exch. 224; *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366; *Ward v. Royal Exchange Shipping Co., Ex p. Harrison* (1887), 58 L. T. 174; *County of Gloucester Bank v. Rudry Merthyr Steam & House Coal Colliery Co.*, [1895] 1 Ch. 629; *Duck v. Tower Galvanizing Co.*, [1901] 2 K. B. 314.

4624. Sealing.—By the deed of settlement a joint-stock co., completely registered under 1844 Act, the directors were authorised, with the consent of an extraordinary meeting, to borrow sums of money as they might think expedient. By sect. 20 of the deed of settlement a common seal was to be provided, which was not to be affixed to any document except by the order of three directors, signed by them, etc. Sect. 27 provided that the directors might effect insurances on lives & survivorships, & sell out & purchase reversions & annuities, & grant endowments for children & generally effect all such other assurances, whether on life, guarantee or otherwise, etc., as they might think proper. Sect. 28 provided that any policy, endowment, grant of annuity or other instrument required in any of the transactions aforesaid should be given under the hands of not less than three directors, & sealed with the common seal, etc. The directors of the co. borrowed of pltf. the sum of £4,000 on debentures, which recited that they were issued "by virtue of the deed of settlement, etc., & by the direction

directors here were practically & legally the co., & the money was therefore received & the debt incurred by the co.—*Re TYSON'S REEF CO. (WINDING UP)*, *Ex p. HOLMES* (1866), 3 W. W. & A'B. 162.—AUS.

obliged to show compliance with formalities.—The ordinance which provides that the borrowing powers of a co. shall not be exercised except with the sanction of a special resolution of the co. previously given in general meeting is directory only, & it is not obligatory on a lender to show that it has been observed as against the co., which must be taken to have done all that was necessary to give themselves the borrowing power.—*NORTHERN CROWN BANK v. GREAT WEST LUMBER CO.* (1914), 6 W. W. R. 528; 28 W. L. R. 708; 17 D. L. R. 593.—CAN.

e. — — — — —.—A person who *bona fide* takes a security in the ordinary course of business from a co. is not bound to inquire into the regularity of the directors' proceedings leading up to the giving of the security;

& consent of more than two-thirds of the shareholders of the co. present at a meeting convened for the purpose." These debentures were signed by two directors, & sealed with the common seal of the co. No meeting granting authority to borrow money on debentures was in point of fact held; but there was an entry in the directors' agenda book dated two days before the issue of the debentures, of a resolution, "that the co.'s seal be affixed to the said debentures for £4,000," & the entry of the resolution was signed by three directors:—*Held*: the debentures were binding upon the co.

Semble : it was competent for the co. to introduce a clause into their deed, providing that an instrument which, in fact, accords with the statute law as regards signatures, & is sealed with the common seal, shall not be valid unless it has the additional formality of being signed by three directors, &, therefore, the provisions of sect. 28 of the deed of settlement cannot control the express terms of 1844 Act, which provides that contracts entered into on behalf of any joint-stock co. shall be signed by two directors, & sealed with the common seal of the co.—*AGAR v. ATHENÆUM LIFE-ASSURANCE SOCIETY (OFFICIAL MANAGER)* (1858), 3 C. B. N. S. 725 ; 27 L. J. C. P. 95 ; 30 L. T. O. S. 302 ; 4 Jur. N. S. 211 ; 6 W. R. 277 ; 140 E. R. 927.

Annotations.—**Distd.** Athenaeum Life Insee. v. Pooley (1858), 28 L. J. Ch. 119. **Appld.** Prince of Wales Assec. v. Harding (1858), E. B. & E. 183. **Consd.** *Re Magdalena Steam Navigation Co.* (1860), John. 690; *Colonial Bank of Australasia v. Willan* (1874), L. R. 5 P. C. 417.

4625. .]—(1) Where arts. of assocn. of an incorporated co. empower the directors to make regulations as to the quorum of directors necessary to authorise the affixing of the common seal, an outside person taking a deed under the co.'s seal signed by two directors & the secretary is entitled to assume that the regulations, if any, made by the directors have been complied with. A plea of *non est factum* cannot be sustained by evidence that regulations have been made requiring a quorum of three directors.

(2) The mtgee. of colliery property held under a mining lease is entitled to have a receiver & manager appointed, as such a security involves the right to work the colliery business, & the fact that the mtgee. has taken possession does not deprive him of such right.

he is entitled to assume that everything has been done regularly. In this respect a shareholder stands on the same footing as a stranger.—**JACKSON v. CANNON** (1903), 10 B. C. R. 73.—**CAN.**

1. ——— ——— ———.]—Where some act such as the granting of an obligation in the course of its business, is put by the constitution of a co. within its power & certain formalities of administration are prescribed by the arts. of assocn., which for domestic purposes regulate the duties of the directors to the shareholders, the mere failure to comply with a formality such as a proper appointment or the presence of a quorum of directors, will not affect a person dealing with the co. from outside, & without knowledge of the irregularity. He is presumed to know the constitution of the co. but not what may or may not have taken place within doors that are closed to him. But the case stands quite otherwise when the act is one which was not, by the constitution of the corpn., put within its powers except on the fulfilment of a condition. In that event, the persons dealing with the corpn.

The ct. has a discretion to appoint a receiver & manager on the application of a mtgee. in possession.—COUNTY OF GLOUCESTER BANK v. RUDRY MERTHYR STEAM & HOUSE COAL COLLIERY Co., [1895] 1 Ch. 629; 64 L. J. Ch. 451; 72 L. T. 375; 43 W. R. 486; 39 Sol. Jo. 331; 2 Mans. 223; 12 R. 183, C. A.

Annotations:—As to (1) **Apld.** *Re Bank of Syria, Owen & Ashworth's Claim, Whitworth's Claim*, [1900] 2 Ch. 272. **Consd.** *Premier Industrial Bank v. Carlton Manufacturing Co. & Crabtree*, [1909] 1 K. B. 106. **Refd.** *Duck v. Tower Galvanising Co.*, [1901] 2 K. B. 314; *Ruben v. Great Fingall Consolidated*, [1904] 1 K. B. 650; *Re Fireproof Doors, Umney v. Fireproof Doors*, [1916] 2 Ch. 142; *Dey v. Pullinger Engineering Co.*, [1921] 1 K. B. 77. As to (2) **Refd.** *Poole v. Downes* (1897), 76 L. T. 110; *Stamford, Spalding & Boston Banking Co. v. Keeble* (1913), 82 L. J. Ch. 388.

4626. ——— Due appointment of directors.]
—**DUCK v. TOWER GALVANIZING Co., No. 4621,**
ante.

4627. — Deposit of title deeds with bank.]—A co. deposited title deeds with a bank, “as collateral security for bills under discount.” At the time the co. was wound up they were indebted to the bank in respect of other bills than those actually discounted for them, & the securities realised more than was sufficient to cover the latter bills:—*Held*: (1) the co. could effect a mtge. by deposit of deeds without complying with the formalities required by their arts. of assocn. upon the execution of mtge. deeds; (2) the bankers were not in the position of officers of the co., who were bound to see that the required formalities were complied with.—*Re* GENERAL PROVIDENT ASSURANCE CO., *Ex p.* NATIONAL BANK (1872), L. R. 14 Eq. 507; 41 L. J. Ch. 823; 27 L. T. 433; 20 W. R. 939.

Annotations:—*As to (1) Consd. Re General South American Co. (1876), 2 Ch. D. 337. As to (2) Consd. Re Gregson, Christison v. Bolam (1887), 36 Ch. D. 223. Generally, Mentd. Pile v. Pile (1875), 23 W. R. 440.*

4628. Borrowing within company's powers
—Application of money lent.]—Where money is being borrowed by a co. within the limits of its powers of borrowing, there is no obligation on the lender to inquire for what purposes the borrowing is made, or whether the money borrowed is to be applied for objects within the powers of the borrowing co.—*Re PAYNE (DAVID) & Co., LTD., YOUNG v. PAYNE (DAVID) & Co., LTD., [1904]* 2 Ch. 608 ; 73 L. J. Ch. 849 ; 91 L. T. 777 ; 20

are bound to ascertain whether the condition has been fulfilled.—PACIFIC COAST COAL MINES, LTD. v. ARBUTHNOT, [1917] 3 W. W. R. 762; 36 D. L. R. 561.—CAN.

g. ——— ——— ———.]—If a co. has power to borrow, & a bank in loaning to it receives letters from the co.'s solrs. indicating that all the requirements as to borrowing have been complied with & also receives copies of the bye-laws & resolutions, properly certified, authorising the borrowing, the genuineness whereof it has no reason to doubt, the bank is justified in concluding that the borrowing powers have been properly exercised. The bank has the right to assume as against the co. that all matters of internal management have been duly complied with.—DOMINION TRUST Co. v. ROYAL BANK OF CANADA, [1921] 1 W. W. R. 90.—CAN.

k. ——— *Regularity of resolutions.*]—Defts., a trading co., were heavily indebted to a trading partnership; & upon the suggestion of the partnership, took into their employment as manager M., who was related

to a member of the partnership. The pltf. co. took over the business of the partnership. The indebtedness of the debts. amounted to \$19,378.19. A mtge. upon their land was then made by debts. to pltfs. to cover liabilities for goods purchased, for advances made to enable debts. to discharge other liabilities, & for future advances. The mtge. purported to be duly executed under the seal of debt. co. & the hands of its president & secretary, & was duly registered in the land registry office, but was not filed in the office of the Provincial Secretary:—
Held: (1) pltfs. had no knowledge of any irregularity in the execution or giving of the mtge., & knowledge was not to be attributed to them because M. had such knowledge, for M. did not represent pltfs. as their agent & they had no control over him, & he was not accountable to them in any way; (2) the mtge. was one which the directors had power to give, & the liability which it purported to secure being such as was enforceable by pltfs. against debt. co., pltfs. were not put upon inquiry as to the regularity of the resolutions authorising its execution—it was a case of the indoor management.

Sect. 34.—Borrowing and securing money: Sub-sect. 2, C. (b) ii. & iii., (c) & D.;

T. L. R. 590; 48 Sol. Jo. 572; 11 Mans. 437, C. A.

Annotations:—**Consd.** Sun Bldg. Soc. v. Western Suburban & Harrow Rd. Bldg. Soc., [1920] 2 Ch. 144. **Mentd.** Rainford v. Keith & Blackman Co. (1905), 74 L. J. Ch. 531.

4629. Regularity of proceedings.—It is not incumbent on a person lending money to a joint-stock co. to ascertain that all the proceedings of the co. & its shareholders, *inter se*, have been strictly regular.—**COLONIAL BANK OF AUSTRALASIA v. WILLAN** (1874), L. R. 5 P. C. 417; 43 L. J. P. C. 39; 30 L. T. 237; 22 W. R. 516, P. C.

Annotations:—**Mentd.** R. v. Woodhouse, [1906] 2 K. B. 501; R. v. Bloomsbury I. T. Comrs., [1915] 3 K. B. 768; R. v. Nat Bell Liquors, [1922] 2 A. C. 128.

4630. What constitutes notice—Knowledge of husband of debenture-holder.—(1) The registration of a series of debentures under 1908 Act, s. 93 (3), protects not only debentures of that series properly issued, but also documents purporting to be debentures of that series which owing to some technical defect can only be upheld as agreements for those debentures, & it is not necessary to register those agreements separately under sub-sect. 2.

(2) The employment by pltf. of her husband to apply & pay for debentures for her does not affect her with notice of all he knew as director, & the question whether one director could form a quorum of a board of two is a matter of internal management of the co., & does not affect a debenture-holder seeking to enforce her security.—**Re FIRE-PROOF DOORS, LTD., UMNEY v. FIREPROOF DOORS, LTD.**, [1916] 2 Ch. 142; 85 L. J. Ch. 444; 114 L. T. 994; 60 Sol. Jo. 513.

— **Loan by another company—Officer common to borrowing & lending companies.**—See Nos. 4268-4269, 4271, *ante*.

— **Knowledge of director acquired in private capacity.**—See No. 4256, *ante*.

See, generally, Sect. 31, sub-sect. 6, *ante*.

iii. *Debentures issued with Lender's Name Blank.*

4631. Name inserted after sealing of debenture.—A debenture or document was issued under the seal of the co. in the following form, with the exception only that there was a blank for the name of the party to whom it was to be payable, & which was subsequently filled up by E. thus—“H. J. Enthoven, esq. or order,” & indorsed away: “The Governor & Company of C. promise to pay to H. J. Enthoven, esq. or order, at, etc., the sum of £500 value received, & further to pay to the holder of the warrants annexed, on presentment thereof as they shall fall due, interest on the said sum of £500 at 5 per cent.” The form of the warrants annexed was as follows, & as they became

due were usually cut off & presented at the co.'s office for payment: “The Governor & Company of Miners in England warrant for £12 10s. for half a year's interest on debenture No. 5,252, due Jan. 15, 1849—W. Inglis, Secretary:”—**Held**: the debenture was void by reason of the name of the payee being inserted after the sealing thereof.—**ENTHOVEN v. HOYLE** (1852), 13 C. B. 373; 21 L. J. O. P. 100; 18 L. T. O. S. 317; 16 Jur. 272; 138 E. R. 1243, Ex. Ch.

Annotation:—**Refd.** *Re* Queensland Land & Coal Co., Davis v. Martin, [1894] 3 Ch. 181.

4632. —In pursuance of an agreement adopted by resolutions signed by the chairman, a co. handed debentures to a bank as security for a loan. The debentures were in blank as far as regarded the name of the obligee:—**Held**: the debentures were void at law; but as the directors' minutes could be read in connection with the debentures & the trust deed for securing them, there was a sufficient memorandum of a contract under which the bank was entitled in equity to be treated as if the name of the bank had been inserted in the debentures prior to their execution by the co.—**Re QUEENSLAND LAND & COAL CO., DAVIS v. MARTIN**, [1894] 3 Ch. 181; 63 L. J. Ch. 810; 71 L. T. 115; 42 W. R. 600; 10 T. L. R. 550; 38 Sol. Jo. 579; 1 Mans. 355; 8 R. 476.

Annotation:—**Fold.** *Peggo v. Neath & District Tram. Co.*, [1898] 1 Ch. 183.

4633. Deposit of blank debentures to secure bank loan—Whether amounting to issue.—A co. had power to issue a series of mtge. debentures of £100 each. Each debenture was to be under seal in a certain form, & was to be issued to a holder specified therein & registered. The co. had no power to reissue debentures:—**Held**: the deposit of an unregistered £100 debenture, sealed in blank without name or date, to secure a temporary loan, was an issue of that debenture, so that it could not be reissued after repayment of the loan.—**Re PERTH ELECTRIC TRAMWAYS, LTD., LYONS v. TRAMWAYS SYNDICATE, LTD. & PERTH ELECTRIC TRAMWAYS, LTD.**, [1906] 2 Ch. 216; 75 L. J. Ch. 534; 94 L. T. 815; 54 W. R. 535; 22 T. L. R. 533; 13 Mans. 195.

Annotation:—**Refd.** *Dey v. Rubber & Mercantile Corpn.*, [1923] 2 Ch. 528.

(c) *Position of Assignee.*

See, generally, CHOSSES IN ACTION, Vol. VIII., pp. 479 *et seq.*

4634. Holder for value without notice.—L. & P. defts., having raised money under statutory powers by debentures, issued certain of those debentures to one of their own body in payment for goods supplied by him, such a transaction being illegal under the statute by which defts. were constituted a corporate body:—**Held**: in an

of the co. which those dealing with the co. were entitled to presume was regularly conducted.—**RICHARDSON (JAMES) & SONS, LTD. v. MCCARTHY & SONS CO., LTD.** (1921), 49 O. L. R. 60; 59 D. L. R. 513; 19 O. W. N. 439.—CAN.

PART III. SECT. 34, SUB-SECT. 2.—C. (c).

1. *Holder for value without notice—From director in whose hands bonds were left—Misappropriation—Company negligent.*—A railway co. issued bonds under the usual deed of trust. The N. T. C., a body corporate, was the

original trustee, but after having executed the deed, resigned. Another trustee was appointed who signed & issued a number of the bonds a few days before the co. passed into the hands of a receiver. The bonds on their face recited that they should not be “obligatory until certified by N. T. C., trustee.” D., the new trustee, signed the bonds in the name of the original trustee, adding thereto “succeeded by D.” The bonds were also signed by the president & secretary of the co. A certain number of the bonds were handed to H., the president of the co., by the trustee D., after he

had signed them. H. borrowed money for his own use from R., & gave some of the bonds as collateral security, also depositing sixteen of them with R. for safe keeping. R. used all the bonds as collateral for a loan subsequently obtained by him for his own use. The holders of these bonds for value & without notice made claim:—**Held**: they were entitled to recover against the co. on the ground that the co. had by their negligence in allowing H. to have the bonds under his control made it possible for the bonds to find their way into the hands of *bond fide* purchasers.—**RAILWAYS & CANALS**

action by the exors. of an innocent holder for value of such securities, the same having been transferred to him from the original mtgee. in the manner provided by the statute, debts. were estopped from setting up as a defence the original illegality of the transaction.—*WEBB v. HERNE BAY COMRS.* (1870), L. R. 5 Q. B. 642; 39 L. J. Q. B. 221; 22 L. T. 745; 34 J. P. 629; 19 W. R. 241.

Annotations:—*Expld.* *Re Hercules Insee.*, Brunton's Claim (1874), L. R. 10 Eq. 302. *Apld.* *Re Romford Canal Co.*, Pocock's Claim, Trickett's Claim, Carew's Claim (1883), 24 Ch. D. 85. *Consd.* *Re Jubilee Cotton Mills*, [1922] 1 Ch. 100. *Mentd.* *R. v. Charnwood Forest Ry.* (1884), 1 T. L. R. 161; *Smith v. Chorley District Council* (1897), 66 L. J. Q. B. 427.

4635. What constitutes notice.]—*DAVIES v. BOLTON (R.) & Co.*, No. 4620, *ante*.

4636. —(1) A co.'s arts. of assocn. provided that its affairs should be conducted by a council of administration; that the number of members of the council should not be less than three; that the continuing council might act notwithstanding any vacancy; & that the council might determine the quorum necessary for the transaction of business. The members of the council became reduced to two, & those two members acting in the name of the co. gave securities for debts of the co. to persons who had no knowledge of the irregularity. It was not proved that any resolution fixing a quorum had been passed by the council:—*Held*: the securities so given were binding on the co.

(2) One of the securities was transferred by the creditor to whom it was given to one of the two members of the council, who had himself paid off the secured debt:—*Held*: the security was valid in the hands of the transferee.—*Re BANK OF SYRIA, OWEN & ASHWORTH'S CLAIM, WHITWORTH'S CLAIM*, [1901] 1 Ch. 115; 70 L. J. Ch. 82; 83 L. T. 547; 49 W. R. 100; 17 T. L. R. 84; 45 Sol. Jo. 77; 8 Mans. 105, C. A.

See, also, No. 4844, *post*.

D. Effect of Charge.

Whether uncalled capital included.]—*See* Subsect. 3, A. (b) ii., *post*.

SUB-SECT. 3.—DEBENTURES AND DEBENTURE-STOCK.

A. Nature, Contents, and Construction of Instruments of Security.

(a) Nature of Debentures.

4637. General rule.—An agreement between a co. of the one part & a lender of the other part, whereby the co. agreed to pay the lender the sum of £600 with interest, & charged certain hereditaments with the repayment of the said sum of £600 & interest, & further agreed with the lender that

they would at any time during the continuance of the security at the request of the lender execute a legal mtge., & further agreed to issue debentures of the co. to the extent of £600 secured over all the capital stock, goods, chattels, & effects of the co., including uncalled capital, both present & future:—*Held*: to be in effect a debenture.

Any document which either creates a debt or acknowledges it, is a "debenture."

A debenture means a document which either creates a debt or acknowledges it, & any document which fulfils either of these conditions is a "debenture." I cannot find any precise legal definition of the term, it is not either in law or commerce a strictly technical term, or what is called a term of art. It must be "issued," but "issued" is not a technical term, it is a mercantile term well understood; "issue" here means the delivery over by the co. to the person who has the charge; as to what "company" means I have already said it must be by "an incorporated company," & it must be secured on "the goods, chattels & effects" of the co. (*CHITTY*, J.).—*LEVY v. ABERCORRIS SLATE & SLAB CO.* (1887), 37 Ch. D. 260; 57 L. J. Ch. 202; 58 L. T. 218; 36 W. R. 411; 4 T. L. R. 34.

Annotations:—*Consd.* *Re Perth Electric Tramways*, Lyons v. Tramways Syndicate & Perth Electric Tramways, [1906] 2 Ch. 216. *Refd.* *Re Queensland Land & Coal Co.*, Davis v. Martin, [1894] 3 Ch. 181; *Richards v. Kidderminster Overseers*, *Richards v. Kidderminster Corpn.*, [1896] 2 Ch. 212; *City of London Brewery Co. v. I. R. Comrs.*, [1899] 1 Q. B. 121; *Clark v. Balm, Hill*, [1908] 1 K. B. 667; *Dey v. Rubber & Mercantile Corpn.*, [1923] 2 Ch. 528. *Mentd.* *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627; *Re Coal Co-op. Soc.*, G. N. Ry. v. Coal Co-op. Soc. (1895), 2 Mans. 621; G. N. Ry. v. Coal Co-op. Soc., [1896] 1 Ch. 187.

Whether bills of sale.]—*See* *BILLS OF SALE*, Vol. VII., pp. 28 *et seq.*

Whether bond or mortgage—Construction of instrument.]—*See* No. 4813, *post*.

Whether choses in action—Within Bankruptcy Act, 1869 (c. 71), s. 15 (5).]—*See* *BANKRUPTCY & INSOLVENCY*, Vol. V., p. 749, No. 6465.

See, now, Bankruptcy Act, 1914 (c. 59), ss. 38 (c), 167.

Whether land—Within Mortmain & Charitable Uses Act.]—*See* *CHARITIES*, Vol. VIII., pp. 272, 273, Nos. 384–391.

Whether interest in land.]—*See* No. 4826, *post*, & compare 1908 Act, s. 93 (iv).

Whether negotiable instruments.]—*See* *BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS*, Vol. VI., pp. 448 *et seq.*

Whether "shares"—In bequest in will.]—*See* *WILLS*.

4638. Whether subject of charging order—Judgments Act, 1838 (c. 110), s. 14—Ord. 46, r. 21.]—Debentures of a co. are not "stock or shares" of or in a co. within the meaning of the above rule or sect., & therefore they cannot be made the subject of a charging order under the provisions of that rule & sect.—*SELLAR v. BRIGHT (CHARLES) & Co., LTD.*, [1904] 2 K. B. 446; 73 L. J. K. B. 643;

MINISTER v. QUEBEC SOUTHERN RY. CO. & SOUTH SHORE RY. CO., *PILLING'S CLAIM* (1908), 12 Exch. C. R. 152.—*CAN.*

m. — *Takes free from equities.*—*Re WINDING UP ACT & SUMMERSIDE ELECTRIC CO.* (1908), 5 E. L. R. 129.—*CAN.*

PART III. SECT. 84, SUB-SECT. 8.—A. (a).

n. *Whether sub-mortgage is debenture.*—Whatever may be the full definition of "a debenture" the term

includes at least that it is a written instrument, containing an undertaking for the payment of a sum of money at a time fixed by, or ascertainable from the terms of, the instrument itself, with interest, if interest is payable, fixed or ascertainable in like manner. A co. borrowed money on the security of a sub-mtge. of a number of mtges, held by it; & this sub-mtge. contained a covenant by the co. for the repayment of the amount borrowed, & further advances, on a specified date, & for the payment of interest at a

specified rate & on specified dates:—*Held*: the sub-mtge. was substantially a debenture, & the borrowing, therefore, was authorised by Art. 29; & as part of the money advanced by the bank to the co. had been advanced for the purpose of paying off the sub-mtge., & had been so applied, the bank was entitled to be subrogated to that extent to the rights of the sub-mtgee.—*UNION BANK OF AUSTRALIA, LTD. v. SOUTH CANTERBURY BUILDING & INVESTMENT CO., LTD.* (1894), 13 N. Z. L. R. 489.—*N.Z.*

34.—Borrowing and securing money: Sub-sect. 3, A.

91 L. T. 9; 52 W. R. 563; 20 T. L. R. 586; 48 Sol. Jo. 571, C. A.

Covering deed to secure debentures.]—See No. 5025, post.

(b) Construction of Instruments of Security.

i. In General.

4639. General words—Whether company's books included.]—The books of a co. cannot be said to be comprised in the general words of a mtge. of the co.'s effects, & a mtgee. in possession cannot, as against the liquidator of the co., retain the books on the ground that they are mortgaged.—*Re CLYNE TIN PLATE CO., LTD.* (1882), 47 L. T. 439.

4640. "Undertaking"—"& all real & personal estate of company"—Whether subsequently acquired personal estate included.]—A debenture purporting to be an assignment of the undertaking, & all the real & personal estate of the co., to secure the repayment of a sum of money at a future date:—*Held*: to create a valid charge on all personal estate of the co. existing at the date of the debenture, but not on subsequently-acquired personal estate.—*Re NEW CLYDACH SHEET & BAR IRON CO.* (1868), L. R. 6 Eq. 514.

4641. & all sums of money arising therefrom"—Whether future property included.]—A steamship co., having power to issue mtges., bonds, or debentures, issued mtge. debentures, charging the "undertaking, & all sums of money arising therefrom," with the repayment at a specified time of the money borrowed, with interest in the meantime. Before the debentures became due the co. was wound up, & the ships & other property of the co. were sold:—*Held*: the debenture-holders acquired a charge upon all the property of the co., past & future, by the term "undertaking"; & they were entitled to be paid out of the property of the co. in priority to the general creditors. *Semble*: even if the co. had not stopped, the debenture-holders might have filed a bill to realise their security.—*Re PANAMA, NEW ZEALAND, & AUSTRALIAN ROYAL MAIL CO.* (1870), 5 Ch. App. 318; 39 L. J. Ch. 482; 22 L. T. 424; 18 W. R. 441, L. J.

Annotations:—*Consd. Re Florence Land & Public Works Co., Ex p. Moor* (1878), 10 Ch. D. 530. *Appld. Hodson v. Tea Co.* (1880), 14 Ch. D. 859; *Re Mersey Wood Working Co.* (1885), 1 T. L. R. 566. *Consd. Wheatley v. Silkstone & Haigh Moor Coal Co.* (1885), 29 Ch. D. 715. *Distd. Re Borax Co., Foster v. Borax Co.* (1900), 83 L. T. 638. *Consd. Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979; *Re Cope, Marshall v. Cope*, [1914] 1 Ch. 800. *Refd. Re General South American Co.* (1876), 2 Ch. D. 337; *Re Clarke, Coombe v. Carter* (1887), 35 Ch. D. 109; *Wallace v. Universal Automatic Machines Co.*, [1894] 2 Ch. 547.

4642. & property present & future—Sums recovered in misfeasance proceedings.]—Money recovered in winding up (a) in proceedings under 1890 (Winding up) Act, s. 10, & (b) by calls on contributories, belongs to the holders of debentures charging all the undertaking & property of the co., present & future, including its uncalled capital for the time being, & is not, where the total assets are not sufficient to pay the debenture-holders in full, subject to costs directed by the

winding-up order to be paid out of the assets of the co.

But, *Semble*: the costs incurred by the liquidator in proceedings under the above sect. must be paid out of the money recovered in those proceedings.—*Re ANGLO-AUSTRIAN PRINTING & PUBLISHING UNION, BRABOURNE v. ANGLO-AUSTRIAN PRINTING & PUBLISHING UNION*, [1895] 2 Ch. 891; 65 L. J. Ch. 38; 72 L. T. 442; 44 W. R. 186; 12 T. L. R. 39; 40 Sol. Jo. 68; 2 Mans. 614.

4643. — Including uncalled capital—Calls on contributories.]—*Re ANGLO-AUSTRIAN PRINTING & PUBLISHING UNION, BRABOURNE v. ANGLO-AUSTRIAN PRINTING & PUBLISHING UNION*, No. 4642, ante.

4644. — Stock-in-trade plant & machinery.]—*MARSHALL v. ROGERS & Co.* (1898), 14 T. L. R. 217.

—.]—*See, also*, No. 4650, post.

4645. Bond headed "obligation"—Whether merely bond—Or mortgage.]—*NORTON v. FLORENCE LAND & PUBLIC WORKS CO.*, No. 4813, post.

4646. — Or charge.]—*Re FLORENCE LAND & PUBLIC WORKS CO., Ex p. MOOR*, No. 4692, post.

4647. Effects in & upon the premises—Whether stock-in-trade & book debts included.]—The debentures issued by a manufacturing co. provided that the co. should not thereby be prevented from dealing with their property for the purposes of the co. By the debenture-deed the business premises of the co., & the plant, machinery, & effects in & upon the premises, or used in connection therewith, were assigned upon trust to permit the co. to hold & enjoy the premises, & carry on their business therein & therewith until default, & after default to sell, etc., with a power to the trustees to sell the same & the goodwill as a going concern. The deed also contained a covenant by the co. that all lands, etc., & all machinery & effects which they should thereafter acquire should be included in the security, with a proviso that the co. should not be precluded, on purchasing any lands, from mortgaging them to raise or secure the purchase-money; & a further covenant that the sum to be secured by the debentures should be a first charge upon the property assigned, subject to any mtge. under the proviso. The co. having gone into liquidation:—*Held*: (1) the assignment included all the stock-in-trade upon the premises of the co. at the time of default, but not the book debts owing to the co.; (2) the power to carry on business did not operate to give to ordinary creditors a claim for goods supplied, chargeable in priority to the debenture-holders against the property comprised in the deed.—*Re ANGLO-AMERICAN LEATHER CLOTH CO., LTD.* (1880), 43 L. T. 43, C. A.

4648. "Property"—Whether goodwill included.]—Debentures issued by a hotel co. charged all the co.'s "lands, buildings, property, stock-in-trade, furniture, chattels, & effects whatsoever, both present & future":—*Held*: the word "property" was sufficient to include the goodwill or business of the co., & therefore, in a debenture-holder's action, the ct. had jurisdiction to appoint a manager.—*Re LEAS HOTEL*

PART III. SECT. 34, SUB-SECT. 3.—A. (b) i.

o. "Undertaking"—& all real & personal estate of company—Whether

book debts included.]—*NATIONAL TRUST CO. v. TRUSTS & GUARANTEE CO.* (1912), 21 O. W. R. 933; 3 O. W. N. 1093; 26 O. L. R. 279; 5 D. L. R. 459.—CAN.

p. — & property present & future—Whether after-acquired property included.]—The debenture of a co. charged the undertaking, stock-in-trade, etc., present & future of co.:—

Co., *SALTER v. LEAS HOTEL Co.*, [1902] 1 Ch. 332 ; 71 L. J. Ch. 294 ; 86 L. T. 182 ; 50 W. R. 409 ; 18 T. L. R. 236 ; 46 Sol. Jo. 230 ; 9 Mans. 168.

4649. Whether future property included—Property of which the company should become possessed—During continuance of security.]—*Re GENERAL SOUTH AMERICAN Co.*, No. 4927, *post*.

4650. — Undertaking.]—Where debentures purported to charge the “undertaking” of a co. :—*Held* : the debentures were a charge upon that which was the property of the co. when the debenture-holders realised their securities, including property acquired by the co. after the issue of the debentures.—*Re MERSEY WOOD WORKING Co.* (1885), 1 T. L. R. 566.

—*See, also*, Nos. 4640, 4641, *ante* ; Nos. 4661, 4665, *post*.

4651. — Effect of Judicature Act, 1873 (c. 66), s. 10.]—*Re FLORENCE LAND & PUBLIC WORKS Co.*, *Ex p. MOOR*, No. 4692, *post*.

4652. Supplemental debenture — By way of further security—Property comprised in.]—*Ross v. ARMY & NAVY HOTEL, LTD.*, No. 4779, *post*.

Right to property included—As between liquidator & receiver in debenture-holder's action.]—*See* No. 5029, *post*.

Whether intended as fixed or floating charge.]—*See* Sub-sect. 3, C. (a), *post*.

ii. Whether Charge extends to Uncalled Capital.

4653. “Undertaking.”]—A co. granted debentures, whereby they charged “all the lands, tenements & estates of the co. & all their undertaking” :—*Held* : the unpaid calls & the capital not called up were not charged by such debentures.—*KING v. MARSHALL* (1864), 33 Beav. 565 ; 4 New Rep. 258 ; 34 L. J. Ch. 163 ; 10 L. T. 557 ; 10 Jur. N. S. 921 ; 12 W. R. 971 ; 55 E. R. 488.

Annotation :—**Consd.** *Re Marine Mansions Co.* (1867), L. R. 4 Eq. 601.

4654. “& property & receipts & revenues.”]—The directors of a co. registered under 1862 Act, being empowered by their arts. to borrow on debenture-bonds any sum “necessary” for the business of the co., in Dec., 1865, issued 20 debentures of £100 each, all in the same form, by which they pledged “the property belonging to us for the time being during the subsistence of the debenture, with all the buildings & stock on, & connected with, our said property, & all the receipts & revenues to arise therefrom ;” & declared that the entire debenture-loan & interest should be a first charge on “our undertaking & property, & receipts & revenues aforesaid.” The business of the co. was to buy & sell land, to build, buy, & sell houses, to furnish houses for hotels, & to carry on the business of hotel keepers. A winding-up order having been made, the liquidator proceeded to sell certain freehold & leasehold estate belonging to the co. ; but the purchaser refused to complete unless the debenture-holders were satisfied. The debenture-holders thereupon took out a summons in Chambers :—*Held* : (1) the effect of the debentures was to give the holders a charge, in priority to other creditors, upon the land & other property of the company ; (2) upon the construction of the debentures,

they did not include the capital of the co., & the issuing of them did not necessarily paralyse the business of the co., & was not, on that account, a transaction *ultra vires*, or a breach of trust.—*Re MARINE MANSIONS Co.* (1867), L. R. 4 Eq. 601 ; 37 L. J. Ch. 113 ; 17 L. T. 50

Annotations :—*As to* (1) **Refd.** *Re Florence Land & Public Works, Ex p. Moor* (1878), 10 Ch. D. 530. *As to* (2) **Refd.** *Re New Clydach Sheet & Bar Iron Co.* (1868), L. R. 6 Eq. 514 ; *Re General South American Co.* (1876), 2 Ch. D. 337. *Generally, Refd.* *Re Panama, New Zealand & Australian Royal Mail Co.* (1869), 39 L. J. Ch. 162. **Mentd.** *Re Oriental Hotels Co.*, *Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126 ; *Re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335 ; *Re Standard Manufacturing Co.* (1891), 60 L. J. Ch. 292 ; *Re Staffordshire Gas & Coke Co.*, [1893] 3 Ch. 523 ; *G. N. Ry. v. Coal Co-op. Soc.*, [1896] 1 Ch. 187.

4655. — & assets.]—*BOWER v. FOREIGN & COLONIAL GAS Co.*, [1877] W. N. 222.

4656. Property—& effects.]—The directors of a co. having power to raise money for the purposes of the co. in such manner as they should deem best, issued debentures charging all the lands, property, & effects of the co., of whatever nature or kind which the co. should then hold or be possessed of :—*Held* : the debenture-holders were entitled to be paid in priority to other creditors of the co. out of any money raised by calls, either made or to be made, for payment of the debts of the co.—*Re COLONIAL & GENERAL GAS Co., LTD.*, *LISHMAN'S CLAIM* (1870), 23 L. T. 759 ; 19 W. R. 344.

Annotation :—**Overd.** *Bank of South Australia v. Abrahams* (1875), L. R. 6 P. C. 265.

4657. —.]—*BANK OF SOUTH AUSTRALIA v. ABRAHAM'S*, No. 4590, *ante*.

4658. —.]—A debenture charging a co.'s “property,” does not *prima facie* include uncalled capital, but it may do so if the debenture is issued in pursuance of arts. of assocn. treating uncalled capital as forming part of the property chargeable.—*HOLME v. DRACHENFELS BANKET GOLD MINING SYNDICATE* (1895), 2 Mans. 146 ; *sub nom. HULME v. DRACHENFELS BANKET GOLD MINING SYNDICATE*, 13 R. 345.

4659. —.]—A limited co. having under its arts. of assocn. power to borrow money upon debentures charging its “property,” both present & future, including its uncalled capital, issued debentures charging its undertaking “& all the property to which it now is, or shall at any time hereafter become entitled.” The co. afterwards went into liquidation :—*Held* : the expression “property” in the debentures did not include the capital of the co. uncalled up at the commencement of the liquidation.—*Re RUSSIAN SPRATTS PATENT, LTD.*, *JOHNSON v. RUSSIAN SPRATTS PATENT, LTD.*, [1898] 2 Ch. 149 ; 67 L. J. Ch. 381 ; 78 L. T. 480 ; 46 W. R. 514 ; 42 Sol. Jo. 508, C. A.

Annotation :—**Mentd.** *Alexander v. Automatic Telephone Co.*, [1899] 2 Ch. 302.

4660. —.]—*Re HANDYSIDE (ANDREW) & Co., LTD.* (1911), 131 L. T. Jo. 125.

4661. —.]—A co., having power by its memorandum & arts. to borrow on the security of any of its property both present & future, including its uncalled capital, issued debentures charging the undertaking & all its “property whatsoever & wheresoever both present & future” with payment of the sums advanced. The co. subsequently

Held : it charged after-acquired stock-in-trade & other property of co. in priority of its general creditors.—*Re DUBLIN DRAPERY Co.*, *Ex p.*

Cox (1884), 13 L. R. Ir. 174.—**IR.**

q. — *May include “land.”]* — The word “undertaking” may, under certain circumstances, be held to

include the “land” upon which a railway is made.—*Re BAGNALSTOWN & WEXFORD RY. Co.*, *Ex p. SMITH* (1867), 1 L. R. Eq. 275.—**IR.**

Sect. 34.—Borrowing and securing money: Sub-sect.

went into liquidation:—*Held*: the addition of the word “future” did not extend the meaning of the term “property” as defined by *British Provident Life & Fire Assurance Society, Ex p. Stanley*, No. 4587, *ante*, & the debentures were a charge only on the property of the co. as it existed at the commencement of the liquidation, & did not include the then uncalled capital.—*Re STREATHAM & GENERAL ESTATES Co.*, [1897] 1 Ch. 15; 66 L. J. Ch. 57; 75 L. T. 574; 45 W. R. 105; 13 T. L. R. 59; 41 Sol. Jo. 80.

Annotation:—*Apprvd. Re Russian Spratts Patent, Johnson v. Russian Spratts Patent*, [1898] 2 Ch. 149.

4662. — Assets & revenues.—A co. expressly empowered by its arts. to mortgage “the property & rights of the co., both present & future or either, including the uncalled capital,” issued debentures purporting to charge “all & singular the property, assets, & revenues of the co.”:—*Held*: the uncalled capital was comprised in the debenture under the term “assets,” if not under the term “property.”—*PAGE v. INTERNATIONAL AGENCY & INDUSTRIAL TRUST, LTD.* (1893), 62 L. J. Ch. 610; 68 L. T. 435; 3 R. 596.

Annotation:—*Refd. Re Streatham & General Estates Co.*, [1897] 1 Ch. 15.

4663. Assets.—*PAGE v. INTERNATIONAL AGENCY & INDUSTRIAL TRUST, LTD.*, No. 4662, *ante*.

—*Re HANDYSIDE (ANDREW) & Co., LTD.*, No. 4660, *ante*.

4665. “Real & personal estate.”—A co. formed for the purchase & management of land, & which was empowered by arts. to borrow money for the purposes of the co. provided that the amount borrowed should not at any time exceed the amount of the unpaid subscribed capital, had issued debentures whereby they bound “themselves & their successors & their real & personal estate” for payment of the sums advanced, with a proviso that the holders of the debentures should be entitled to be paid the principal & interest secured to them respectively *pari passu*. The co. was in liquidation, a provisional liquidator having been appointed on the petition of the co., & a resolution having been subsequently passed for a voluntary winding up, which was continued under supervision. On a claim by debenture-holders to be entitled to a primary charge on the co.’s property, including the uncalled capital:—*Held*: (1) the debentures were a charge on the real & personal estate of the co. as it existed at the commencement of the winding up, but not including the then uncalled capital; (2) the debenture-holders, so far as they might be unable to obtain payment in full out of the property comprised in their charge, were at liberty to prove with the other creditors against the general assets.—*Re COLONIAL TRUSTS CORPN.*, *Ex p. BRADSHAW* (1879), 15 Ch. D. 465.

Annotations:—As to (1) *Extd. Re Streatham & General Estates Co.*, [1897] 1 Ch. 15. *Refd. Wheatley v. Silkstone & Haigh Moor Coal Co.* (1885), 29 Ch. D. 715; *Re Pyle Works* (1890), 44 Ch. D. 534; *Driver v. Broad* (1893), 63 L. J. Q. B. 12; *Government Stock Investment & Other Securities Co. v. Manila Ry.*, [1895] 2 Ch. 551; *Re Hubbard, Hubbard v. Hubbard* (1898), 68 L. J. Ch. 54; *Cox Moore v. Peruvian Corpn.*, [1908] 1 Ch. 604; *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979; *Re Cope, Marshall v. Cope*, [1914] 1 Ch. 800. *Generally, Mentd. Re Emperor Life Assec. Soc.*, *Ex p. Halliday* (1885), 55 L. J. Ch. 3; *Re Horne & Hellard* (1885), 29 Ch. D. 736; *Re Dry Docks Corpn. of London*, *Ex p. St. Anne, Limehouse Overseers* (1888), 1 Meg. 86.

4666. Effect of condition that company may

receive calls.—A co. borrowed from its bankers on the security of two debentures charging its uncalled capital. The principal money was repayable at the expiration of five years or on the co. being wound up. The debentures contained this condition: “The co. shall be at liberty from time to time to make & receive payment of any calls”:—*Held*: the debentures constituted a valid charge as against the co. on the uncalled capital from the time they were issued to the bank, & the condition did not affect the bank’s right against the co. to have any money that might be called up appropriated to the bank’s debt, & creditors who had obtained judgments against the co. subsequently to the issue of the debentures but before the principal money became repayable were not secured creditors ranking in priority to the bank on calls made by the co.—*Re QUEENSLAND MERCANTILE & AGENCY Co., LTD.*, *Ex p. UNION BANK OF AUSTRALIA, Ex p. AUSTRAL-ASIAN INVESTMENT Co.*, [1891] 1 Ch. 536; 60 L. J. Ch. 579; 64 L. T. 555; 39 W. R. 447; 7 T. L. R. 10; 2 Meg. 394.

Compare cases in Sub-sect. 1, D. (b), *ante*.

iii. *Whether Charge extends to Unpaid Calls.*

4667. Undertaking.—*KING v. MARSHALL*, No. 4653, *ante*.

Compare No. 4600, *ante*.

B. *Debentures secured by Trust Deed.*

(a) *Nature and Construction of Trust Deeds.*

4668. Nature of trust deed—Debenture never issued—Whether deed “completed mortgage”—Solicitor’s costs.—A trust or covering deed was executed by a limited co. to trustees in the usual form for securing debentures intended to be issued to a certain amount; but the debentures were never issued, & the deed therefore became inoperative:—*Held*: the covering deed so executed was not a completed mtge. within r. 2 (a) & Part I. of sched. 1 to the General Order under the Solicitors’ Remuneration Act, 1881 (c. 44), & therefore the solr. to the trustees was not entitled to charge a scale fee for “preparing & completing mtge.” under that rule.

Qu.: whether, if the deed had become operative by the issue of the debentures, it would have been a “mtge.” within the rule, & whether a mtge. for future advances is a completed mtge. within the rule.—*Re BIRCHAM*, [1895] 2 Ch. 786; 64 L. J. Ch. 768; 73 L. T. 129; 43 W. R. 673; 11 T. L. R. 547; 39 Sol. Jo. 693; 12 R. 443, C. A.

—**Whether registration necessary under Bills of Sale Acts.**—*See BILLS OF SALE*, Vol. VII., pp. 30, 31, Nos. 150, 152–154.

4669. Construction of trust deed—Right to compensation payable under Licensing Act, 1904 (c. 23)—Right to interest arising from investment.—Where a co. has specifically mortgaged leaseholds to trustees to secure debenture-stock, the trustees will be entitled to receive the compensation money awarded to the co. under the above Act in respect of the refusal of the licensing authority to renew the licence of a leasehold beerhouse included in the security; but the mtgors., being in possession, will be entitled to the interest received in respect of the investment of such compensation money until the security becomes enforceable.—*LAW GUARANTEE & TRUST SOCIETY, LTD. v. MITCHAM & CHEAM BREWERY Co., LTD.*, [1906] 2 Ch. 98;

75 L. J. Ch. 556; 94 L. T. 809; 54 W. R. 551; 22 T. L. R. 499.

Annotations :—**Expld.** Dawson v. Braine's Tadcaster Breweries, [1907] 2 Ch. 359. **Foll.** Noakes v. Noakes, [1907] 1 Ch. 64. **Consd.** Bent's Brewery Co. v. Dykes (1909), 100 L. T. 476. **Mentd.** Birkin v. Smith, [1909] 2 K. B. 112.

4670. Power of investment.—The debenture trust deed of a brewery co. contained the usual common form powers for the trustees to settle, adjust, refer to arbitration, compromise, & arrange all accounts, questions, claims, etc., with regard to the mortgaged premises, & also generally to act in relation to the mortgaged premises in such manner as they might think expedient in the interest of the debenture stockholders. It also contained a power, which was said to be common form in debenture deeds of the kind in question, to invest capital money arising (*inter alia*) under the powers first mentioned in the purchase of new licensed premises. Renewal having been refused of the licence of part of the premises comprised in the trust deed under the power conferred on the licensing authority by the above Act, & compensation money having been paid for such refusal :—*Held* : this money came to the trustees by virtue of the power to settle, adjust, etc., all accounts, questions, claims, etc., mentioned above, & they were therefore entitled under the power of investment mentioned above to re-invest the money in the purchase of fresh licensed premises.—**NOAKES v. NOAKES & CO., LTD.**, [1907] 1 Ch. 64; 76 L. J. Ch. 151; 95 L. T. 606; 71 J. P. 130; 23 T. L. R. 16; 14 Mans. 28.

Annotations :—**Foll.** Dawson v. Braine's Tadcaster Breweries, [1907] 2 Ch. 359. **Consd.** Bent's Brewery Co. v. Dykes (1909), 100 L. T. 476. **Appl.** *Re* Bladon, Dando v. Porter, [1911] 2 Ch. 350. **Mentd.** Birkin v. Smith, [1909] 2 K. B. 112.

4671. — — — As capital money.—A brewery co. assured all its licensed premises to trustees upon the trusts of a debenture trust deed, which was in the usual form, for securing an issue of debenture stock, the premises being held by the trustees on trust to permit the co. to hold & enjoy the same & to carry on thereon the business of the co. until the security thereby constituted became enforceable, which event had not happened, & then upon the usual trust for sale & conversion. The deed provided by clause 17 that at any time before the security thereby constituted became enforceable the trustees might, *inter alia*, sell & convert, or concur in selling & converting, all or any of the mortgaged premises in the same manner as they could do if the primary trust for conversion had then arisen; & by clause 18, that the trustees should hold the capital moneys arising under clause 17 upon trust to lay out the same in, *inter alia*, the purchase of the licensed premises suitable to be held for the purposes of the co. :—*Held* : moneys paid under the above Act for compensation for the licence of one of the mortgaged premises comprised in the trust deed were capital moneys arising under clause 17 as above set out, & were applicable under the provisions of clause 18.—**DAWSON v. BRAIME'S TADCASTER BREWERIES, LTD.**, [1907] 2 Ch. 359; 76 L. J. Ch. 588; 97 L. T. 83; 14 Mans. 254.

Annotations :—**Foll.** *Re* Bentley's Yorkshire Breweries, [1909] 2 Ch. 609. **Appl.** *Re* Bladon, Dando v. Porter, [1911] 2 Ch. 350.

4672. — — — .]—Compensation money under the above Act received by the trustees of a debenture trust deed executed by a co. owning licensed houses, may be treated as "purchase-money" or "capital moneys" for the purpose of

its application by them in accordance with the terms of the deed.

Under a general power to invest such purchase-money in real or leasehold property, such trustees may apply it in either the purchase or, if the security is sufficient, the mtge. of licensed messuages & premises belonging either to the co. or to third parties.—*Re* BENTLEY'S YORKSHIRE BREWERIES, LTD., [1909] 2 Ch. 609; *sub nom. Re* BENTLEY (H.) & CO.'S TRUST DEED, CHARLESWORTH v. BENTLEY'S YORKSHIRE BREWERIES, LTD., *Re* BENTLEY'S YORKSHIRE BREWERIES TRUST DEED, DAY v. BENTLEY'S YORKSHIRE BREWERIES, LTD., CHARLESWORTH v. BENTLEY'S YORKSHIRE BREWERIES, LTD., 78 L. J. Ch. 704; 101 L. T. 488; 53 Sol. Jo. 715; 16 Mans. 296.

4673. — Powers of debenture-holders to alter terms—General & express powers.—**SPICER v. HILLINGDON** (1908), *Times*, May 20, C. A.

4674. — Application of sinking fund—Purchase at "lowest price."—A mtge. deed executed by a co. in favour of applts. as trustees for its bondholders provided for an annual fund out of surplus profits to be devoted by the trustees to the purchase or retirement of its bonds, & directed that from the bonds offered to them applt. co. "shall purchase those bonds which are offered to it at the lowest price" :—*Held* : according to the plain intent of this direction "the lowest price" offered meant the price which was lowest on the average as applied to the whole block purchased. There was no breach of contract with resp. in refusing his offer for a small number of bonds, if by its acceptance the average price of the whole block acquired would, having regard to the terms of other offers, have been increased.—**NATIONAL TRUST CO., LTD. v. WHICHER**, [1912] A. C. 377; 81 L. J. P. C. 182; 106 L. T. 310, P. C.

4675. — Distribution of proceeds of sale of property charged.—In 1902 a co. issued debenture stock payable by the instalments mentioned in the application form, which were all called up by May, 1903. The trust deed securing the stock provided for a distribution of the net proceeds of any sale thereunder first in payment of arrears of interest in proportion to the amount due, & secondly in payment of principal in proportion to the stock held by the stockholders. All the stockholders were entered on the register & received certificates for the full amount of stock allotted, but several had not paid their instalments. The trustees had realised the security & were distributing the assets, & the question arose whether the partly paid stockholders could participate without notionally bringing in their unpaid instalments in accordance with the principle of *Cherry v. Boulbee* (1839), 4 My. & Cr. 442 :—*Held* : the transaction simply amounted to a contract to make a loan by instalments to the co. on the security of debenture stock, which contract prior to Companies Act, 1907 (c. 50), s. 16, re-enacted by 1908 Act, s. 105, was not enforceable either in debt or specific performance but only in damages; as therefore the unpaid instalments did not constitute a debt to the co. or the trustees, the principle of *Cherry v. Boulbee* was inapplicable, & the partly paid stockholders were entitled to a rateable distribution in respect of the loans they had actually made.—*Re* SMELTING CORPN., **SEAVER v. SMELTING CORPN.**, [1915] 1 Ch. 472; 84 L. J. Ch. 571; 113 L. T. 44; [1915] H. B. R. 126.

Annotation :—**Mentd.** *Re* Jewell's Settlement, **Watts v. Public Trustee**, [1919] 2 Ch. 161.

— **Whether registration necessary.**—*See* Nos. 4694, 4798, *post*.

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(b) Trustees of Trust Deeds.

Whether place of profit under the company amounting to disqualification for directorship.]—See No. 3478, *ante*.

4676. Powers & rights of trustees—Possession of title deeds—As against receiver appointed under trust deed.]—By trust deeds certain freehold & leasehold premises, belonging to a co., were conveyed to trustees for debenture-holders in the co., & the trustees held the title deeds relating to the specific hereditaments comprised in the trust deeds. Receivers having been appointed of the properties comprised in the trust deeds, & also of the undertaking & property of the co., application was made to the trustees by the receivers for delivery to them of the title deeds of the properties. The ct. came to the conclusion that on the ground of convenience & for the proper discharge of the receivers' duties, the deeds should be deposited with them till further order, the receivers to allow the trustees complete access to the deeds & deliver them over to the trustees upon their undertaking to re-deliver them when the specific purpose for which they were taken out was fulfilled:—*Held*: the matter was one entirely of discretion, & the ct. would not interfere with the order made by the judge.—*Re IND, COOPE & Co., LTD., FISHER v. IND, COOPE & Co., LTD.* (1909), 26 T. L. R. 11, C. A.

— **As against solicitors claiming lien.]—**See Nos. 4685, 4686, *post*.

4677. — Shares in another company comprised in property charged—Exercise of voting power.]—Where a co. makes an issue of debenture stock which it secures by a debenture trust deed, & as part of the specifically mortgaged property causes shares in another co. to be registered in the names of the trustees of the deed, the trustees are, in the absence of any contract restricting their rights, entitled, as the legal owners of the shares, to exercise the voting rights in respect of them in such manner as in their judgment they may deem best, irrespective of any directions of the mtgor. co. as to how the voting rights should be exercised, & this, notwithstanding that the security is not yet enforceable.—*SIEMENS BROTHERS & Co. v. BURNS, BURNS v. SIEMENS BROTHERS DYNAMO WORKS*, [1918] 2 Ch. 324; 87 L. J. Ch. 572; 119 L. T. 352, C. A.

4678. Liability of trustees—Receiver appointed by trustees under power in deed to carry on company's business—Goods ordered by receiver after subsequent winding-up order.]—*GOSLING v. GASKELL*, No. 4975, *post*.

4679. Remuneration of trustees—Right in priority to debenture-holders.]—Trustees for debenture-holders who by the terms of their trust deed are entitled to remuneration, to be paid by the co., are not, in the absence of express provision in the trust deed, entitled to be paid such remuneration in priority to the debenture-holders, out of proceeds paid into ct. of a sale of the mortgaged property, in a debenture-holder's action.—*Re ACCLES, LTD., HODGSON v. ACCLES* (1902). 51 W. R. 57; 18 T. L. R. 786; 46 Sol. Jo. 686.

Annotations:—*Distd. Re Piccadilly Hotel, Paul v. Piccadilly*

Hotel, [1911] 2 Ch. 534. *Apld. Re Locke & Smith, Wigan v. Locke & Smith*, [1914] 1 Ch. 687.

4680. —.]—B. debenture-stock issued by this co. was secured by a trust deed, called the B. security, on the general assets & on the site of a hotel, with a "primary trust for conversion" when the B. security became enforceable. Clause 18 provided that the B. trustees should hold the moneys to arise under the primary trust for conversion upon trust that they should thereout in the first place pay or retain their costs & expenses "including the remuneration of the B. trustees," & should apply the residue in payment of the B. stockholders & should pay the surplus, if any, to the co. Clause 34 provided that the co. should pay the B. trustees a fixed remuneration *per annum* to continue payable until the trusts of the B. security should be finally wound up & whether or not a receiver should be appointed or the trusts should be administered by the ct. The B. security became enforceable & a receiver was appointed in a B. stockholder's action. This receiver was superseded by a receiver appointed in an action by the trustees of a prior lien security to which action the B. trustees were parties, & in which their security was established. The hotel was actually sold by the prior lien trustees, the entire purchase-money being received & paid by them into ct. in pursuance of an order in the prior lien action. The B. trustees joined in the conveyance. After discharging a prior lien a considerable surplus was left in ct. for the B. stockholders:—*Held*: (1) the B. trustees were entitled to their fixed contractual remuneration under clause 34 until the trusts of the B. security were finally wound up; & (2) under clause 18 to a lien on the surplus proceeds of sale in ct. in priority to the B. stockholders.—*Re PICCADILLY HOTEL, LTD., PAUL v. PICCADILLY HOTEL, LTD.*, [1911] 2 Ch. 534; 81 L. J. Ch. 89; 105 L. T. 775; 56 Sol. Jo. 52; 19 Mans. 85.

Annotations:—*As to* (1) *Consd. Re British Consolidated Oil Corp'n., Howell v. British Consolidated Oil Corp'n.*, [1919] 2 Ch. 81. *Refd. Re Anglo-Canadian Lands* (1912), *Park v. Anglo-Canadian Lands* (1912), [1918] 2 Ch. 287. *As to* (2) *Folld. Re Locke & Smith, Wigan v. Locke & Smith*, [1914] 1 Ch. 687.

4681. — Termination — Effect of appointment of receiver.]—*Re PICCADILLY HOTEL, LTD., PAUL v. PICCADILLY HOTEL, LTD.*, No. 4680, *ante*.

4682. —.]—A trust deed to secure the first mtge. debenture stock of a co. contained a clause under which the trustees of the deed were to hold the moneys to arise under the primary trust for conversion upon trust to pay the costs & expenses in the execution of the trust, including their own remuneration. A further clause provided that the co. should in every year, "during the continuance of this security," pay to the trustees for the time being of the deed, "as & by way of remuneration for their service as trustees the sum of £105. In 1911 an action was commenced by the debenture stockholders of the co. to carry the trusts of the indenture into execution, & a receiver was appointed on July 14, 1911. The hereditaments & premises comprised in the trust deed were sold pursuant to orders of the ct. & the proceeds paid into ct. The sole trustee of the deed who had received his remuneration down to Jan. 1, 1911, claimed to be paid his remuneration

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B. (b).

x. Liability of trustees — Breach of trust—Good faith—Protection under Trustee Act.]—*STOTHERS v. TORONTO GENERAL TRUSTS CORPN.* (1918), 44 O. L. R. 432.—CAN.

4681 i. Remuneration of trustees—Termination—Effect of appointment of receiver.]—The mere appointment of a receiver on behalf of the debenture holders of a co. does not oust the trustee for such debenture holders. The question whether the trustee's

remuneration continues after the appointment of the receiver is one of contract to be determined by the provisions of the trust deed relative to the trustee's remuneration.—*BALKWILL v. BURRARD SAW MILLS CO., LTD.*, [1921] 3 W. W. R. 831.—CAN.

down to the close of the proceedings in the action, out of the proceeds of sale, in priority to the debenture-holders, & to have a lien declared:—*Held*: the trustee was entitled to his remuneration down to the date of the appointment of the receiver out of the proceeds of sale, but inasmuch as he had not rendered any appreciable services since that date he was not entitled to any further remuneration.—*Re LOCKE & SMITH, LTD., WIGAN v. LOCKE & SMITH, LTD.*, [1914] 1 Ch. 687; 83 L. J. Ch. 650; 110 L. T. 683; 58 Sol. Jo. 379; 21 Mans. 267, C. A.

Annotations:—*Consd.* *Re Anglo-Canadian Lands* (1912), *Park v. Anglo-Canadian Lands* (1912), [1918] 2 Ch. 287; *Re British Consolidated Oil Corpn.*, *Howell v. British Consolidated Oil Corpn.*, [1919] 2 Ch. 81.

4683. —.]—A trust deed for securing first mtge. debenture stock provided, by clause 39, that until the mortgaged premises were reconveyed or released, or until the whole of the same premises were realised under the trust for sale, neither of which events had happened, each of the trustees should be entitled to receive, & the co. would pay by way of remuneration the yearly sum of £105. The deed also provided that the remuneration of the trustees should be an additional charge upon the mortgaged premises taking priority over any payment to the stockholders, & that the moneys to arise under the primary trust for conversion should be applied in the first instance in paying, *inter alia*, all remuneration payable to the trustees. The deed also empowered the trustees to appoint a receiver of the mortgaged premises in certain specified events, one of which afterwards happened, whereupon the trustees, in exercise of their power, duly appointed a receiver who was subsequently appointed receiver & manager by the ct. in an action by the first mtge. debenture stockholders:—*Held*: the trustees having taken office in consideration of the contract in clause 39 of the trust deed were entitled to their remuneration from the date of, & notwithstanding, the appointment of a receiver.—*Re ANGLO-CANADIAN LANDS* (1912), *LTD., PARK v. ANGLO-CANADIAN LANDS* (1912), *LTD.*, [1918] 2 Ch. 287; 87 L. J. Ch. 592; 119 L. T. 366.

Annotation:—*Consd.* *Re British Consolidated Oil Corpn.*, *Howell v. British Consolidated Oil Corpn.*, [1919] 2 Ch. 81.

4684. —.]—A trust deed to secure an issue of second debenture-stock empowered the trustees at any time after the security thereby constituted became enforceable to appoint a receiver at a remuneration & to delegate their powers to him, & also to apply to the ct. for the execution of the trusts of the deed or assent to or approve of any such application at the suit of one of the debenture-holders. The next succeeding clause in the deed provided that in each & every year during the continuance of the security the co. should pay to each of the trustees as & by way of remuneration for his services as trustee a sum computed at the rate of one hundred guineas *per annum*. Upon default by the co. a receiver was appointed at the instance of the first debenture-stockholders, who were ultimately paid off, & the balance of the proceeds of realisation was paid into ct.:—*Held*: the remuneration to the trustees of the deed was in no way conditional upon proof by them that they had rendered substantial, or any, services in each year, but upon the true construction of the contract under which they accepted office, they were entitled whether their duties were onerous or light, & notwithstanding the appointment of a receiver, to receive the stipulated remuneration until the security came to an end.—

Re BRITISH CONSOLIDATED OIL CORPN., LTD., HOWELL v. BRITISH CONSOLIDATED OIL CORPN., LTD., [1919] 2 Ch. 81; 88 L. J. Ch. 260; 120 L. T. 665; 35 T. L. R. 337; 63 Sol. Jo. 431.

4685. Costs—Solicitor's lien—Same solicitor acting for mortgagor & mortgagee.—On the issue of debentures by a co., the property of the co. was mortgaged to trustees, two of the directors of the co., to secure the payment of such debentures. The same solrs. acted for both mtgors. & mtgees. in the matter. The co. went into liquidation, & the costs of the preparation of the deed & incidental thereto remained unpaid. The solrs. when applied to by the trustees to hand over the mtge. deed & the title deeds of the property declined to do so, claiming a lien upon them for costs:—*Held*: the solrs. had no lien upon the deeds for their costs & must hand them over.—*Re MASON & TAYLOR* (1878), 10 Ch. D. 729; 48 L. J. Ch. 193; 27 W. R. 311.

Annotations:—*Consd.* *Brunton v. Electrical Engineering Corpn.*, [1892] 1 Ch. 434. *Distd.* *Re Dee Estates, Wright v. Dee Estates*, [1911] 2 Ch. 85. *Reid.* *Re Lawrance, Bowker v. Austin*, [1894] 1 Ch. 556.

4686. Solicitor acting for trustees only.—A co. determined to issue mtge. debentures to be secured by a trust deed, & a trustee was proposed. The proposed trustee, who on the execution of the trust deed became the trustee for the debenture-holders, retained a solr. to act for him in connection with the trust, the co. being represented by another solr., & under this retainer the solr. investigated the title of the trust property & approved the trust deed on behalf of the trustee:—*Held*: the solr. was entitled, both as against the trustee & as against the debenture-holders, to a lien on the trust deed for all costs properly incurred in relation to the trust, notwithstanding that they were incurred before the execution of the deed.—*Re DEE ESTATES, LTD., WRIGHT v. DEE ESTATES, LTD.*, [1911] 2 Ch. 85; 80 L. J. Ch. 461; 104 L. T. 903; 55 Sol. Jo. 424; 18 Mans. 247, C. A.

4687. In debenture-holders' action—Joint retainer of solicitor by defendant company & trustees for first & second debenture-holders.—Where debentures are secured by a trust deed, the trustees are properly added as defts. to a debenture-holders' action, & where the trustees & the co. appear by the same solr., although the co., are not entitled to costs, all the costs of defts., except any separate costs of the co. ought to be paid out of the assets before distribution amongst the debenture-holders, upon the ground that, subject to that exception, those costs must be treated as incurred by the trustees; & for this purpose the order directing taxation should contain a direction that in taxing the costs of the trustees the taxing master should allow them a full set of costs, except as regards any separate costs of the co., notwithstanding that the trustees & the co. have appeared by the same solr.—*MORTGAGE INSURANCE CORPN., LTD. v. CANADIAN AGRICULTURAL, COAL & COLONISATION CO., LTD.*, [1901] 2 Ch. 377; 70 L. J. Ch. 684; 84 L. T. 861; 45 Sol. Jo. 619.

Annotation:—*Reid.* *Re Clayton Engineering & Electrical Construction Co.* (1904), 90 L. T. 283.

4688. Removal of trustees—Breach of trust—Neglect to enforce payment of purchase-money—Purchase of trust property by company's agent.—Property in Germany, belonging to a limited co., was vested in certain persons as trustees for securing the payment of debentures. The trustees, professing to act under a power of sale in the trust

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instrument, caused certain proceedings to be instituted in a German ct., the result of which was that the trust property was sold at an undervalue by the officer of the ct., part of the property being purchased by a person who was an agent of the co. & held a fiduciary position. The trustees took no steps, notwithstanding a long period had elapsed, to get in any of the purchase-moneys:—*Held*: the breach of trust thus committed justified the removal of the trustees from office, & the purchase by the agent must be declared to be for the benefit of the trust for the debenture-holders.—*REID v. HADLEY* (1885), 2 T. L. R. 12.

4689. Corporation trustee—Formerly in financial difficulties.—Deft. corpn. was the trustee of a debenture trust deed. A large majority of debenture-holders brought an action to have the corpn. removed from being trustee. The corpn. had suggested that their salary should be increased, but had withdrawn the suggestion on the objection of the co. Petitions had been presented to wind up the corpn., who had been in financial difficulties, but their difficulties had been surmounted & the petitions withdrawn, & they were now solvent & working efficiently, & it did not appear that the interest of the debenture-holders had suffered or been in danger:—*Held*: no sufficient cause had been shown for removing the corpn. from being trustee.—*ASSETS REALISATION CO. v. TRUSTEES, EXECUTORS & SECURITIES INSURANCE CORPN.* (1895), 65 L. J. Ch. 74; 44 W. R. 126.

*C. Floating Charges.**(a) What constitutes a Floating Charge.*

4690. General rule.—A co., by way of security to guarantors, assigned by deed all its present & future book & other debts, with the benefit of all securities for the same, to a trustee in trust for the guarantors. The deed contained no express provision against possession being taken by the trustee, but declared that the trustee should at any time, if required by the guarantors, give notice of this assignment to the co.'s debtors, but that it should not be incumbent on the trustee to give notice unless he thought fit; with provisions that the trustee might at any time give notice, appoint a receiver & exercise the statutory power of sale, but meanwhile should not be answerable for allowing the co. to receive the book debts:—*Held*: upon the true construction of the deed it was clearly intended that the co. should carry on its business in the ordinary way & receive the book debts for that purpose, & the deed was "a floating charge" within Companies Act, 1900 (c. 48), s. 14, & void for want of registration in a question between the trustee & a creditor of the co.

A mtge. or charge by a co. which contains the three following characteristics is a "floating charge" within Companies Act, 1900 (c. 48), s. 14 (1) (d): (1) if it is a charge on a class of assets both present & future; (2) if that class is one which in the ordinary course of the business of the co. would be changing from time to time; (3) if it is contemplated by the charge that, until some future step is taken by or on behalf of the mtgee., the co. may carry on its business in the ordinary way so far as concerns the particular class of assets charged (*ROMER, L.J.*).—*ILLINGWORTH v. HOULDSWORTH*, [1904] A. C. 355; 73 L. J. Ch. 739; 91 L. T. 602; 53 W. R. 113; 20 T. L. R. 633; 12 Mans. 141, H. L.; *affg.* S. C. *sub nom.*

Re YORKSHIRE WOOLCOMBERS' ASSOCN., LTD. HOULDSWORTH v. YORKSHIRE WOOLCOMBERS' ASSOCN., LTD., [1903] 2 Ch. 284, C. A.

Annotations:—*Consd.* *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979. *Folld.* *Hoare v. British Columbia Development Asscn.* (1912), 107 L. T. 602. *Apld.* *National Provincial Bank of England v. United Electric Theatres*, [1916] 1 Ch. 132. *Refd.* *Norton v. Yates*, [1906] 1 K. B. 112; *De Beers Consolidated Mines v. British South Africa Co.*, [1912] A. C. 52; *Re Cope, Marshall v. Cope* (1914), 110 L. T. 905; *Re Midland Express, Pearson v. Midland Express*, [1914] 1 Ch. 41; *Re Morrison, Jones & Taylor, Cookes v. Morrison, Jones & Taylor*, [1914] 1 Ch. 50; *Hamer v. London City & Midland Bank* (1918), 87 L. J. K. B. 973.

4691. Debenture charging present & future property—Expressed to operate as first charge.—A debenture charging all the property present & future of a co., although expressed to be intended to operate as a first charge upon the property, will be construed to be a general floating security, operating as a first charge against the general creditors of the co. over the property of the co. as it exists at the time at which the debenture comes into operation. A co. which has issued debentures in such a form, & has power to dispose of its property in the course of carrying on business, can give to an equitable mtgee. an effective first charge upon its property with priority over the charge created by the debentures.—*WHEATLEY v. SILKSTONE & HAIGH MOOR COAL CO.* (1885), 29 Ch. D. 715; 54 L. J. Ch. 778; 52 L. T. 798; 33 W. R. 797.

Annotations:—*Consd.* *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979; *Re Cope, Marshall v. Cope*, [1914] 1 Ch. 800. *Refd.* *Hubbuck v. Helms* (1887), 56 L. J. Ch. 536; *Brunton v. Electrical Engineering Corpn.*, [1892] 1 Ch. 434; *English & Scottish Mercantile Investment Trust v. Brunton*, [1892] 2 Q. B. 1; *Re Valletort Sanitary Steam Laundry Co., Ward v. Valletort Sanitary Steam Laundry Co.*, [1903] 2 Ch. 654.

4692. Obligation binding estate, property, & effects—No specific charge.—The arts. of a co. incorporated for the purpose of acquiring land in Florence & building thereon, & selling, mortgaging, or leasing the same, gave power to the directors to borrow money by mtge. of any part of the co.'s property, or by "bonds, debentures, or mtge. debentures," which should entitle the holders to be paid out of the moneys, property, & effects of the co. *pari passu*. The co. issued instruments called "obligations," which were expressed to be made under the power of their arts., by which they bound "themselves, their successors, & assigns, & all their estate, property, & effects," to repay the sums mentioned therein at a future date, with power to redeem a certain portion of the obligations at intermediate times:—*Held*: reading the obligation with reference to the arts. of assocn., they constituted a charge on the property of the co., subject to the power of the directors to dispose of any part of such property in the ordinary course of their business.

Upon the construction of the obligations themselves, without reference to the arts., except as to whether they were *ultra vires*, there was sufficient to constitute a charge upon the property of the co. (*JAMES, L.J.*).

Qu.: whether the Jud. Act, 1873, s. 10, has affected the power of cos. to charge their after-acquired property as against the other creditors of the co.—*Re FLORENCE LAND & PUBLIC WORKS CO., Ex p. MOOR* (1878), 10 Ch. D. 530; 48 L. J. Ch. 137; 39 L. T. 589; 27 W. R. 236, C. A.

Annotations:—*Consd.* *Re Colonial Trusts Corpn., Ex p. Bradshaw* (1879), 15 Ch. D. 465; *Re Hamilton's Windsor Ironworks, Ex p. Pitman & Edwards* (1879), 12 Ch. D. 707; *Moore v. Anglo-Italian Bank* (1879), 10 Ch. D. 681; *Re Horne & Hellard* (1885), 29 Ch. D. 736. *Apld.* *Wheatley v. Silkstone & Haigh Moor Coal Co.* (1885), 29 Ch. D. 716.

Reid. Edgington v. Fitzmaurice (1885), 29 Ch. D. 459; *Re Mersey Wood Working Co.* (1885), 1 T. L. R. 566; *Hubbuck v. Helms* (1887), 56 L. J. Ch. 536; *Brunton v. Electrical Engineering Corp.*, [1892] 1 Ch. 434; *Driver v. Broad*, [1893] 1 Q. B. 744; *Taunton v. Warwickshire Sheriff* (1894), 72 L. T. 712; *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979; *Re Cope, Marshall v. Cope*, [1914] 1 Ch. 800. *Mentd. Anderson v. Butler's Wharf Co.* (1879), 48 L. J. Ch. 824; *Re Crumlin Viaducts Works Co.* (1879), 48 L. J. Ch. 537.

4693. Companies Act, 1900 (c. 48), s. 14 (1) (d)—Mortgage of book debts present & future.]—*ILLINGWORTH v. HOULDSWORTH*, No. 4690, *ante*.

4694. — Charge on all rights & interests present & future under arrangement being negotiated.]—In order to give additional benefits to the allottees of an issue of its debenture-stock, a co. also issued "bonus certificates" to them secured by a trust deed. The trust recited that the co. was negotiating an arrangement for certain dealings in land, & by clause 1 the co. covenanted to pay the trustees one-fourth of all profits therefrom not exceeding the nominal amount of debenture-stock issued. Clause 2 provided that meanwhile one-fourth of all such profits in each year should be paid to the trustees before Sept. 30 following with interest thereon in default; & by clause 4 the co. charged all its rights & interests both present & future under or by virtue of such arrangement & all profits from time to time received or derived therefrom, with the payment of all moneys from time to time payable under clauses 1 & 2, & as a security for the due performance by the co. of all the obligations imposed upon it by that deed. Clause 5 provided for the issue of bonus certificates to the allottees of stock & for transfers & dealings therewith:—*Held*: the trust deed constituted a mtge. or charge for the purpose of securing an issue of debentures, & was also a floating charge on the undertaking or property of the co., & required registration under the above sub-sect.—*HOARE v. BRITISH COLUMBIA DEVELOPMENT ASSOCN.* (1912), 107 L. T. 602.

See, now, 1908 Act, s. 93 (1) (f).

4695. Agreement to give a "floating charge" in certain events—Whether charge or right to charge.]—

(1) A co. being indebted in respect of an overdraft to its bankers, L., one of its directors, gave the bankers security on his own property for the overdraft—£3,000, & the co. in July, 1914, gave L. an agreement that in the event of (a) the bankers pressing the co. for the overdraft, or (b) the bankers calling on L. to redeem the property charged by him, the co. would give L. a debenture containing a floating charge on its assets to secure £3,000 & interest, & this agreement was registered under 1908 Act, s. 93. One of the events having happened within 3 months of the commencement of the winding up of the co., the co., on Feb. 1, 1915, gave L. a debenture for £3,000 & interest, stating that it was given under the agreement & containing the floating charge therein referred to. This was also registered under sect. 93. On Feb. 23, 1915, the co. passed an extraordinary resolution for voluntary winding up. L. having died, his exors. on Feb. 12, 1915, commenced an action against the co. for realisation of the assets comprised in two debentures for £3,000 & £1,000—both cash—given to L. in 1912 & 1913—the validity of which was not disputed—and the debenture of Feb. 1, 1915, & on Feb. 19, a motion for a receiver was by consent of pltfs. & the co. treated as the trial, & judgment was given omitting any declaration of charge, but directing accounts & inquiries, in answer to which the master found that there was owing to pltfs. on the three debentures the sum of £7,000 & interest. After the

master's certificate had become binding the liquidator in the winding up took out a summons asking that the certificate might be varied by disallowing the £3,000 & interest under the debenture of Feb. 1, 1915:—*Held*: (1) there were special circumstances within Ord. 55, r. 71, entitling the liquidator to have his summons heard; (2) the form of the judgment did not preclude the ct. from considering whether the debenture of Feb. 1, 1915, gave an effective charge, having regard to 1908 Act, s. 212; & (3) that debenture was invalidated under the sect. by the winding-up resolution; because, (a) assuming in favour of L. & his estate that one of the events referred to in the agreement of July, 1914, occurred about Feb. 1, 1915, pltf.'s position was not saved by the agreement, as the debenture was so complete a performance of the executory agreement as to leave no obligation or right still subsisting under it, & (b), even if that was not so, the agreement gave no present charge, but merely a right to a floating charge, not as at the date of the agreement, but on the occurrence of one of two events, one of which occurred within 3 months of the winding up.

(2) Cos. or their liquidators should not as a rule consent on a motion for judgment in a debenture-holder's action to a declaration that the debentures constitute a charge on the co.'s assets.—*Re LOVE (GREGORY) & Co., FRANCIS v. LOVE (GREGORY), & Co.*, [1916] 1 Ch. 203; 85 L. J. Ch. 281; 114 L. T. 395; [1916] H. B. R. 42; *sub nom. Re LOVE (GREGORY) & Co., LTD., LOVE v. LOVE (GREGORY) & Co., LTD.*, 32 T. L. R. 210; 60 Sol. Jo. 221.

4696. Whether charge fixed or floating—Specific charge with clause applicable to floating charge.]—

Where a debenture creates a charge on certain specific assets of the co., & contains in the conditions of the debenture the words "but so that the co. is not to be at liberty to create any mtge. or charge in priority to or *pari passu* with the said debentures," these words will not be construed as implying the creation of a floating charge contrary to the terms of the specific charge already given by the debenture.—*GRIGSON v. TAPLIN & Co.* (1915), 85 L. J. Ch. 75; 112 L. T. 985; [1915] H. B. R. 226; *sub nom. GREGSON v. TAPLIN (GEORGE) & Co., LTD.*, 59 Sol. Jo. 349.

4697. — No intention of interfering with carrying on business.]—

(1) There is no change of occupation within Poor Rate Assessment & Collection Act, 1869 (c. 41), s. 16, or Public Health Act, 1875 (c. 55), s. 211 (3), when a receiver & manager is appointed by an order made in a mtge. action which directs the tenants of those properties which were let to attorn & the mtgors. to deliver to the receiver & manager as such all the stock-in-trade & effects of the businesses carried on, but no order was made for delivery up of possession of the land, though the receiver stated he entered into possession.

(2) Freehold property was conveyed by way of mtge., together with all the fixed & movable plant machinery & fixtures then or thereafter fixed or placed upon or used on the hereditaments; & the goodwill was assigned of the business of electric theatres & all the furniture & loose effects then or from time to time placed or used upon the hereditaments. The mtge. was made to secure payment of all moneys then or from time to time owing. There was a provision that the mtgors. should conduct the business in a regular & proper manner & should not let any of the premises without the consent of the mtgees.:—*Held*:

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the ordinary carrying on of the businesses was not intended to be interfered with, & the mtge. constituted a charge upon chattels which would in the ordinary course of the business be changed from time to time, & was therefore a floating rather than a specific charge on the chattels & consequently a debenture within 1908 Act, s. 107.—*NATIONAL PROVINCIAL BANK OF ENGLAND, LTD. v. UNITED ELECTRIC THEATRES, LTD.*, [1916] 1 Ch. 132; 85 L. J. Ch. 106; 114 L. T. 276; 80 J. P. 153; 32 T. L. R. 174; 60 Sol. Jo. 274; 14 L. G. R. 265; [1916] H. B. R. 56.

Whether charge extends to future property.]—See Sub-sect. 3, A. (b) i., *ante*.

Whether charge extends to uncalled capital.]—See Sub-sect. 3, A. (b) ii., *ante*.

(b) To What a Floating Charge attaches.

4698. Whether particular assets affected—Before charge becomes fixed.]—A debenture, constituting a floating security over the undertaking & assets of a co., does not specifically affect any particular assets until some event occurs or some act on the part of the mtgee. is done which causes the security to crystallise into a fixed security. A demand by the debenture-holder of the payment by the co. of the money secured by his debenture is not such an act; nor is a notice by him to the co.'s bankers claiming payment to him of the co.'s bank balance which has been attached by a judgment creditor of the co. under a garnishee order; for there is no equity in a debenture-holder, whose security is a floating charge, arising from his merely giving notice to seize a particular asset of the co.—*EVANS v. RIVAL GRANITE QUARRIES, LTD.*, [1910] 2 K. B. 979; 79 L. J. K. B. 970; 26 T. L. R. 509; 54 Sol. Jo. 580; 18 Mans. 64, C. A.

*Annotations:—***Refd.** *De Beers Consolidated Mines v. British South Africa Co.*, [1912] A. C. 52; *Sinnott v. Bowden*, [1912] 2 Ch. 414.

When charge becomes fixed.]—See Sub-sect. 3, C. (e) i., *post*.

Construction of charge generally.]—See Sub-sect. 3, A. (b) i., *ante*.

(c) Effect of Winding up within Three Months of Charge.

See, now, 1908 Act, s. 212.

4699. Object of section.]—(1) The object of 1908 Act, s. 212, is to prevent insolvent cos. from creating floating charges to secure past debts or for moneys which do not go to swell their assets & become available for creditors.

(2) The term "cash" in sect. 212 is not to be interpreted by the light of the decisions as to the meaning of that term in 1867 Act, s. 25.

(3) Where moneys are advanced to reduce the liability of a co. under an antecedent independent guarantee, debentures giving a floating charge created by the co. in favour of the guarantors, who find money to pay off the debt owing by the co. & guaranteed by them, are, if the co. goes

into winding up within three calendar months after the issue of the debentures, invalid unless it is proved that the co. was solvent immediately after the creation of the charge.

(1) *Qu.*: whether it is necessary to register under sect. 93 of the Act an agreement by a co. to give a debenture containing a floating charge on its assets, where no debenture has actually been issued.—*Re ORLEANS MOTOR CO., LTD.*, [1911] 2 Ch. 41; 80 L. J. Ch. 477; 18 Mans. 287; *sub nom. Re ORLEANS MOTOR CO., LTD.*, *SMYTH v. ORLEANS MOTOR CO., LTD.*, 104 L. T. 627.

*Annotations:—*As to (1) **Refd.** *Re Hayman, Christy & Lilly, Christy v. Hayman, Christy & Lilly*, [1917] 1 Ch. 283. *Generally, Refd.* *Ladenburg v. Goodwin, Ferreira & Garnett*, [1912] 3 K. B. 275.

4700. "Within three months"—Agreement to give debenture more than three months before winding up—Debenture given within three months.]—A co., finding that its capital was insufficient for its needs, authorised one of its directors to arrange an overdraft with its bankers, & requested him to secure the same to the satisfaction of the bank by depositing securities belonging to him personally or by his own guarantee, & in consideration for arranging such overdraft, the co. passed a resolution that they would, whenever called upon by him to do so, give him full & sufficient security over its assets by means of debentures or other charge in respect of the amount for which he should render himself liable. About seven months after the overdraft had been arranged the director wrote to the co. demanding security in respect of the amount for which he was liable to the bank on the co.'s behalf. A debenture which created a floating charge on all the co.'s property was accordingly given to him for that amount with interest. Within a month of the creation of the debenture a resolution was passed for the voluntary winding up of the co.:—*Held*: the debenture was invalid as a fraudulent preference, as an agreement to give security must be registered under Companies Act, 1900 (c. 48), s. 14, & a promise could not be allowed to take effect if insistence on it was postponed till a date when the period prescribed for fraudulent preference had arrived.—*Re JACKSON & BASSFORD, LTD.*, [1906] 2 Ch. 467; 75 L. J. Ch. 697; 95 L. T. 292; 22 T. L. R. 708; 13 Mans. 306.

*Annotations:—***Refd.** *Re Columbian Fireproofing Co.*, [1910] 1 Ch. 758; *Re Love, Francis v. Love*, [1916] 1 Ch. 203.

4701. ————.]—*Re LOVE (GREGORY) & CO., FRANCIS v. LOVE (GREGORY) & CO.*, No. 4695, *ante*.

4702. "Solvent"—How solvency ascertained—Whether fixed assets included.]—*HODSON v. BLANCHARDS (LONDON), LTD.* (1911), 131 L. T. Jo. 9.

4703. ———— Office furniture & fixtures.]—Where a rubber co. issued debentures on a floating charge & within three months a resolution was passed to wind up the co. as an insolvent concern, & it appeared that, except for the value of certain office furniture & fixtures, the co. was insolvent immediately after the creation of the debentures:—*Held*: the office furniture & fixtures were fixed assets, & could not

PART III. SECT. 34, SUB-SECT. 3.—
C. (b).

s. "Assets"—Future assets—Uncalled capital.]—Certain cos. agreed in writing to mortgage, besides certain specified property, "all their assets, real & personal of every description."

The cos. were intended by the parties to, & actually did, continue to carry on their respective businesses, & consequently in the ordinary course of business disposed of some of their assets, & appropriated the proceeds to their own purposes:—*Held*: (1) the

security was a floating security covering future assets; (2) it did not include the uncalled capital of the cos., as such were not "assets."—*BANK OF NEW ZEALAND v. GUTHRIE (WALTER) & CO., LTD.* (1907), 16 N. Z. L. R. 484,

be taken into account in deciding the question of solvency, & the debentures were, therefore, invalid within the provisions of 1908 Act, s. 212.—*Re JONES (W. H.) & Co., Ex p. FRANKENBURG* (1913), 2 L. J. C. C. 101.

4704. — Balance sheet showing assets in excess of liabilities.—*HODSON v. BLANCHARDS (LONDON), LTD.* (1911), 131 L. T. Jo. 9.

4705. — Certain assets difficult to realise.—*HODSON v. BLANCHARDS (LONDON), LTD.* (1911), 131 L. T. Jo. 9.

4706. "Cash"—Whether decisions under 1867 Act, s. 25, apply.—*Re ORLEANS MOTOR CO., LTD.*, No. 4699, *ante*.

See, generally, Sect. 20, sub-sect. 3, ante.

4707. "Paid to the company"—Debt of company paid off by guarantors.—*Re ORLEANS MOTOR CO., LTD.*, No. 4699, *ante*.

4708. "At the time of the creation of the charge"—Question of fact.—Where a floating charge is created on the property of a co. within three months of the commencement of the winding up of the co., the question whether cash is paid "at the time of the creation of the charge" within 1908 Act, s. 212, is a question of fact to be determined by all the circumstances of the case, & as a general rule a payment on account made in consideration for the charge, although made a few days before the execution of the debenture, is made at the time of its creation.

A co. being in need of funds, the directors on Nov. 25, 1909, accepted an offer by S. to advance £1,000, upon the security of a floating charge on the property of the co. & passed a resolution that a debenture should be prepared to be executed at the next meeting of the board. On the strength of this resolution S. paid to the co., on account of the £1,000, £350 immediately & a further £350 on Dec. 2. At the next meeting on Dec. 6, the debenture was duly executed & the balance of the £1,000 was paid. The debenture was registered on Dec. 23. The co. went into liquidation in the following Jan., & the liquidator disputed the validity of the charge:—*Held*: (1) for the purposes of 1908 Act, s. 93, the charge was created at the time when the formal instrument was executed, & it was registered within 21 days of its creation; (2) the whole of the £1,000 was advanced "at the time" of the creation of the charge within sect.

212; consequently the debenture was a valid security for the full amount.—*Re COLUMBIAN FIREPROOFING CO., LTD.*, [1910] 2 Ch. 120; 79 L. J. Ch. 583; 102 L. T. 835; 17 Mans. 237, C. A.

4709. — Payment on account a few days before execution of debenture.—*Re COLUMBIAN FIREPROOFING CO., LTD.*, No. 4708, *ante*.

4710. — Existing loan account with bank.—Within three months of winding up, an insolvent co. issued debentures to their bank to secure their loan & current accounts. The loan account, on which a considerable sum was owing, was left untouched, but the bank subsequently advanced more than the value of the debentures on the current account. At the time of the winding up, however, there was nothing due on current account, the advance having been discharged by payments to that account in the ordinary course of business:—*Held*: under 1908 Act, s. 212, the debentures so far as issued as security for the past debt on the loan account were invalid, & so far as issued as security for the fresh advance on the current account they were only valid to the extent of the money owing on that account at the date of the winding up, & this being nil, they were wholly invalid.—*Re HAYMAN, CHRISTY & LILLY, LTD., CHRISTY v. THE CO.*, [1917] 1 Ch. 283; 86 L. J. Ch. 255; 116 L. T. 283; 33 T. L. R. 167; [1917] H. B. R. 80.

See, also, No. 4700, ante.

4711. "Subsequently to the creation of & in consideration of the advance"—Overdrawn current account at bank—Further advances—Overdraft paid off before winding up.—*Re HAYMAN, CHRISTY & LILLY, LTD., CHRISTY v. THE CO.* No. 4710, *ante*.

(d) Effect of Charge while Floating.

i. Power of Company to Carry on Ordinary Business.

4712. General rule.—A limited co. issued mtge. debentures charging all its undertaking & property, one of the conditions of the debentures being that they were to rank *pari passu* as a first charge & to be a "floating security," but so that the co. should "not be at liberty to create any mtge. or charge in priority to the said debentures." There was no trust deed for further securing the

PART III. SECT. 34, SUB-SECT. 3.—C. (c).

4707 i. "Paid to the company"—Debt of company paid off by guarantors.—The official liquidator of a co. which had been ordered to be wound up upon Jan. 16, 1912, upon a petition presented to the ct. on Dec. 4, 1911, applied for the sanction of the ct. to his refusal of payment of the amount of a debenture dated Oct. 10, 1911, executed as a floating charge on all the assets of the co. in favour of three of its directors on the ground that same was void under 1908 Act, s. 212, or in the alternation for direction of the ct. as to payment or otherwise, & it appearing that the co. was insolvent at the time of the issue of the debentures & that the three directors had secured the co.'s Bill of Exchange in consideration of being indemnified by the co. by means of the debentures:—*Held*: the debenture was invalid under sect. 212 & the payment by the three directors to the payee of the bill of exchange, was not a payment of "cash" to the co. within the proviso in the sect.—*Re McCLEAVE*

& Co., LTD. (1913), 47 L. L. T. 214.—*IR.*

t. — Advance by bankers.—*Re OLDERFLEET SHIPBUILDING & ENGINEERING CO., LTD.*, [1922] 1 L. R. 26.—*IR.*

PART III. SECT. 34, SUB-SECT. 3.—C. (d) i.

a. Ordinary course of business—Sale & delivery of goods.—A co. had, for the purpose of raising capital, issued as a first charge on all the property of the co., debentures, which were secured by a trust deed executed at the time of their issue. By the terms of the debentures & the trust deed the co. was to be at liberty, notwithstanding the charge, in the course of its business, & for the purpose of continuing & carrying on the same, to use, employ, sell, lease, exchange, or otherwise deal with, all or any part of the property until the principal money thereby secured became payable, but nothing should authorise the creation of any mtge. or charge upon the property, or any part of it, in priority

to the debentures. The co., being subsequently in want of money to carry on its business, & unable to borrow in consequence of the debentures, it was agreed that a syndicate should purchase a certain amount of whisky from the co. at a named price, & the money so paid should be applied, under the direction of the syndicate, in satisfaction of the trade debts & other pressing liabilities of the co. None of the syndicate, or of the creditors whom they represented, were engaged in the whisky trade:—*Held*: having regard to the position in which the co. was placed the sale was one in the course of business.—*Re OLD BUSHMILLS DISTILLERY CO., Ex p. BRETT*, [1897] 1 L. R. 488.—*IR.*

b. — Pledge of goods.—A co. with power to create debentures & to borrow on mtge., issued debentures, & executed a trust deed to further secure the debentures. By the debentures the undertaking, & all the property, present & future, of the co., not comprised in the trust deed, were charged with the money borrowed as a first charge thereon. By the

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debenture debts. Subsequently an order appointing a receiver was made in a debenture-holders' action, the co. being ordered to deliver up to such receiver all documents relating to the property comprised in the debentures. The co.'s title deeds were then in the possession of their solr., who refused to deliver them up, claiming a lien for costs incurred by the co. to him as their solr. prior to the appointment of the receiver:—*Held*: so long as the debentures continued to be a "floating security"—that is, until the appointment of the receiver—they did not interfere with the co.'s business being carried on in the ordinary way, & the debenture-holders could not prevent the co.'s solr., employed by them in the usual course of their business, from acquiring the ordinary solr.'s lien; & inasmuch as that lien was a right given by the general law, & not a "charge," or, at any rate, not a charge "created" by the co., the solr. was not precluded by the condition of the debentures from asserting his lien in priority to the debenture-holders.—*BRUNTON v. ELECTRICAL ENGINEERING CORPN.*, [1892] 1 Ch. 434; 61 L. J. Ch. 256; 65 L. T. 745; 8 T. L. R. 158.

Annotations:—*Refd.* *Robson v. Smith*, [1895] 2 Ch. 118; *Taunton v. Warwickshire Sheriff*, [1895] 1 Ch. 734. *Mentd.* *Re Walker, Meredith v. Walker* (1893), 68 L. T. 517.

4713. —.]—(1) Debentures whereby a charge in the nature of what is called a floating security over all a co.'s property is given to the debenture-holders, allow the co. to deal with its assets in the ordinary course of business until the co. is wound up, or stops business, or a receiver is appointed at the instance of the debenture-holders; or, in other words, such debentures constitute a charge, but give a licence to the co. to carry on its business. So long as the debentures remain a mere floating security, that is to say, so long as the licence to the co. to carry on its business has not been terminated, the property of the co. may be dealt with in the ordinary course of business as if the debentures had not been given, & any such dealing with a particular property will be binding on the debenture-holders, provided that the dealing be completed before the debentures cease to be merely a floating security.

(2) The holder of a debenture which constitutes only a floating security as long as the co. continues to carry on its business, & no steps have been taken to wind it up or to get a receiver appointed, cannot single out a particular debt due to the co., & give notice requiring that debt to be paid to him, or not to be paid to the co., or to persons validly claiming under the co., & under such circumstances where a garnishee order has been obtained against the debtor, the garnishee may safely pay his debt to the judgment creditor without reference to the notice.

(3) The word "charge" in a debenture providing that the co. shall not be at liberty to create any mtge. or charge upon any property in priority to the debenture will be construed strictly, & accordingly garnishee proceedings—which are

only a form of execution—do not lead to any "charge" in the true sense being created on the debt garnished.

(4) Pltf. was the holder for value of a co.'s first mtge. debenture, which gave him a charge in the nature of a floating security over all the present & future property of the co., real & personal. On Sept. 27, 1893, two garnishee orders *nisi* were obtained by two judgment creditors against defts., who admitted a debt of £200 to the co., & these orders were made absolute on Oct. 4, 1893. On Sept. 28, 1893, pltf. also, as a judgment creditor, obtained a garnishee order *nisi* against defts., which was made absolute on Oct. 5, 1893. On Oct. 11, 1893, pltf. gave notice to defts. of his debenture as a prior charge, & required them to pay their debt to no person other than himself. Defts., however, paid the creditor whose garnishee order was first in time. In Oct. 1894, the co. passed resolutions for a voluntary liquidation. In an action by pltf. for payment by defts. to him of the amounts of their said debts, evidence was given that the co. had procured the completion by other firms of the existing trade orders which they had, after Sept. 5, 1893, when their goods had been seized & sold under an execution, so that they had in that way continued to carry on business:—*Held*: in spite of the notice of Oct. 11, the payment by defts. under the garnishee order was good as against pltf.—*ROBSON v. SMITH*, [1895] 2 Ch. 118; 64 L. J. Ch. 457; 72 L. T. 559; 43 W. R. 632; 11 T. L. R. 351; 2 Mans. 422; 13 R. 529.

Annotations:—*As to* (2) *Apprvd.* *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979. *As to* (3) *Refd.* *Geisse v. Taylor, Weston, Claimant* (1905), 74 L. J. K. B. 912. *As to* (4) *Foll.* *Robinson v. Burnell's Vienna Bakery Co.*, [1904] 2 K. B. 624. *Expld. & Distd.* *Cairney v. Back*, [1906] 2 K. B. 746; *Norton v. Yates*, [1906] 1 K. B. 112. *Generally, Mentd.* *Pegge v. Neath & District Tram. Co.* (1895), 64 L. J. Ch. 737.

4714. Ordinary course of business—Payment of debts—Payment of insurance moneys received by company to creditors—Advances by directors to company.]—By its debentures a co. agreed to pay to the lender the principal sum thereby secured on a date therein mentioned, & charged with the payment of such principal & interest its undertaking & all its property, both present & future. By the conditions indorsed on each of the debentures it was provided that the charge executed by the debentures should be a floating security, & that, accordingly, the co. might in the course of its business deal with & dispose of the property in such manner as it thought fit. The works & part of the stock of the co. having been destroyed by fire, two directors who had made considerable advances to the co. held a meeting of directors, two directors being a quorum, & passed a resolution authorising actions against the co. for the moneys they had advanced, & instructing solrs. to appear for the co. & to consent to an immediate judgment, & the amount of the insurance money was obtained for them under a garnishee order:—*Held*: the transaction was a payment of a just debt, & was therefore in the course of the business of the co., & that being so,

conditions endorsed on the debentures, the co. was to be permitted, until default in payment of interest, etc., in course of its business, & for the purpose of carrying on same, to deal with the property thereby charged in such manner as the co. might think fit, & in particular might sell, lease, or exchange same, pay & receive money, & might declare & pay dividends out

of profits, but nothing therein should be taken to authorise the creation of any mtge. or charge on the property for the time being of the co. in priority to the charge thereby created. By the trust deed the co. mortgaged the freehold & leasehold premises of the co. to secure the repayment of the debentures to the lenders *pari passu*, & the co. covenanted to pay the principal

& interest secured by the debentures, & that same should be a first charge on the mortgaged premises, & should take precedence over all money which might thereafter be raised by the co. by any means whatsoever. The co. obtained advances from their bankers to enable them to purchase grain for the purpose of manufacturing whisky, to secure the repayment of which the

the debenture-holders had no claim upon the insurance moneys.—*WILLMOTT v. LONDON CELLULOID CO.* (1886), 34 Ch. D. 147; 56 L. J. Ch. 89; 55 L. T. 696; 35 W. R. 145; 3 T. L. R. 121, C. A.

Annotations:—*Mentd.* *Re Faure Electric Accumulator Co.* (1888), 58 L. J. Ch. 48; *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95; *Hamer v. London, City & Midland Bank* (1918), 87 L. J. K. B. 973.

4715. ——— **Under garnishee order.**—*ROBSON v. SMITH*, No. 4713, *ante*.

4716. ——— **Payment to sheriff.**—Judgment having been given in an action against a limited co., which had issued debentures giving a floating charge over all its property, the goods of the co. were taken in execution under a writ of *fi. fa.* In order to avoid a sale & to enable them to continue to carry on business, the co. with the assent of the execution creditor, paid daily to the sheriff a certain sum out of their daily takings. Afterwards a receiver was appointed in a debenture-holders' action, who claimed to be entitled to the money paid by the co., which still remained in the hands of the sheriff & had not been handed over by him to the execution creditor:—*Held*: the true effect of the transaction was that the money was paid to the sheriff as part of the debt owing to the execution creditor, who was therefore entitled to retain it as against the debenture-holders.—*ROBINSON v. BURNELL'S VIENNA BAKERY CO.*, [1904] 2 K. B. 624; 73 L. J. K. B. 911; 91 L. T. 375; 52 W. R. 526; 20 T. L. R. 284; 48 Sol. Jo. 299.

Annotation:—*Consd.* *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979.

4717. **Acquisition of lien by solicitor.**—*BRUNTON v. ELECTRICAL ENGINEERING CORPN.*, No. 4712, *ante*.

4718. ——— **Issue of debentures to solicitor for security for costs.**—*Re HUBBARD & CO., LTD.*, *HUBBARD v. HUBBARD & CO., LTD.*, No. 4602,

4719. ——— **Allowing seizure of goods under execution.**—*DAVEY & CO. v. WILLIAMSON & SONS*, No. 4706, *post*.

4720. ——— **Working out foreclosure decree—Debenture-holders no parties to foreclosure action.**—(1) The holders of debentures—subsequent in date to a specific mtge. on a co.'s property—which constitute a "floating charge" on all the property of the co. are necessary parties to an action for foreclosure of the mtge., even although their charge has not yet crystallised.

(2) The working out of a foreclosure decree in the absence of the debenture-holders cannot be considered a dealing by the co. with its property in the ordinary course of its business.—*WALLACE v. EVERSLED*, [1899] 1 Ch. 891; 80 L. T. 523; 15 T. L. R. 335; 6 Mans. 351; *sub nom.* *WALLACE v. EVERSLED*, *SLADEN v. EVERSLED*, 68 L. J. Ch. 415.

4721. **Sale of whole undertaking—Without making provision for debenture-holders.**—The power of a co., which has issued debentures operating as a floating security, to deal with its property in the ordinary course of business, does not extend to a sale of the whole of its property without making provision for the satisfaction or discharge of the debentures, & such a sale will be

restrained by injunction at the instance of a debenture-holder.—*Re BORAX CO.*, *FOSTER v. BORAX CO.*, [1899] 2 Ch. 130; 68 L. J. Ch. 410; 80 L. T. 461; 6 Mans. 439; *on appeal*, [1899] 2 Ch. 137, n., C. A.

4722. ——— **Sale specified as one of company's objects.**—The memorandum of assocn. of a limited co. included, among its objects, the carrying on of a business of a specified nature, & also the carrying into effect of arrangements for amalgamation or union of, or sharing in interests whether in whole or in part with, any other co. carrying on any business similar or analogous to any business authorised by the memorandum; & also the sale of all or any part of the co.'s business or property & the holding of any debentures, shares, stocks, or securities of any other co. The co. sold the whole of its property & assets, including the goodwill, with the exception of certain securities, which it retained as its own property, to a new co. formed for the purpose of acquiring & working the old co.'s business & similar undertakings, the sale being in consideration of debenture-stock & shares in the new co. & the old co. agreeing not to carry on any similar business otherwise than in conjunction with & for the benefit of the new co. The old co. had, before the sale, issued debentures charging, "by way of floating security, all its property, undertaking, & assets for the time being, whether present or future," & becoming immediately payable upon an order or effective resolution to wind up.

In a debenture-holders' action against the old co. claiming that by the sale it had ceased to carry on its objects as defined by the memorandum, & that therefore the debenture charge immediately attached:—*Held*: pl'tfs.' claim failed, because (1) the sale was not *ultra vires* of the memorandum of assocn.; (2) the old co.'s undertaking had not ceased to be a going concern, so that the debentures were still nothing more than a "floating security"; & (3) the debentures, being a floating security, did not give the holders any right to interfere with what the co. had done in the ordinary course of its business as defined in the memorandum of assocn.

Qu.: whether on the sale the old co. could preclude itself from exercising its powers in respect of what was in fact the principal object included in the memorandum, & whether so to do would not endanger the security of the debenture-holders by limiting & altering it.—*Re BORAX CO.*, *FOSTER v. BORAX CO.*, [1901] 1 Ch. 326; 70 L. J. Ch. 162; 83 L. T. 638; 49 W. R. 212; 17 T. L. R. 159; 45 Sol. Jo. 138, C. A.

4723. ——— **Sale & delivery of goods—Set off by debenture-holder of amount due on debenture against balance due from him for goods sold & delivered.**—A debenture issued by a trading co. to their bankers & payable on Aug. 1, 1900, provided that the debenture should be a first charge upon all the co.'s undertaking & property present & future; that such charge was to be a floating security, but so that the co. were not to be at liberty to create any mtge. or charge in priority to, or upon an equality with that debenture; that the co. should be at liberty to carry on their business until default should be

co. pledged to the bank certain whisky, by delivering to the bank the warrants for the whisky, with invoices:—*Held*: the transaction came within the restriction against creating any mtge. or charge on the property in

priority to the debentures, & the provision that the debentures should take precedence over all money which might be raised by the co., by any means whatsoever, & the bank were not entitled to the whisky against the

debenture
CITY DIS. Co.,
446; 40 L. T. 84.—IR.

c. ——— *COVENEY v.*
[1910] 1 L. L. 191.—IR.

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made in payment of the principal sum secured, or until a receiver should be appointed, & that from & after such default, or the appointment of a receiver, the liberty of the co. to carry on their business should forthwith cease & determine, & the charge created by the debenture should be immediately enforceable. The co. subsequently issued to debts., with whom they had been & were trading, a debenture payable on Oct. 1, 1900, & expressed to be subject to the debenture held by the bankers. The co. made default in payment both of the debenture issued to the bankers & of that issued to debts. The bankers took no steps to stop the co. carrying on their business until Oct. 2, 1901, when they appointed a receiver. In an action brought by the co. & the bankers to recover from debts. the balance of the price of goods sold & delivered by the co. to debts. between July 1, 1900, & Oct. 1, 1901:—*Held*: debts. were entitled to set off the sum which on Oct. 1, 1900, became due under their debenture against the sum due to pltf. for the goods.—*NELSON (EDWARD) & Co. v. FABER & Co.*, [1903] 2 K. B. 367; 72 L. J. K. B. 771; 89 L. T. 21; 10 Mans. 427.

4724. — Charge to secure overdraft.]—*Re STANDARD ROTARY MACHINE CO., LTD.*, No. 4736, *post*.

4725. — Assignments of “drawbacks” owing by the Crown.]—A co. issued debenture-stock secured by a trust deed whereby certain freehold & leasehold properties were specifically mortgaged to the trustees of the deed, & a floating charge was created in their favour on all the assets of the co. Subsequently the co. assigned to W. & H. certain book-debts, including rents in arrear in respect of leases, some of which were specifically included in the trust deed, & also certain drawbacks owing to the co. by the Crown in respect of beer exported by the co. on which the co. was entitled to receive payments equal to the amount of the excise brewing duty paid thereon. W. & H. gave notice of their assignment to the tenants from whom rents were due, & to the shipping agents who had been employed by the co. to export the beer; but gave no notice to the Crown. A receiver & manager of the assets & undertaking of the co. was appointed on behalf of the debenture-holders. He gave notice of his appointment to the tenants & to the Crown:—*Held*: the rents in arrear in respect of property not specifically charged belonged to W. & H. but the rents of properties specifically mortgaged belonged to the debenture-holders inasmuch as they had taken possession by the appointment of a receiver & giving notice; the drawbacks were only subject to the floating charge & could be dealt with by the co.; & as the co. had this power by their contract with the debenture-holders the latter could not, with notice of the assignment, obtain priority to the assignees by giving notice to the Crown.—*Re IND, COOPE & Co., LTD., FISHER v. IND, COOPE & Co., LTD., KNOX v. IND, COOPE & Co., LTD., ARNOLD v. IND, COOPE & Co., LTD.*, [1911] 2 Ch. 223; 80 L. J. Ch. 661; 105 L. T. 356; 55 Sol. Jo. 600.

4726. — Sale of fixtures—Machinery.]—In Aug., 1903, a co. issued certain first mtge. debentures secured by a deed of which B. & E. were trustees. In 1912 the co., issued certain “A” debentures

to a bank which were registered in the names of M. & S., managers of the bank. In the autumn of 1916 the co., with the assent of the trustees, sold to pltf. certain loose & fixed machinery for £1,880 which was applied by B. & E. to recoup certain advances they had made to the co. It was a term of the agreement of sale that pltf. should be at liberty to leave the machinery *in situ* as long as he liked, although it was to become his property at once. In Dec., 1916, the bank appointed T. their receiver, who when he went into possession gave orders that pltf. might remove the loose machinery but not plant which was fixed to the freehold. In Jan., 1917, the co. went into liquidation, T. being appointed liquidator. Pltf. brought an action against the bank, the receiver, the trustees, & the co. claiming a declaration that the plant & machinery were his, & an injunction to restrain debts. from dealing with it:—*Held*: (1) the bank was properly joined as a party, there being evidence that they had instructed the trustee & the liquidator to prevent pltf. having the fixed machinery; (2) the charge given to the bank was a floating charge, which merely gave them a right to seize the property subject to any right created in good faith; (3) the fixtures had been sold with the concurrence of the trustees & in the ordinary course of business, & the property in them had passed to pltf. before the bank's charge had crystallised; (4) the mere fact that the money was applied towards payment of trustees did not affect the question whether the sale was in the ordinary course of business; & pltf. was entitled to judgment.—*HAMER v. LONDON CITY & MIDLAND BANK, LTD.* (1918), 87 L. J. K. B. 973; 118 L. T. 571.

See, also, No. 4690, *ante*.

4727. Exercise of power—Purchase of goods—Rights of creditors for goods supplied & debenture-holders inter se.]—*Re ANGLO-AMERICAN LEATHER CLOTH CO., LTD.*, No. 4647, *ante*.

4728. — Sale of part of assets—Proof of right to sell.]—A co. which carried on the business of ironmasters & manufacturers, issued debentures for a total sum of £500,000, by which they charged their undertaking, works, stock-in-trade, plant, moneys, & other real & personal property, both present & future, with the payment of the sums secured by the debentures, “to the intent that the same charge shall, until default in the payment of the principal or interest to accrue due or become payable in respect of the said sum of £500,000, or some part thereof, be a floating security upon the undertaking, works, & property of the co., not hindering sales or leases of, or other dealings with, any of the property or assets of the co. in the course of its business as a going concern.” The co. afterwards contracted to sell some of their land:—*Held*: the purchaser was entitled to reasonable evidence that there had been no default in the payment of the principal or interest of the debentures.—*Re HORNE & HELLARD* (1885), 29 Ch. D. 736; 54 L. J. Ch. 919; 53 L. T. 562.

*Annotations:—***Refd.** *Brunton v. Electrical Engineering Corp.*, [1892] 1 Ch. 434; *Driver v. Broad*, [1893] 1 Q. B. 744; *Government Stock Investment & Other Securities Co. v. Manila Ry.*, [1895] 2 Ch. 551. **Mentd.** *Taunton v. Warwickshire Sheriff* (1894), 72 L. T. 712.

ii. Power to Borrow Money and to Charge Specific Assets.

4729. General rule.]—The mtge. of the property & undertaking of a co. to secure debenture-

PART III. SECT. 34, SUB-SECT. 3.—
C. (d) ii.

d. Restriction on creating prior

*charge on property—Pledge of materials—Position of lender—With notice of contents of trust deed.]—*The trust deed to pltf. co., to secure debentures of

the A. Co., contained a clause charging in favour of the trustees its other assets whatsoever & wheresoever with the payment of all money for the time

holders or mtgees. in an equivalent position does not prevent the co. from making a valid charge on a specific asset as a security for an advance of money necessary for carrying on the business.—A trading co. has general power to borrow money to an extent which is reasonable & necessary for the purposes of the business.—A co. assigned to mtgees. all their land, fixtures, & stock-in-trade, & their undertaking, by way of security for a sum of money then due. The co. afterwards borrowed money for payment of wages & carrying on the business, & assigned to the lenders, who were aware of the previous mtge., a sum of money which would become due to the co. when certain work was completed. The lenders gave notice of this to the persons liable to pay the money. The work was completed after a winding-up order, & the money paid into ct.:—*Held*: the lenders had a claim on the money so paid into ct., in priority to the claim of the mtgees. of the undertaking.—*Re HAMILTON'S WINDSOR IRONWORKS, Ex p. PITMAN & EDWARDS* (1879), 12 Ch. D. 707; *sub nom. Re HAMILTON'S WINDSOR IRON WORKS, LTD., Ex p. PITMAN, Re HAMILTON'S WINDSOR IRON WORKS, LTD., Ex p. PROVISIONAL OFFICIAL LIQUIDATOR, Re HAMILTON'S WINDSOR IRON WORKS, LTD., Ex p. GENERAL CREDIT & DISCOUNT Co., LTD.*, 39 L. T. 658; 27 W. R. 445.

Annotations:—*Consd.* *Wheatley v. Silkstone & Haigh Moor Coal Co.* (1885), 29 Ch. D. 715. *Refd.* *Re Anglo-American Leather Cloth Co.* (1880), 42 L. T. 504; *General Auction Estate & Monetary Co. v. Smith*, [1891] 3 Ch. 432.

4730. — Equitable mortgage.]—WHEATLEY v. SILKSTONE & HAIGH MOOR COAL CO., No. 4691, *ante*.

4731. Money borrowed for wages & carrying on business.]—Re HAMILTON'S WINDSOR IRONWORKS, Ex p. PITMAN & EDWARDS, No. 4729, *ante*.

4732. Charge on particular freights.]—The directors of a shipping co. passed a resolution authorising its brokers to hypothecate the freight of two ships during their present voyages, to secure a present advance of sums not exceeding £5,000. Shortly afterwards the brokers transferred the freight of one of the ships to H. & Co. to secure an advance of £3,000. The transfer was signed by the brokers as managers of the co., who also gave an undertaking to collect the freight as agents to H. & Co. An action having been brought by the debenture-holders of the co. for the enforcement of their securities, & the co. having gone into liquidation, H. & Co. applied for an order that the liquidator of the co. should pay to appcts. out of moneys representing the freight of the ship in question the sum of £3,000:—*Held*: the co. had power under its arts. of assocn. & the resolutions passed pursuant thereto, notwithstanding the debenture debt, to charge specifically a particular asset for the purpose of carrying on the co.'s business; & therefore, H. & Co.'s security was prior to that of the debenture-holders.—*WARD v. ROYAL EXCHANGE SHIPPING CO., LTD., Ex p. HARRISON* (1887), 58 L. T. 174; 6 Asp. M. L. C. 239.

Annotation:—*Consd.* *Re Ind, Coope, Fisher v. The Co., Knox v. The Co., Arnold v. The Co.*, [1911] 2 Ch. 223.

being owing on the security of the deed, & providing that such charge should rank as a floating charge, & should in no way hinder the co. from selling or otherwise disposing of such assets in the ordinary course of its business, & for the purpose of carrying out same. The deed contained the restriction that the co. should not be entitled to mortgage or charge same

in priority to or *pari passu* with the security thereby constituted. It became necessary for the co. to obtain an advance to pay for pulp wood & to carry on their business, & debt. bank were applied to for a loan, & granted same upon security being given, under the terms of the Bank Act, s. 74, upon the co.'s wood at different places:—*Held*: (1) in determining the question

4733. Hypothecation to bankers of remittances from foreign agents.]—A limited co. owned a railway & also valuable coal mines in a foreign country. In 1888 it issued 5 per cent. debentures on the security of its railway, it being provided by the trust deed securing the same that the security should not, except in the case of suspension of payment by or liquidation of the co., affect its other property. In 1892 it issued 6 per cent. debentures charged on all its property, & ranking as a first charge on its property other than its railway, in respect of which the 1892 debentures ranked as a second charge after the 1888 debentures, it being provided by the trust deed securing the 1892 debentures that the co., notwithstanding that issue, should be at liberty in the ordinary course of its business, & for the purpose of carrying on the same, to sell, lease, & deal with its property for the time being, but not to create any mtge. or charge on its railway or coal mines in priority to the debentures, & not to sell its undertakings or any substantial part thereof without the concurrence of the trustees for the debenture-holders.

The ordinary course of business was for its foreign agents when they had sufficient cash in hand on account of the co. to remit it to the co. by bills through its agents in England, who sent the bills to the co.'s bankers for discounting or for collection on account of the co., & the bankers placed the proceeds to the credit of their account with the co. In Aug., 1896, the co. being in need of money to pay interest on its 6 per cent. debentures, obtained an advance from its bankers on the security of a letter hypothecating all remittances to be received from its foreign agents; & in Sept. the co., being in need of money to pay off certain debentures, obtained another advance from its bankers on a similar letter of hypothecation. In Mar., 1897, the co. made default in payment of interest on its debentures, & a debenture-holders' action was brought against it & a receiver appointed on Mar. 27. On Mar. 18, & again on Mar. 27, the foreign agents having no notice of the appointment of the receiver sent remittances to the co., which were handed to the receiver on Apr. 23 & May 3, respectively:—*Held*: the bankers, by virtue of the two letters of hypothecation, were entitled to these remittances in priority to the debenture-holders.—*Re ARAUCO Co., LTD.* (1898), 79 L. T. 336.

4734. Restriction on creating prior charge on property—Construction of clause.]—ROBSON v. SMITH, No. 4713, *ante*.

4735. — Title deeds of company's property left with company—Deposit of deeds with bank to secure overdraft.]—In 1885 a limited co. issued a series of debentures charged upon all its property both present & future, such charge to be a floating security, but so that the co. was not to be at liberty to create any mtge. or charge upon its freehold or leasehold hereditaments in priority to the said debentures. In 1895 the co. deposited the title-deeds of some of its property with its bankers, on a memorandum of charge under seal, as a security for an overdraft. When this charge was given, the bank had no notice of the existence

whether or not the restrictive clause in the trust deed was brought to the attention of the bank before the money was advanced, the positive evidence of an officer of the co. giving details of what occurred must be preferred to the evidence of the bank manager, who testified that he had no recollection on the subject; (2) the fact that the bank, in making the loan, relied upon

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of the debentures & made no inquiries. In 1896 a debenture-holders' action to enforce the security was commenced in which an inquiry as to priorities was directed:—*Held*: the debenture-holders, having left the title-deeds with the co. so as to enable it to deal with its property as if it had not been incumbered, could not set up their prior charge against the equitable mtge. to the bank; the bank had not been guilty of negligence, & having a stronger equity than the debenture-holders, was entitled to priority.—*Re CASTELL & BROWN, LTD., ROPER v. CASTELL & BROWN, LTD.*, [1898] 1 Ch. 315; 67 L. J. Ch. 169; *sub nom. Re CASTELL & BROWN, LTD., Ex p. UNION BANK OF LONDON*, 78 L. T. 109; 46 W. R. 248; 14 T. L. R. 194; 42 Sol. Jo. 213.

Annotations:—*Refd. Re Valletort Sanitary Steam Laundry Co., Ward v. Valletort Sanitary Steam Laundry Co.*, [1903] 2 Ch. 654; *Re Bourne, Bourne v. Bourne*, [1906] 1 Ch. 113. **Mentd.** *Walker v. Linom*, [1907] 2 Ch. 104.

4736. Transfer of shares standing in company's name to bankers.]—The C. co. for the purpose of raising capital issued mtge. debentures amounting to £38,000 secured by a trust deed. By each debenture the C. co. thereby charged its undertaking & property whatsoever & wheresoever including its uncalled capital. By indorsed conditions the debentures were to rank *pari passu* on the property charged, but so that the co. might from time to time mtge. or charge the premises up to £20,000 with its bankers. With that exception the charge thereby created was to be a floating security, but so that the co. should not be at liberty to create any mtge. or charge ranking in priority to or *pari passu* with the charge thereby created. The C. co. was to keep a register of the names of debenture-holders & particulars of their debentures. The money secured by the debentures was to become payable if the C. co. created any charge in priority to them. The debentures were duly registered under Companies Act, 1900 (c. 48), s. 14, in the year 1903. The four directors of the C. co. having an overdrawn account with the M. bank—who were not the co.'s ordinary bankers—on Apr. 10, 1905, transferred 5,000 shares in the R. co. which were standing in the share register of that co. in the name of the C. co., to the M. bank, as security for the overdraft, executing a banker's memorandum of deposit under the C. co.'s common seal as security for the overdraft. A receiver & manager of the C. co.'s property was appointed in a debenture-holders' action on July 14, 1906; who, on presentation to the R. co. of the transfer for registration, objected to registration of the shares in the M. bank's name & gave notice to the bank not to deal with the shares. By art. 65 of the arts. of assocn. of the C. co., the directors of the C. co. were empowered to borrow money for the purposes of the co.

On an application by the M. bank to have their names inserted on the register of members of the R. co.:—*Held*: (1) the transaction with the M. bank was within the ordinary course of business

of the C. co. & power of charge fell within the powers of the directors; (2) even if a proportion of the advance was applied in wiping off a private overdraft of the directors, that would not, unless the whole transaction was *ultra vires*, prevent the bank obtaining registration in order to enforce their mtge. security; (3) assuming that the bank had notice that there were debentures which required to be filed under 1890 (Winding Up) Act, s. 14, if they had inspected the register they would not have found out in that way that the debentures did include a provision that no charge should be created on the C. co.'s property in priority to them, only that there were debentures which charged the property of the co., & not having notice in that way they were entitled to an order for registration of the shares.—*Re STANDARD ROTARY MACHINE CO., LTD.* (1906), 95 L. T. 829; 51 Sol. Jo. 48.

Annotation:—*As to (3) Refd. Wilson v. Kelland*, [1910] 2 Ch. 306.

4737. — Consent of debenture-holders—Whether applicable to floating charge or charge on specific assets.]—A limited co. issued first mtge. debentures for £3,700,000 out of a total authorised issue of £6,000,000. These debentures purported to create a floating charge on all the property of the co., but this was not to interfere—until default had been made in payment of principal or interest—with the dealing with & distribution of the said property. Condition 1 of the debentures provided that the debenture was “one of an issue of like debentures for the aggregate sum of £6,000,000—part of the said authorised issue of £6,000,000—the whole of which debentures of such authorised issue are intended to rank *pari passu* as a first charge upon all the co.'s property.” Condition 17 provided that a meeting of debenture-holders might “sanction the creation & issue by the co. of debentures or any other security ranking as part of or *pari passu* with the before-mentioned £6,000,000 debentures, & to such amounts & bearing such rates of interest & generally on such terms & conditions as may be sanctioned or prescribed at any such meeting”:—*Held*: condition 17 only referred to floating charges, & did not prevent the co. from creating specific charges on specific assets, having priority over the debentures, without calling a meeting of the debenture-holders.—*COX MOORE v. PERUVIAN CORPN., LTD.*, [1908] 1 Ch. 604; 77 L. J. Ch. 387; 98 L. T. 611; 15 Mans. 191.

4738. Notice of restriction.]—A limited co. issued debentures charging all its property both present & future, & containing a condition that the co. should not be at liberty to create any mtge. or charge in priority to the debentures. Subsequently the co. obtained a loan from resps. on the security of an assignment to them of its interest in moneys due from an insurance co. When the loan & assignment were effected resps. solr., who negotiated the matter for them, knew that debentures had been issued, but did not know in what form they were issued, & having been misled by the managing director of the co. into

the assignment under the Bank Act, s. 74, could not prejudicially affect pltf's. when it was shown that the advance was made after notice of the restriction contained in the trust deed.—*INDIAN & GENERAL INVESTMENT TRUST, LTD. v. UNION BANK* (1908), 42 N. S. R. 353; 40 S. C. R. 510.—**CAN.**

• ——— **Transfer of debts due to company.]—**Pltf's., trustees for bondholders of deft. co. under mtge.

of all their real estate & assets, containing a trust in the words “upon trust that trustees shall permit the co. to continue & carry on the undertaking & business of the co. as directors may deem expedient, & the co. may pledge or mortgage the stock-in-trade finished or unfinished, & raw material therefor, but may not pledge the real property, fixtures, machinery, or plant, or any part thereof,” brought action to recover certain material, manu-

factured & unmanufactured, pledged, & certain debts due the co., transferred, to a bank for advances made:—*Held*: directors of co., notwithstanding the mtge., had the right to pledge the material to the bank, & without a two-thirds vote of shareholders of co., required by Ont. Joint Stock Companies Act, s. 49; & the transfer of debts to bank was a necessary power in the directors in order to carry on business under sect. 46, & both

believing that there was nothing in the debentures to affect his client's security, he did not require to see the form. Resps. gave notice of the assignment to the insurance co., & subsequently the debenture-holders gave notice to the insurance co. of the prior charge created by the debentures. There are three forms in which debentures are usually issued. In two of them the debenture does not, & in the third it does, restrict the co. from creating any charge upon its property which shall have priority over the charge created by the debenture:—*Held*: resps. were not affected with constructive notice of the restrictive clause in the debentures, & therefore the assignment gave them a charge upon the insurance moneys in priority to the debenture-holders.—**ENGLISH & SCOTTISH MERCANTILE INVESTMENT CO. v. BRUNTON**, [1892] 2 Q. B. 700; 62 L. J. Q. B. 136; 67 L. T. 406; 41 W. R. 133; 8 T. L. R. 772; 4 R. 58, C. A.

Annotations:—**Consd.** *Black v. Williams* (1894), 64 L. J. Ch. 137; *Molynaux v. Hawtrey*, [1903] 2 K. B. 487; *Re Valletort Sanitary Steam Laundry Co., Ward v. Valletort Sanitary Steam Laundry Co.*, [1903] 2 Ch. 654. **Refd.** *Blackburn v. Mason* (1893), 68 L. T. 510; *Manchester Trust v. Furness*, [1895] 2 Q. B. 539. **Mentd.** *Brown, Shipley v. I. R. Comrs.*, [1895] 1 Q. B. 240.

4739. ———.]—(1) On Nov. 26, 1898, the managing director of a limited co., forgetting that their first mtge. debentures, though only constituting a floating security, precluded the creation of any prior charge, deposited their title-deeds with their bank to secure the present & future overdraft of their current account. The bank, though aware that debentures had been issued, some of which they held as security for another customer's account, made no inquiry in the matter:—*Held*: (1) the mere possession of the debentures as security for another customer's account did not affect the bank with notice of their contents in their dealing with the co.; (2) as the co.'s managing director by depositing the title-deeds impliedly represented that the co. could give a valid first charge, the bank, though aware that debentures had been issued, were not put on inquiry, & were entitled to priority.

(2) On Mar. 17, 1900, the co. issued a second mtge. debenture to the bank as a collateral security for an extended overdraft. This debenture was expressed to be subject to the first mtge. debentures:—*Held*: the bank did not thereby obtain notice of the terms of the first mtge. debentures so as to postpone their equitable mtge. in respect of subsequent advances.—*Re VALLETORT SANITARY STEAM LAUNDRY CO., LTD., WARD v. VALLETORT SANITARY STEAM LAUNDRY CO., LTD.*, [1903] 2 Ch. 654; 72 L. J. Ch. 674; 89 L. T. 60; 19 T. L. R. 593.

Annotations:—*As to* (1) **Folld.** *Re Standard Rotary Machine Co.* (1906), 95 L. T. 829. *As to* (2) **Folld.** *Re Bourne, Bourne v. Bourne*, [1906] 1 Ch. 113.

4740. Purchase of property—Mortgage to vendor to secure purchase price—Mortgage of equity of redemption.—In 1901 a co. assured all its property present & future upon trust to secure debentures. The debenture trust deed provided that it should operate as a floating security, but so that the co. should not be at liberty to create any mtge. or charge on the premises ranking in priority or *pari passu* with the security created in favour

of the debentures. The debentures provided that the charge thereby created should operate as a floating charge, but that nothing therein contained should prevent the co. from charging by way of specific mtge., either *pari passu* or in priority to the charge thereby created, any after-acquired real or leasehold property. In 1905 it purchased certain other real property & mortgaged it to the vendor to secure the unpaid balance of the purchase-money. In 1906 it mortgaged the equity of redemption of the same property to pltf., who in 1909, after action brought, took a transfer of the mtge. of 1905:—*Held*: pltf. was entitled to priority over the debentures in respect of the mtge. of 1905, as the vendor's unpaid lien for the purchase-money, which was secured by the mtge., was paramount to the interest of the purchasers & any persons claiming through them, but by virtue of the terms of the debenture trust deed he was not entitled to priority in respect of the mtge. of 1906.

If the priority had turned upon the question of notice, the particulars registered pursuant to Companies Act, 1900 (c. 48), s. 14, would have amounted to constructive notice of a charge affecting the property but not of any special restrictions upon dealings by the co. with its property in the usual manner when the subsisting charge is a floating security.—**WILSON v. KELLAND**, [1910] 2 Ch. 306; 79 L. J. Ch. 580; 103 L. T. 17; 26 T. L. R. 485; 54 Sol. Jo. 542; 17 Mans. 233.

iii. On Landlord's Power of Distress.

4741. General rule.—*Re ROUNDWOOD COLLIERY CO., LEE v. ROUNDWOOD COLLIERY CO.*, No. 4747, *post*.

4742. Debentures exceeding value of assets.—Where furniture & chattels on premises demised to a co. which is in course of winding up are comprised in the debentures of the co., & the value of the furniture & chattels is less than the amount of the debenture debt, such furniture & chattels are not the property of the co. within 1862 Act, s. 163, & the landlord may distrain upon them for arrears of rent due to him previously to the commencement of the winding up.—*Re NEW CITY CONSTITUTIONAL CLUB CO., Ex p. PURSELL* (1887), 34 Ch. D. 646; 56 L. J. Ch. 332; 56 L. T. 792; 35 W. R. 421; 3 T. L. R. 331, C. A.

Annotation:—**Extd.** *Re Harpur's Cycle Fittings Co.*, [1900] 2 Ch. 731.

4743. ———.]—H. granted a lease to X. which was purchased by a co., but no assignment of it was taken. The co., however, entered into occupation of the demised premises, & gave H. bills of exchange for rent overdue, which bills were dishonoured. After the dishonour the co. passed an extraordinary resolution for voluntary winding up, & then the landlord distrained for the rent on the co.'s chattels. These, however, were subject to a floating security contained in debentures covering all the co.'s assets, which were insufficient in value to satisfy the debenture debt. No receiver had been appointed. The liquidators having moved to restrain the landlord from proceeding with the distress:—*Held*: (1) but for the existence of the debentures, the landlord

securities were valid in hands of bank.—**TRUSTS & GUARANTEE CO. v. ABBOTT MITCHELL IRON & STEEL CO. OF ONTARIO, LTD.** (1902), 11 O. L. R. 403; 7 O. W. R. 889.—**CAN.**

1. ——— *Specific security given—Position of lender—Onus of establishing*

absence of notice.—The question was as to the validity of a specific security created by a trading co., in the ordinary course of business, as against the floating security created by a previous trust deed to secure bonds issued by the co.:—*Held*: the plea of purchase or value without notice must be

proved in its entirety by the party offering it; it is not incumbent on the opposite party to prove notice after the purchase for value is established.—**UNION BANK OF HALIFAX v. INDIAN & GENERAL INVESTMENT TRUST** (1908), 40 S. C. R. 510.—**CAN.**

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would have been restrained, as he had a right to prove in the winding up; (2) as the assets were covered by the debentures & were insufficient to satisfy the debenture debt, the liquidator had no right to intervene, & the non-appointment of a receiver made no difference.—*Re HARPUR'S CYCLE FITTINGS Co.*, [1900] 2 Ch. 731; 69 L. J. Ch. 841; 83 L. T. 407; 8 Mans. 90.

(e) *Charge becoming Fixed.*

i. *When Charge becomes Fixed.*

4744. On winding up.]—A co. borrowed money upon the security of debentures, each of which contained a covenant with the holder to pay the principal at a future date with interest in the meantime, an assignment to the holder of all the stock chattels & effects which might from time to time be held by the co., & a charge of the same as security for the repayment of principal & interest, with a proviso that until default in payment of principal or interest for 21 days after the same respectively ought to be paid the co. might receive & apply all its assets for its own purposes. Before the principal money became due or the interest had fallen into arrear, the co. went into liquidation:—*Held*: the moment the winding up commenced the money secured by the debentures became payable, & the debenture a security enforceable upon all the assets of the co. as they existed at the date of the winding up.—*HODSON v. TEA Co.* (1880), 14 Ch. D. 859; 49 L. J. Ch. 234; 28 W. R. 458.

Annotations:—**Folld.** *Wallace v. Universal Automatic Machines Co.*, [1894] 2 Ch. 547; *Re Crompton, Player v. Crompton*, [1914] 1 Ch. 954. **Refd.** *Re Southern Brazilian Rio Grande do Sul Ry.*, [1905] 2 Ch. 78.

4745. —.]—Where debentures issued by way of floating security, & charging the undertaking with repayment of principal & interest, contained a covenant for payment on a specified day & of interest in the interim, but contained no condition making the principal payable on default in payment of interest or on a winding up:—*Held*: the principal sum was rendered due & payable by a winding up before such day.—*WALLACE v. UNIVERSAL AUTOMATIC MACHINES Co.*, [1894] 2 Ch. 547; 63 L. J. Ch. 598; 70 L. T. 852; 10 T. L. R. 501; 1 Mans. 315; 7 R. 316, C. A.

Annotations:—**Folld.** *Re Crompton, Player v. Crompton*, [1914] 1 Ch. 954. **Mentd.** *Re Borax Co., Foster v. Borax Co.* (1900), 83 L. T. 638.

4746. —.]—*ROBSON v. SMITH*, No. 4713, *ante*.

4747. — Passing of first special resolution.]—Where a co. has issued debentures which are a floating charge on its chattels, a distress under a power conferred either before the debentures were issued, or while they were a floating security & levied before the debentures ceased to be a floating security, is valid against the holders of the debentures.

The debentures would not cease to be a floating security for this purpose by reason of the passing by the co. of the first only of the two special resolutions to wind up, nor by reason of the making of an order in the debenture-holders' action appointing a receiver subject to his giving security, which order was never drawn up & never came to

the notice of the landlord distraining.—*Re ROUNDWOOD COLLIERY Co.*, *LEE v. ROUNDWOOD COLLIERY Co.*, [1897] 1 Ch. 373; 66 L. J. Ch. 186; 75 L. T. 641; 45 W. R. 324; 13 T. L. R. 175; 41 Sol. Jo. 240, C. A.

Annotation:—**Apld.** *Venner's Electrical Cooking & Heating Appliances v. Thorpe*, [1915] 2 Ch. 404.

4748. —.]—*Re HUBBARD & Co., LTD., HUBBARD v. HUBBARD & Co., LTD.*, No. 4602, *ante*.

4749. — Condition of debenture—Winding up otherwise than for reorganisation, reconstruction or amalgamation.]—In 1895 a co. issued a series of debentures of £100 each to secure the aggregate principal sum of £100,000. The debentures, which were all in the same form, provided that the co. would, on Jan. 1, 1920, or on such earlier day as the principal moneys thereby secured should become payable in accordance with the conditions endorsed thereon, pay to the registered holder the sum of £100, with interest thereon as therein mentioned. The conditions provided that the principal moneys thereby secured should become immediately payable if an order was made or an effective resolution was passed for winding up the co. otherwise than for the purposes of reorganisation, reconstruction, or amalgamation. The debentures were secured by a trust deed which contained a similar provision. The combined effect of the debentures & the trust deed was to give a floating charge on all the assets. In June, 1913, the co. passed a resolution for winding up for the purposes of reconstruction, & subsequently the assets of the co. were transferred to a new co. which had been incorporated for the purpose of taking them over. Two debenture-holders brought an action on behalf of themselves & all other holders of debentures in the old co. to have the trusts of the trust deed carried into execution under the order of the ct. On an application by plffs. for the appointment of a receiver:—*Held*: when the business of the transferor co. came to an end by the winding up, the security ceased to be a floating security of that co.; the debentures then became payable & the security became enforceable, & plffs. were entitled to the appointment of a receiver notwithstanding the provisions in the debentures & trust deed with reference to winding up for the purposes of reconstruction.—*Re CROMPTON & Co., LTD., PLAYER v. CROMPTON & Co., LTD.*, [1914] 1 Ch. 954; 83 L. J. Ch. 666; 110 L. T. 759; 58 Sol. Jo. 433; 21 Mans. 200.

4750. On sale of undertaking—Otherwise than in ordinary course of business.]—The right of the holder of a debenture which is a charge on the undertaking of a co. to enforce his security attaches if the co. parts with the whole or substantially the whole of its undertaking & assets otherwise than in the ordinary course of business, & ceases to be a going concern. The proper remedy of the debenture-holder in such a case is by the appointment of a receiver of the property comprised in his debenture.—*HUBBUCK v. HELMS* (1887), 56 L. J. Ch. 536; 56 L. T. 232; 35 W. R. 574; 3 T. L. R. 381.

Annotations:—**Consd.** *Re Borax Co., Foster v. Borax Co.* (1900), 83 L. T. 638. **Mentd.** *Robson v. Smith*, [1895] 2 Ch. 118; *Re Crighton & Law Car & General Insce. Corpn.* [1910] 2 K. B. 738.

4751. — Sale of business one of company's objects.]—*Re BORAX Co., FOSTER v. BORAX Co.*, No. 4722, *ante*.

PART III. SECT. 34, SUB-SECT. 3.—
C. (e) i.

g. General rule.]—The question whether the security given by de-

bentures & a trust deed, which in its inception was a floating security, had on a certain date become fixed & attached to the co.'s assets as they then stood, depends upon the question

whether the authority of the co. to use, in the course of its business, the assets charged with the money owing to the debenture holders had then been determined. It is not necessary, in

4752. Objects comprising carrying on of three distinct businesses—Sale of one business.]

The objects of a co. comprised the carrying on three distinct businesses, supplemental to one another. The ct. refused, at the instance of debenture-holders having a floating charge on the whole undertaking, to restrain the sale of one business.—*Re VIVIAN (H. H.) & Co., LTD., METROPOLITAN BANK OF ENGLAND & WALES, LTD. v. VIVIAN (H. H.) & Co., LTD.*, [1900] 2 Ch. 654; 69 L. J. Ch. 659; 82 L. T. 674; 48 W. R. 636; 44 Sol. Jo. 530; 7 Mans. 470.

Annotation:—Reid. Re Borax Co., Foster v. Borax Co., [1901] 1 Ch. 326.

4753. On stoppage of business.] — ROBSON v. SMITH, No. 4713, ante.

4754. On appointment of receiver on behalf of debenture-holders.] — ROBSON v. SMITH, No. 4713, ante.

4755. —.] — (1) Debentures issued by a limited co., being a floating charge on its assets, do not take effect as a charge as from the date of their issue, but only from the date of the appointment of a receiver on behalf of the debenture-holders, & then subject to the existing equities.

(2) A limited co. agreed to sell to B. & Co. 7,000 barrels out of their stock at 3s. 6d. each. B. & Co. paid for them; but the co. fell into difficulties, its stock of barrels was exhausted, & as to more than 4,000 it failed to deliver them. The co. had to the knowledge of B. & Co. issued debentures in the usual form of floating securities on all the property of the co. The debenture-holders obtained the appointment of a receiver at which time B. & Co. owed the co. a liquidated sum for rent, & had the above claim against the co. in respect of the barrels:—*Held*: (1) the claim of B. & Co. against the co. was a liquidated claim of 3s. 6d. for each barrel not delivered, there being as to each such barrel a total failure of consideration which entitled B. & Co. to recover back their purchase-money; (2) B. & Co. could set off this demand against what they owed to the co.; (3) the knowledge of the existence of the debentures as a floating security, at the time when the debt due to them was contracted was not such notice of an assignment as to prevent a set off binding the debenture-holders.—*BIGGERSTAFF v. ROWATT'S WHARF, LTD., HOWARD v. ROWATT'S WHARF, LTD.*, [1896] 2 Ch. 93; 65 L. J. Ch. 536; 74 L. T. 473; 44 W. R. 536, C. A.

Annotations:—Generally, Reid. Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co., [1897] 1 Ch. 373; *Nelson v. Faber*, [1903] 2 K. B. 367. *Mentd. Re Bank of Syria, Owen & Ashworth's Claim, Whitworth's Claim*, [1900] 2 Ch. 272; *Premier Industrial Bank v. Carlton Manufacturing Co. & Crabtree*, [1909] 1 K. B. 106; *Re Fireproof Doors, Umney v. Fireproof Doors*, [1916] 2 Ch. 142; *Dey v. Pullinger Engineering Co.*, [1921] 1 K. B. 77

4756. — Subject to giving of security—Order not drawn up.] — Re ROUNDWOOD COLLIERY CO., LEE v. ROUNDWOOD COLLIERY CO., No. 4747, ante.

order that the floating security may attach, that the co.'s business should be brought to an end finally & for ever.—*GEORGHEGAN v. GREYMOUTH-POINT ELIZABETH RY. & COAL CO., LTD.* (1897), 16 N. Z. L. R. 749.—N.Z.

PART III. SECT. 34, SUB-SECT. 3. — C. (e) ii.

k. To what assets charge attaches —Charge becoming fixed by appointment of receiver—Effect of contract.] — Deft. co. had entered into a contract with a corpn. for the construction of certain works. By one of the clauses of the contract the corpn. was empowered to determine the contract & complete the work, & by another clause the corpn. was given power upon

such determination to take possession of & use any materials, plant, etc., provided by deft. co. for the purpose of the work. Subsequently to this contract deft. co. gave to pltf. bank a floating charge over all its property & assets. On Apr. 11, 1913, deft. co. commenced an action against the corpn. to set aside the contract, or in the alternative for damages for its breach. On Apr. 23, 1913, the corpn. gave notice to deft. co. determining the contract. On Apr. 30, 1913, a receiver & manager was appointed in this action at the suit of pltf. bank. By the order appointing him, the receiver & manager was directed to take possession of deft. co.'s assets, which he accordingly proceeded to do.

4757. —.] — Re HUBBARD & Co., LTD., HUBBARD v. HUBBARD & Co., LTD., No. 4602, ante.

4758. On default in payment of interest—No active steps taken by debenture-holders.] —A co. issued debentures charging "by way of floating security all its property whatsoever & wheresoever, both present & future, including its uncalled capital for the time being," subject to a condition that, notwithstanding the said charge, the co. was to be at liberty to carry on its business until default should be made in payment of interest for three months, or until an order of ct. should have been made, or a special or extraordinary resolution passed for winding up:—*Held*: the mere default for three months in payment of interest, without any active interference on the part of the debenture-holders, did not operate to convert the floating charge into a fixed security, so as to prevent the co. from dealing with its property.—*GOVERNMENTS STOCK & OTHER SECURITIES INVESTMENT CO. v. MANILA RY. CO.*, [1897] A. C. 81; 66 L. J. Ch. 102; 75 L. T. 553; 45 W. R. 353; 13 T. L. R. 109, H. L.; *affg.*, [1895] 2 Ch. 551, C. A.

Annotations:—Consd. Biggerstaff v. Rowatt's Wharf, Howard v. Rowatt's Wharf (1896), 74 L. T. 473; *Re Yorkshire Woolcombers' Assn., Houldsworth v. Yorkshire Woolcombers Assn.*, [1903] 2 Ch. 284. *Expld. Illingworth v. Houldsworth*, [1964] A. C. 355. *Consd. Cox Moore v. Peruvian Corp.*, [1908] 1 Ch. 604. *Apld. Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979. *Consd. De Beers Consolidated Mines v. British South Africa Co.*, [1912] A. C. 52. *Apld. National Provincial Bank of England v. United Electric Theatres*, [1916] 1 Ch. 132; *Hamer v. London, City & Midland Bank* (1918), 87 L. J. K. B. 973. *Reid. Re Hubbard, Hubbard v. Hubbard* (1898), 68 L. J. Ch. 54; *Re Vivian, Metropolitan Bank of England & Wales v. Vivian*, [1900] 2 Ch. 654; *Re Borax Co., Foster v. Borax Co.*, [1901] 1 Ch. 326; *Nelson v. Faber*, [1903] 2 K. B. 367; *Norton v. Yates*, [1906] 1 K. B. 112; *Re Crompton, Player v. Crompton*, [1914] 1 Ch. 954.

4759. On demand for repayment.] — EVANS v. RIVAL GRANITE QUARRIES, LTD., No. 4698, ante.

4760. On notice of company's bankers claiming company's bank balance attached under garnishee order.] — EVANS v. RIVAL GRANITE QUARRIES, LTD., No. 4698, ante.

ii. On What Assets.

4761. To what assets charge attaches—Charge becoming fixed by winding up—Assets at date of commencement of winding up.] — HODSON v. TEA CO., No. 4744, ante.

4762. — Charge becoming fixed by appointment of receiver—Whether assets at date of creation or fixing.] — BIGGERSTAFF v. ROWATT'S WHARF, LTD., HOWARD v. ROWATT'S WHARF, LTD., No. 4755, ante.

iii. Effect as regards Execution Creditors and Garnishees.

4763. General rule.] —Where a co. has issued debentures giving a floating charge on its present

The corpn. then claimed the material & plant of deft. co., which the receiver refused to deliver. The corpn. now moved *pro interesse suo* in the action, for an order directing the receiver & manager to deliver possession of the materials & plant to the corpn., who claimed it under the above clause in the contract. Judgment had been obtained in this action, declaring pltf. co. to have a first charge on all the assets of the deft. co. The action by deft. co. against the corpn. was still pending:—*Held*: the corpn. was not entitled to possession as against the receiver & manager under the floating charge.—*BANK OF MONTREAL v. WEST-HOLME LUMBER CO., LTD.* (1913), 18 B. C. R. 65.—CAN.

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& future property, the debenture-holders are entitled to the appointment of a receiver on the sole ground of jeopardy to the security, even although nothing may be due & presently payable to the debenture-holders. The fact that the creditor has issued a writ & signed judgment, & is in a position to issue execution, may constitute jeopardy. Persons supplying such a co. with goods have an expectation of being paid only when such payment would be in the ordinary course of business. This expectation is intercepted when a receiver is appointed, but even before the appointment those creditors, as between themselves & the debenture-holders, have no right to enforce payment of their debts in priority to the latter.

An execution creditor takes subject to all equities of the debenture-holders.—*Re LONDON PRESSED HINGE CO., LTD., CAMPBELL v. LONDON PRESSED HINGE CO., LTD.*, [1905] 1 Ch. 576; 74 L. J. Ch. 321; 92 L. T. 409; 53 W. R. 407; 21 T. L. R. 322; 49 Sol. Jo. 334; 12 Mans. 219.

Annotations:—*Consd.* *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979. *Refd.* *Re Chic*, [1905] 2 Ch. 345; *Re Melson*, [1906] 1 Ch. 841; *Norton v. Yates*, [1906] 1 K. B. 112; *Re Newdigate Colliery*, *Newdigate v. Newdigate Colliery*, [1912] 1 Ch. 468.

4764. —.]—*EVANS v. RIVAL GRANITE QUARRIES, LTD.*, No. 4698, *ante*.

Compare No. 4783, *post*.

4765. Entry of sheriff under writ of *fi. fa.*—Subsequent petition for winding up & order.]—On Jan. 16 & 17, 1890, the sheriff, under two writs of *fi. fa.*, entered into possession of the co.'s theatre, & seized personal chattels of the co. On Jan. 18, a winding-up petition was presented, & an order was made upon it on Feb. 1. From Jan. 18 to Jan. 27, the sheriff took the money received from the public at the door of the theatre, & on Jan. 24, he paid the execution creditors out of the takings. The sheriff remained in possession, under a third writ lodged after the presentation of the petition, until Feb. 10, when he withdrew under an order of the ct., without having sold any of the goods seized. He was afterwards ordered to pay the whole of the takings to the liquidator, which he did. The liquidator sold the goods, & the sheriff claimed out of the proceeds the sums paid to the execution creditors under the writs of Jan. 16 & 17. All the real & personal property of the co. was subject to debentures by way of floating security:—*Held*: the debenture-holders, at any rate until the sale of the goods, were entitled in priority to the execution creditors, & the sheriff was not entitled to any relief as against them.—*Re OPERA, LTD.*, [1891] 3 Ch. 260; 60 L. J. Ch. 839; 65 L. T. 371; 39 W. R. 705; 7 T. L. R. 655, C. A.

Annotations:—*Distd.* *Robson v. Smith*, [1895] 2 Ch. 118. *Appld.* *Richards v. Kidderminster Overseers*, *Richards v. Kidderminster Corpn.*, [1896] 2 Ch. 212. *Consd.* *Re Roundwood Colliery Co.*, *Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373. *Folld.* *Davey v. Williamson*, [1898] 2 Q. B. 194. *Distd.* *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979. *Refd.* *Taunton v. Warwickshire Sheriff*, [1895] 2 Ch. 319; *Duck v. Tower Galvanising Co.*, [1901] 2 K. B. 314; *Re London Pressed Hinge Co.*, *Campbell v. London Pressed Hinge Co.*, [1905] 1 Ch. 576.

4766. Seizure by sheriff—Company's property vested in trustees under trust deed.]—Mtge. debentures issued by a limited co. were secured by a floating charge on all the property of the co., subject to the conditions that no part of the property should be dealt with except in the ordinary course of the business, & that the debenture-holders should be entitled to the benefit of a trust deed which vested in the trustee for the benefit of

the debenture-holders the leasehold property & uncalled capital, & gave him the right to call upon the co. to vest in him all other property of the co. except chattels within the meaning of the Bills of Sale Acts; but the co. was left free to carry on the business & deal with the assets until the debenture-holders or the trustee took action on the happening of certain events, by one of which the security constituted by the trust deed became enforceable if any execution were sued out against the property of the co. Before the due date for the payment of the debentures had arrived execution was issued against the co. under a judgment obtained for trade goods supplied to them, & goods of the co. charged by the debentures were seized by the sheriff under a writ of *fi. fa.* No winding-up resolution had been passed, no receiver had been appointed, & the trustee had not put in force his powers under the trust deed. In an interpleader issue between the execution creditors & the debenture-holders:—*Held*: the rights of the debenture-holders prevailed over those of the execution creditors, as the goods seized were validly charged with the payment of the debentures, & the rights of the debenture-holders could not be affected by the seizure of goods in which the judgment debtors had no interest available to satisfy the judgment debt; & the security constituted by the trust deed had become enforceable by reason of the execution against the co., the seizure under the execution not being a dealing by the co. in the ordinary way of its business.—*DAVEY & CO. v. WILLIAMSON & SONS*, [1898] 2 Q. B. 194; 67 L. J. Q. B. 699; 78 L. T. 755; 46 W. R. 571; 42 Sol. Jo. 525, D. C.

Annotations:—*Consd.* *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979. *Refd.* *Re London Pressed Hinge Co.*, *Campbell v. London Pressed Hinge Co.*, [1905] 1 Ch. 576. *Cairney v. Back*, [1906] 2 K. B. 716; *Norton v. Yates*, [1906] 1 K. B. 112.

4767. — Receiver appointed before sale—Sheriff paid out by debenture-holders.]—A joint-stock co. issued debentures charging all the property & assets of the co. as a floating security. On Feb. 14, 1895, the sheriff, in execution of a judgment obtained by a creditor of the co., seized certain chattels covered by the debentures. On Feb. 16, the debenture-holders commenced an action to enforce their security, & informed the sheriff thereof on Feb. 18. On Feb. 21, the day advertised for the sale of the goods by the sheriff, the debenture-holders paid out the sheriff under protest, & on Feb. 22, they obtained the appointment of a receiver:—*Held*: the debenture-holders were entitled to the money in the hands of the sheriff in priority to the execution creditor.—*TAUNTON v. WARWICKSHIRE (SHERIFF)*, [1895] 2 Ch. 319; 64 L. J. Ch. 497; 72 L. T. 712; 43 W. R. 579; 39 Sol. Jo. 522, C. A.

Annotations:—*Refd.* *Government Stock Investment & Other Securities Co. v. Manila Ry.*, [1895] 2 Ch. 551; *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979.

4768. Garnishee order—Payment actually made by garnishee to garnishor—Before charge fixed.]—*ROBSON v. SMITH*, No. 4713, *ante*.

4769. — Debenture issued by company after service of garnishee order.]—A garnishee order creates no charge on the property or assets of the garnishee; therefore, where a co., after service upon them of a garnishee order absolute, issued for good consideration to a person having notice of the garnishee order a debenture which, on process being issued against them, became a charge on the whole of their assets:—*Held*: the debenture-holder in respect of goods of the co. was entitled to priority over the garnishor issuing execution

under his garnishee order.—*GEISSE v. TAYLOR*, [1905] 2 K. B. 658; 74 L. J. K. B. 912; 93 L. T. 534; 54 W. R. 215; 12 Mans. 400, D. C.

Annotations:—*Refd.* *Norton v. Yates*, [1906] 1 K. B. 112; *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979. *Mentd.* *Galbraith v. Grimshaw & Baxter*, [1910] 1 K. B. 339.

4770. — Subject to all existing equities over debt.—In 1903 a limited co. issued a series of debentures creating the usual first charge “by way of floating security” on “all real & personal property now or any time hereafter belonging to the co.” On Jan. 17, 1905, Y. & Co. obtained judgment against the co., & on the same day they obtained & served on T. & Sons a garnishee order *nisi* for a debt of £434 owing by that firm to the co. On Jan. 19, a receiver & manager of the co. was appointed in a debenture-holders’ action. Notice of this appointment was served on Y. & Co. on Jan. 20. The debt of £434 having been claimed by both the judgment creditor & the receiver, the money was paid into ct. On an interpleader issue to determine the question of priority:—*Held*: as service of a garnishee order *nisi* did not operate as an assignment in equity or amount to a transfer of the debt, the right of the garnishor was subject to such rights & equities as already existed over this particular debt as the property of the co.; at the time the garnishee order was served there was an existing charge on this property by virtue of the floating security created by the debentures, which was capable of becoming a specific charge when the debenture-holders intervened, & consequently, the receiver was entitled to the money in ct. in priority to the judgment creditor.—*NORTON v. YATES*, [1906] 1 K. B. 112; 75 L. J. K. B. 252; 54 W. R. 183; 50 Sol. Jo. 95.

Annotations:—*Appld.* *Cairney v. Back*, [1906] 2 K. B. 746; *Sinnott v. Bowden*, [1912] 2 Ch. 414. *Refd.* *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979.

4771. — Receiver for debenture-holders appointed after garnishee order absolute.—In Jan. 1906, a limited co. issued to pltf. a mtge. debenture creating a first charge by way of floating security over all the property for the time being of the co. On June 15, 1906, deft. obtained judgment against the co., & served a garnishee order *nisi* on a bank in respect of a sum of money standing to the credit of the co. in the books of the bank. On June 25 the garnishee order was made absolute. On June 29 a receiver of the assets of the co. was appointed on behalf of pltf. under the powers contained in his debenture. An interpleader issue having been directed to determine whether pltf. or deft. was entitled to the money:—*Held*: a garnishee order absolute does not transfer to the garnishor the property in the garnished debt, & consequently the fact that the receiver was not appointed until after the garnishee order had been made absolute was immaterial, & pltf. was therefore entitled to the money in priority to deft.—*CAIRNEY v. BACK*, [1906] 2 K. B. 746; 75 L. J. K. B. 1014; 96 L. T. 111; 22 T. L. R. 776; 50 Sol. Jo. 697; 14 Mans. 58.

Annotations:—*Appld.* *Sinnott v. Bowden*, [1912] 2 Ch. 414. *Refd.* *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979.

See, generally, EXECUTION.

D. Enforcement of Contracts to Take Debentures.

See, now, 1908 Act, s. 105.

4772. Whether specific performance granted—Form of decree.—*WESTERN COUNTIES RY. CO. v. ANDERSON & CO.* (1892), 8 T. L. R. 595, C. A.

4773. — Contract to lend money to company on security of debentures.—(1) The rule that specific performance cannot be granted in respect

of a contract to lend money applies to a contract to lend to a co. money, payable by instalments, upon the security of debentures to be issued by the co.

(2) Where the lender makes default in payment, the moneys due for unpaid instalments do not constitute a debt to the co. & the co. are only entitled to damages for the actual loss caused by the breach of contract.—*SOUTH AFRICAN TERRITORIES v. WALLINGTON*, [1898] A. C. 309; 67 L. J. Q. B. 470; 78 L. T. 426; 46 W. R. 545; 14 T. L. R. 298; 42 Sol. Jo. 361, H. L.

Annotations:—*As to* (1) *Folld.* *Kuala Pah Rubber Estates v. Mowbray* (1914), 111 L. T. 1072. *Refd.* *Jarrah Timber & Wood Paving Corp. v. Samuel*, [1903] 2 Ch. 1; *Re Smelting Corp., Seaver v. Smelting Corp.*, [1915] 1 Ch. 472.

4774. — Prior forfeiture of debentures for non-payment of calls.—Pltfs. were a limited co., & deft. an allottee of certain debentures created by them. The debentures were issued on the terms of a debenture prospectus which contained provisions that the debentures should be payable “on application £1, on allotment £1, & the balance as required in calls not to exceed £4 per debenture at intervals of not less than 4 months,” & that non-payment of any instalment would render all previous payments liable to forfeiture “in the same manner as under arts. 36 to 45 of the co.’s arts. of assocn. shares are forfeitable on which calls are in arrear.” The debentures were allotted on May 26, 1913. On June 23, 1913, pltfs. made a first call payable on July 5. & on Oct. 23, 1913, a second call payable on Nov. 8. Deft. failed to pay these calls. Subsequently, the co. forfeited the debentures standing in his name. Art. 43 of the arts. of assocn., one of the arts. mentioned above dealing with the forfeiture of shares for non-payment of calls, provided that a shareholder whose shares had been forfeited should nevertheless be liable for all calls made & not paid at the time of the forfeiture. Pltfs. under this art. claimed the amount of the calls as being specific performance of the contract between them & deft.:—*Held*: (1) pltfs., having forfeited the debentures, were not in a position to ask for specific performance; (2) on the authority of *South African Territories v. Wallington*, No. 4773, *ante*, they had here no right to recover with respect to the debentures apart from specific performance; (3) in order to make art. 43 apply to the debentures clearer language should have been used than the general words above quoted; (4) the first call was bad, as being at a less interval than 4 months after May 26, 1913; the second call was good.—*KUALA PAHI RUBBER ESTATES, LTD. v. MOWBRAY* (1914), 111 L. T. 1072, C. A.

4775. Measure of damage—Special damage.—*WESTERN COUNTIES RY. CO. v. ANDERSON & CO.* (1892), 8 T. L. R. 595, C. A.

4776. — Actual loss.—*SOUTH AFRICAN TERRITORIES v. WALLINGTON*, No. 4773, *ante*.

4777. — Whether general or nominal.—Defts. agreed to purchase debentures of pltf. syndicate. Defts. failed to carry out the agreement:—*Held*: pltf. syndicate was entitled to recover from defts. general, & not merely nominal damages, for defts.’ breach of contract.—*WALLIS CHLORINE SYNDICATE, LTD. v. AMERICAN ALKALI CO., LTD.* (1901), 17 T. L. R. 656; 45 Sol. Jo. 654.

E. Agreements to Issue Debentures.

4778. Agreement to create charge—Defective execution of intention—Enforceable in equity.—*Re STRAND MUSIC HALL CO.*, No. 4577, *ante*.

4779. — Operation as charge.—In 1883, a

Sect. 34.—Borrowing and securing money: Sub-sect. 3, E. & F. (a) & (b).]

co. issued certain debentures, which were in the form of an agreement under the common seal of the co., to pay to the bearer on a specified day a sum of £100, with interest. These debentures themselves created no charge, but each contained a statement that it was issued upon & subject to the conditions endorsed thereon. Condition 5 was to the effect that the debenture-holders were entitled to the benefit of a certain covering deed, by which, subject to a certain mtge., the freehold buildings of the co. & all the machinery fittings, etc., of the co. in or about the premises, & any other that might be substituted therefor, were vested in trustees to secure the payment of the debentures. This deed was not registered under the Bills of Sale Acts. In 1884, the directors of the co. sent a circular to the debenture-holders stating that, in consequence of a defect in the debentures arising from the non-registration of the covering deed, they had caused new debentures to be sealed in their favour. The new form of debentures purported on the face of it to charge in favour of the holder or bearer the amount due on the debenture upon the co.'s undertaking, & all its property, both real & personal & was stated to be supplemental to the original bond of the holder to whom it was given. The co. was in course of being wound up, & the official liquidator now claimed the chattels comprised in the deed on the ground that the deed had not been registered under the Bills of Sale Acts:—*Held*: (1) having regard to condition 5, there was a contract on the part of the co. to give the debenture-holders a charge upon all the property of the co., & a charge was thereby constituted; (2) the debentures came within Bills of Sale Act, 1882 (c. 43), s. 17; (3) the supplemental debentures were issued to give a better security to the holders of the original debentures, & did not extend to property not comprised in the original debentures.—*ROSS v. ARMY & NAVY HOTEL CO.* (1886), 34 Ch. D. 43; 55 L. T. 472; 35 W. R. 40; 2 T. L. R. 907, C. A.

Annotations:—As to (1) *Apld.* *Re Queensland Land & Coal Co.*, *Davis v. Martin*, [1894] 3 Ch. 181. *Distd.* *Re Johnston Foreign Patents Co.*, *Re Johnston Die Press Co.*, *Re Johnstonia Engraving Co.*, *J. P. Trust v. The Cos.* (1904), 91 L. T. 124. *Refd.* *Levy v. Abercorris Slate & Slab Co.* (1887), 37 Ch. D. 260; *Re Bircham* (1895), 64 L. J. Ch. 768; *Brown, Shipley v. I. R. Comrs.*, [1895] 2 Q. B. 598; *Re Fireproof Doors, Umney v. The Co.*, [1916] 2 Ch. 142. As to (2) *Distd.* *Jenkinson v. Brandley Mining Co.* (1887), 19 Q. B. D. 568. *Refd.* *Topham v. Greenside Glazed Fire-Brick Co.* (1887), 37 Ch. D. 281; *G. N. Ry. v. Coal Co-op. Soc.*, [1896] 1 Ch. 187; *Richards v. Kidderminster Overseers, Richards v. Kidderminster, Corpn.*, [1896] 2 Ch. 212.

4780. ——— Debenture not in fact issued.]—
(1) A co. issued a prospectus offering for subscription £20,000, first mtge. debentures to be secured upon the entire property of the co. S. filled up a form of application which requested an allotment of debentures "upon the terms of the co.'s prospectus." The directors passed a resolution allotting the debentures to S., & the secretary wrote a letter communicating the allotment to him, & he paid the amount of his subscription. Subsequently a debenture trust deed was executed by which the co. granted to trustees for the debenture-holders "all & singular the freehold land & hereditaments specified in the first schedule hereto." The deed as executed contained no schedule, nor any description. No debentures were ever issued. The co. went into liquidation. S. claimed to rank as a debenture-holder & to be entitled to a charge on the co.'s property:—*Held*: there was a valid contract to allot to S.

debentures to be a charge on the entire property of the co., & though the debentures had not in fact been issued, still S. must be declared entitled to the charge for the amount advanced by him.

(2) A second prospectus was issued stating the debenture capital to be £20,000 in first mtge. debentures "of which a large amount has already been applied for & allotted. The remainder is now offered for subscription;" but there was no statement as to what the debentures now offered were to be secured upon. Q. applied for debentures on the faith of this prospectus & received notice of the acceptance of his offer to subscribe, & he then paid the amount of his subscription, but no debentures were ever issued to him:—*Held*: there was nothing to show on what security Q. had advanced his money, & he could not therefore be declared entitled to a charge on the co.'s property.—*Re NEW DURHAM SALT CO., STEVENSON'S & QUIN'S CASES* (1890), 7 T. L. R. 13; 2 Meg. 360.

4781. ———.]—A person who is entitled to have a debenture issued to him is a debenture-holder in equity & as such is entitled to the rights of a debenture-holder, even although the debenture has neither been sealed nor issued to him.—*DEY v. RUBBER & MERCANTILE CORPN., LTD.*, [1923] 2 Ch. 528; 39 T. L. R. 615; 67 Sol. Jo. 768.

4782. ——— Uncertainty as to property to be charged.]—*Re NEW DURHAM SALT CO., STEVENSON'S & QUIN'S CASES*, No. 4780, *ante*.

4783. ——— As against execution creditor.]—Where an agreement has been made by a joint-stock co. to issue debentures containing a charge upon all its property, an execution creditor who, subsequently to the agreement, but before the issue of the debentures, seizes property of the co., is only entitled to the property subject to the charge which is created in equity by the agreement to issue the debentures.—*SIMULTANEOUS COLOUR PRINTING SYNDICATE v. FOWERAKER*, [1901] 1 K. B. 771; 70 L. J. K. B. 453; 17 T. L. R. 368; 8 Mans. 307.

Annotations:—*Refd.* *Re London Pressed Hinge Co.*, *Campbell v. London Pressed Hinge Co.*, [1905] 1 Ch. 576; *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979.

Compare No. 4763, *ante*.

4784. ——— Whether contract binding under Statute of Frauds—Sufficiency of memorandum.]—*Re QUEENSLAND LAND & COAL CO., DAVIS v. MARTIN*, No. 4632, *ante*.

See, generally, CONTRACT, Vol. XII., pp. 129 *et seq.*

——— Necessity for writing.]—*Compare* No. 4826, *post*.

4785. ——— At option of creditor—Exercise of option.]—An option to call at any time for a specific amount of mtge. debentures of a given issue in satisfaction of a debt is a good equitable security while the issue remains unexhausted, & may be exercised after judgment in a debenture-holder's action.

A co. borrowed money from a first mtge. debenture-holder, giving him promissory notes & an option to call at any time for the equivalent in second mtge. debentures out of a series then being issued. In spite of repeated pressure by the co., the creditor refused to exercise his option, preferring to retain the notes as bearing a higher rate of interest & being more readily enforceable than the debentures. Ten years having elapsed, the creditor joined in a debenture-holders' action as pltf. in respect of his first mtge. debenture, but, finding after judgment that there would be no funds available for ordinary creditors, & that there

were still mtge. debentures of the second series unissued, he exercised his option, claiming in the alternative to rank as a debenture-holder of the second series:—*Held*: the above facts raised no case of waiver, & the creditor was entitled to rank as a debenture-holder of the second series.

—*PEGGE v. NEATH & DISTRICT TRAMWAYS CO., LTD.*, [1898] 1 Ch. 183; 67 L. J. Ch. 17; 77 L. T. 550; 46 W. R. 243; 14 T. L. R. 62; 42 Sol. Jo. 66.

—Within three months of winding up.]—See Nos. 4695, 4700, *ante*.

Compare Nos. 4786, 4946, *post*.

4786. Agreement to issue debentures when “in a position legally to do so.”—A special verdict found that, by agreement of July 21, 1847, between the directors of the railway co. & deft., he agreed to take all the unappropriated shares in the co., being 4935, & to pay £4 per share on Aug. 15, then next, & meanwhile, to deposit securities to the amount of £20,000; & the co. agreed that, “so soon as £15 per share shall have been paid on the 4,935 shares, & that the co. is in a position legally to do so, they shall deliver” to deft. mtge. debentures of the co. payable three years after date, & bearing 5 per cent. interest, for £24,675, being at the rate of £5 per share. At a meeting of the shareholders, on Aug. 10, 1847, convened for the purpose, the agreement was confirmed by the shareholders, & the shares were registered to deft. with his consent. The call, on which the action was brought, was made in Dec. 1847:—*Held*: the production of the register made a *prima facie* case that deft. was a shareholder, which case was not rebutted by anything in the other evidence; even if the stipulation to deliver mtge. debentures in consideration of the shares taken were illegal, this would be no defence, as the action was not on the agreement, & the agreement had been, in part, executed by the transfer of the shares, which transfer took effect *in presenti*; the stipulation to deliver such debentures, as soon as the co. should be in a position legally to do so, was not illegal.

The directors could not deliver mtge. debentures by their Act of Parliament at the time of the agreement; but they might get the power by another Act; surely there is a difference between an engagement to do a thing that is simply unauthorised & an engagement to do a thing that is either *malum prohibitum* or *malum in se* (ERLE, J.). —*WEST CORNWALL RY. CO. v. MOWATT* (1850), 15 Q. B. 521; 19 L. J. Q. B. 478; 15 L. T. O. S. 247; 15 Jur. 101; 117 E. R. 556.

Annotation:—*Refd.* Brighton Arcade Co. v. Dowling (1868), 37 L. J. C. P. 125.

F. Issue and Reissue of Debentures.

(a) In General.

4787. Payment by instalments—Forfeiture clause in event of non-payment of instalment—Right to withhold payment of instalment without risk of forfeiture in winding up.—A co. issued scrip certificates for debentures, payable by instalments, containing a condition that if the further instalments were not duly paid, the certificate & the payments credited thereon would become liable for forfeiture without further notice. Before the date on which the last instalment became due, a petition for winding up was presented which

was ordered to stand over with liberty for the certificate holders to withhold payment of the final instalment until further order. Subsequently, & after the date named in the certificate for the payment of the last instalment, a resolution was passed authorising the voluntary winding up of the co., & a few days later an order was obtained continuing that winding up under supervision. The certificate holders afterwards, in consequence of a further order, paid the instalment:—*Held*: they were entitled to have the instalment returned to them without incurring a risk of forfeiting the certificate.

Semble: the result would have been the same even if the order authorising the certificate holders to withhold the payment of the instalment had not been made.—*Re CONSOLIDATED LAND CO., LTD., ELLERBY'S CLAIM* (1872), 20 W. R. 855.

—Effect of forfeiture on right to specific performance of contract.]—See No. 4774, *ante*.

4788. Debenture prospectus — “Debenture” referred to in resolution & prospectus—“Mortgage debentures” giving charge over whole property of company given.—*Re HANSARD PUBLISHING UNION, LTD.* (1892), 8 T. L. R. 280, C. A.

4789. Power to issue—Cancellation of defective issue—Issue of fresh series.—The fact of an agreement having been entered into by a limited co. to issue debentures & to give them to one who advances money to the co. as security for his advance, does not prevent debentures subsequently issued for the purpose being duly registered under Cos. Act, 1900, more than 21 days after the date of the agreement, so long as they are registered within 21 days after the time of their being sealed & issued.

A limited co. on Mar. 1, 1903, resolved to issue certain debentures, & in order to obtain an advance from pltf., the co. at the same time agreed to give him debentures of £1,000 as a security for the advance. These debentures were sealed but not registered, & were, on Apr. 6, cancelled & fresh ones were, on Apr. 7, sealed, & to the amount of £1,000 issued to pltf. These latter debentures were registered on Apr. 11:—*Held*: these debentures were duly registered within the 21 days limited by sect. 11 of the Act.—*Re DEFRIES (N.) & CO., LTD., BOWEN v. DEFRIES (N.) & CO., LTD.*, [1904] 1 Ch. 37; 73 L. J. Ch. 1; 52 W. R. 253; 48 Sol. Jo. 51; 12 Mans. 51.

Annotation:—*Refd.* Esberger v. Capital & Counties Bank, [1913] 2 Ch. 366.

Power to reissue.—See Sub-sect. 3, F. (d), *post*.

4790. Issue before statement filed in lieu of prospectus.—*JUBILEE COTTON MILLS, LTD. (OFFICIAL RECEIVER & LIQUIDATOR) v. LEWIS*, No. 75, *ante*.

(b) What constitutes Issue.

4791. Bearer debentures sealed & stamped—Deposited in company's office—Theft & delivery by director to his own creditors.—The directors of a co. directed their secretary to make arrangements for the issue of debentures, for payment of advances to the co. The debentures were accordingly prepared, being made payable to bearer & sealed & stamped; & were placed in a box the key of which was kept by the secretary. The box was deposited

PART III. SECT. 34, SUB-SECT. 3.—F. (b).

1. “Issuing”—*Distinguished from signing.*—Signing debentures is not “issuing” them. “Issue” means to put forth so as to bind the party

issuing.—*JENNETT v. SINCLAIR* (1876), 1 R. & C. 392.—CAN.

m. Deposit to secure performance of a contract.]—The Act of incorporation gave the directors power to “issue & sell or pledge all or any of certain

bonds for the purpose of raising money for the prosecution of the undertaking:—*Held*: the expression “raising money,” should be given a liberal construction, & that using the bonds by depositing them in a bank

Sect. 34.—Borrowing and securing money: Sub-sect.

in the office of the co., which was also the office of T., one of the directors, who had made large advances to the co. Some of the debentures were given out by the secretary to an agent for him to issue them to the public, which he did not succeed in doing. The co. was wound up by order of the ct. After the commencement of the winding up the agent returned the debentures to T., who gave some of them to R. & Co., his own creditors. They took them, believing that they had been regularly issued & that T. had power to dispose of them:—*Held*: the debentures had not been issued before the commencement of the winding up; the other debenture-holders of the co. were not estopped from disputing the validity of the debentures held by R. & Co.

Qu: whether the co. would have been estopped.—**MOWATT v. CASTLE STEEL & IRON WORKS CO.** (1886). 34 Ch. D. 58; 55 L. T. 645, C. A.

Annotations:—**Consd.** *Re Tasker, Hoare v. Tasker*, [1905] 2 Ch. 587. **Refd.** *Chicago Ry. Terminal Elevator Co. v. I. R. Comrs.* (1896), 75 L. T. 157; *Robinson v. Montgomeryshire Brewery Co.*, [1896] 2 Ch. 841.

4792. Delivery to person having charge.—**LEVY v. ABERCROMBIE SLATE & SLAB CO.**, No. 4637, *ante*.

4793. Deposit of unregistered debentures sealed in blank.—*Re PERTH ELECTRIC TRAMWAYS, LTD., LYONS v. TRAMWAYS SYNDICATE, LTD., & PERTH ELECTRIC TRAMWAYS, LTD.*, No. 4633, *ante*.

(c) Issue at a Discount and Payment of Commission.

4794. Power to issue—Construction of articles.—By the arts. of assocn. of a co. the directors were empowered by art. 28 to borrow money, & art. 29 to secure the repayment of or raise any money authorised to be borrowed by them, by the issue, on behalf of the co., of debentures, promissory notes, or bills of exchange, or in such other manner as they might deem expedient; & also—art. 66—to exercise & do all such powers, directions, acts, deeds, & things as the co. might exercise & do:—*Held*: both under the special power conferred by art. 29, & the general powers conferred by art. 66, the directors had power to issue debentures at a discount.—*Re ANGLO-DANUBIAN STEAM NAVIGATION & COLLIERY CO.* (1875), L. R. 20 Eq. 339; *sub nom. Re ANGLO-DANUBIAN STEAM NAVIGATION CO., Ex p. INTERNATIONAL FINANCIAL ASSOCN.*, 44 L. J. Ch. 502; 33 L. T. 118; 23 W. R. 783.

Annotations:—**Refd.** *Mainland v. Upjohn* (1889), 41 Ch. D. 126; *Re Tasker, Hoare v. Tasker*, [1905] 2 Ch. 587.

4795. — Debentures carrying right to exchange for shares of same nominal value.—A co. proposed to issue to its shareholders debentures at a discount of 20 per cent., repayable on Nov. 1, 1909, upon the terms of a circular whereby the registered holder was to have the right at any

security for the payment by the co. for the construction of a railroad undertaken by contractors was really raising money for the prosecution of the undertaking.—**WINNIPEG & HUDSON'S BAY RY. CO. v. MANN** (1890), 7 Man. L. R. 81.—**CAN.**

PART III. SECT. 34, SUB-SECT. 3.—F. (c).

n. Power to issue—To directors at discount—Not ultra vires—Objection raised by other debenture-holders.—The judgment in an action by a bank against a railway co., directed a reference as to who, other than plffs., were the holders of bonds of deft. co. of the same class, & an account of what was due to such bondholders, &

it appeared before the master that the managing director of the co. had issued a great number of debentures of the same class as those held by plffs. to J., G. & B., who were themselves directors of the co., at a discount of twenty-five per cent., in satisfaction of their claims against the co. Plffs., who had obtained their debentures subsequently, thereupon contended that these parties could only claim the amount actually advanced by them, & that they could not as directors sell the debentures to themselves at a discount:—*Held*: inasmuch as the co. did not complain of the transaction, nor any shareholders, & inasmuch as the transaction was not *ultra vires*, it was not competent for the holders of the debentures of the same class,

time prior to May 1, 1909, to exchange his debentures for fully-paid shares in the co. at the rate of one £1 fully-paid share for every £1 of the nominal amount of the debentures; & by the conditions of the debentures, in the event of the debenture-holder giving to the co. a written demand for shares in exercise of this right, the principal moneys were to become immediately repayable:—*Held*: the proposed issue of debentures was void, inasmuch as it was capable of being used as a means of issuing shares at a discount.—**MOSELY v. KOFFYFONTEIN MINES, LTD.**, [1904] 2 Ch. 108; 73 L. J. Ch. 569; 91 L. T. 266; 53 W. R. 140; 20 T. L. R. 557; 48 Sol. Jo. 507; 11 Mans. 294, C. A.

See, generally, Sect. 20, sub-sect. 1, *ante*.

4796. Commission for securing loan to company—Agent receiving secret commission from lenders—Set off of sums received as secret commission against sums due for commission from company.—J. & Co. employed P. & T. as their agents for commission to raise money for them upon the security of debentures; & P. & T., with the knowledge & consent of J. & Co., employed C. to act in the matter upon the terms that he should receive one-half of their commission. C., who knew that P. & T. were acting as agents for J. & Co., procured the required advance from a co. & without the knowledge of either P. & T. or J. & Co., received commission, & would become entitled to further commission from the co.:—*Held*: J. & Co. were entitled to recover from C. any money which he had actually received as commission from the co.; & they were entitled to a declaration that C. would become indebted to them in respect of any further commission which he might receive, but not to a declaration that they were entitled to any such further commission.—**POWELL & THOMAS v. JONES (EVAN) & CO.**, [1905] 1 K. B. 11; 74 L. J. K. B. 115; 92 L. T. 430; 53 W. R. 277; 10 Com. Cas. 36; *sub nom. POWELL & THOMAS v. JONES (EVAN) & CO., JONES (EVAN) & CO. v. POWELL & THOMAS & COWPERTHWAIT*, 21 T. L. R. 35, C. A.

Annotation:—**Consd.** *Bath v. Standard Land Co.*, [1911] 1 Ch. 618.

See 1908 Act, s. 93 (4).

Issue to directors—Whether director liable as for improper profit.—*See* No. 3229, *ante*.

Mortgage of debentures issued at a discount—Proof by mortgagee in winding up.—*See* Sect. 36, sub-sect. 11, E. (b), *post*.

(d) Reissue.

See, now, 1908 Act, s. 104.

4797. Power to reissue—After purchase by company.—The effect of a co. purchasing its own debentures is to extinguish the debt, for the co. cannot be at the same time both mtgor. & mtgee.

such as plffs. were, to impugn the position of J., G. & B. If the directors abused their position so as to get an advantage at the expense of the co., it was for the corpn. or its corporators to complain, to permit plffs. to attack them on this ground would be to recognise the validity of the transfer of a right of action to complain of a fraud, actual or constructive.—**BANK OF TORONTO v. COBBOURG, PETERBOROUGH & MARMORA RY. CO.** (1885), 10 O. R. 376.—**CAN.**

PART III. SECT. 34, SUB-SECT. 3.—F. (d).

o. Power to reissue—After redemption—Priorities.—*Cos. Act*, 1907, s. 15, enabled a co. to keep its own

of its own property. Where therefore a co. had taken transfers to itself of its own debentures, & had registered them in its own name & had afterwards re-sold the debentures:—*Held*: the purchasers acquired no right to share with the other debenture-holders of the same series in the distribution of the proceeds of the security.—*Re ROUTLEDGE (GEORGE) & SONS, LTD., HUMMEL v. ROUTLEDGE (GEORGE) & SONS, LTD.*, [1904] 2 Ch. 474; 73 L. J. Ch. 843; 91 L. T. 288; 53 W. R. 44; 48 Sol. Jo. 655; 11 Mans. 405.

Annotations:—*Consd.* *Re Tasker, Hoare v. Tasker*, [1905] 2 Ch. 587; *Re Perth Electric Tramways, Lyons v. Tramways Syndicate, & Perth Electric Tramways*, [1906] 2 Ch. 216.

4798. ——— **Transfer to nominee—Subsequent cancellation & consolidation.**—Three years before Jan. 1, 1901, when Cos. Act, 1900 (c. 48), s. 14, came into operation, a co. conveyed & assigned all its present & future real & personal property, including uncalled capital, to trustees to secure an issue of debentures, each of which gave to the registered holder thereof a first charge on the freehold & leasehold property of the co. & a floating charge on all its other assets. A few days after the execution of the trust deed the debentures were sealed & issued, seven of them for £100 each, being issued to A. In 1902 the co. purchased from A. the seven debentures & took a transfer of them to U. as its nominee. U. at once deposited them & a blank transfer with a bank to secure an overdraft. In 1905 the seven debentures were delivered up to the co. & cancelled, & the co. issued one debenture for £700, but otherwise in the same form, to R. to secure a cash advance. This debenture was never registered under sect. 11 of the Act. In Jan. 1907, a winding-up order was made against the co., & on Aug. 28 there came into operation Cos. Act, 1907 (c. 50), s. 15, which retrospectively validates the security of reissued debentures under certain circumstances. In a debenture-holders' action commenced on the same day, the question arose whether, having regard to the non-registration of the debenture given to R., he had any security under either it or the trust deed:—*Held*: (1) the winding-up order was not an order pronounced before Mar. 7, 1907, "as between the parties to the proceedings in which the order was made" within Cos. Act, 1907 (c. 50), s. 15 (5); (2) there had been a keeping alive & reissue of the original debentures within sect. 15, sub-sect. 1; (3) as the charge claimed by R. was created on the execution of the trust deed before Jan. 1, 1901, & not when he advanced money to the co., non-registration of the debenture did not affect his security.—*Re NEW LONDON & SUBURBAN OMNIBUS CO., APPELYARD v. NEW LONDON & SUBURBAN OMNIBUS CO.*, [1908] 1 Ch. 621; 77 L. J. Ch. 358; 98 L. T. 663; 15 Mans. 151.

Annotation:—*As to* (3) *Consd.* *Esberger v. Capital & Counties Bank*, [1913] 2 Ch. 366.

4799. ——— **After redemption.**—A co. issued a series of debentures to rank *pari passu* as a first charge, the co. not to be at liberty to create any mtg. or charge on the security in priority to or *pari passu* with those debentures. Certain of the debentures having been issued as security for loans were, on repayment of the loans, returned to the co. with blank transfers. These debentures were subsequently assigned to fresh holders for value by completing the transfers:—*Held*: on payment off of the loans for which they were issued as security the debentures were paid off, & the holders of these debentures could not rank *pari passu* with the other debenture-holders.—*Re TASKER (W.) & SONS, LTD., HOARE v. TASKER (W.) & SONS, LTD.*, [1905] 2 Ch. 587; 74 L. J. Ch. 643; 93 L. T. 195; 54 W. R. 65; 21 T. L. R. 736; 49 Sol. Jo. 700; 12 Mans. 302, C. A.

Annotations:—*Consd.* *Re Perth Electric Tramways, Lyons v. Tramways Syndicate & Perth Electric Tramways*, [1906] 2 Ch. 216. *Foll.* *Re Russian Petroleum & Liquid Fuel Co., London Investment Trust v. Russian Petroleum & Liquid Fuel Co.*, [1907] 2 Ch. 540. *Refd.* *Manks v. Whiteley*, [1912] 1 Ch. 735.

4800. ——— *Re PERTH ELECTRIC TRAMWAYS, LTD., LYONS v. TRAMWAYS SYNDICATE, LTD. & PERTH ELECTRIC TRAMWAYS, LTD.*, No. 4633, *ante*.

4801. ——— **Further loan from same lenders.**—(1) A co. issued a series of debentures as floating securities on the terms that they should not without the authority of the debenture-holders create any charge on the mortgaged assets ranking *pari passu* with or in priority to the charge created by the debentures. They deposited £100,000 of these debentures with a bank as collateral security for a credit of £150,000, by the terms of which the bank were to accept the co.'s drafts. This credit was not a current account, nor was anything advanced which was strictly speaking a loan. After this arrangement had been in operation for some time the amount due to the bank on the credit was paid off by the co. Immediately before this repayment the bank advanced £500 to the co. in order to avoid the deposited debentures being freed from all charges in favour of the bank; & the debentures were not given back to the co. The other debenture-holders claimed that the deposited debentures were dead, & could not be re-charged with the £500 or any other sum:—*Held*: inasmuch as the whole amount for which the debentures were originally deposited as security had been paid off, the debentures themselves were spent, notwithstanding that they had not been handed back to the co., & they could not be re-charged with the £500 or any further sum.

(2) *Qu*: whether such a re-charge would be authorised by an art. which gave power to the board to create, issue, make & give debentures for the purpose of borrowing money or for any other purpose.

(3) The rule that if debentures are issued & deposited as security, & the amount nominally

issue. The loan from the bank was repaid out of the proceeds of the second debenture issue & some first debentures, which had been deposited with the bank, & transferred to trustees for the bank as security for the loan, were afterwards retransferred from trustees for the bank to nominees of the co.:—*Held*: these first debentures were not redeemed "in pursuance of any obligation so to do" within one of the exceptions contained in the above sect. & the priority of these first debentures, as such, was not disturbed.—*FITZGERALD v. PERSE*, [1908] 1 L. R. 279.—*IR*.

debentures alive for the purpose of reissue from time to time, as security for advances from the co.'s bankers, without disturbing their priority. The section was retrospective, & operated upon past as well as future transactions, & it preserved the priority of such debentures as of the original date of issue, & not merely as of the date of reissue. A co., before the passing of the 1907 Act, deposited from time to time some of its first debentures with its bankers as security for an overdraft. The practice was to transfer the debentures from nominees of the co. to trustees for the bank, & upon repayment of the overdraft, to retransfer the debentures to nominees of the co.:—*Held*: the above sect. had the effect of preserving the original priority of these debentures.

A co., in 1901, invited subscriptions for an issue of second debentures by a prospectus which contained a statement that the issue was made for the purpose of repaying a temporary loan from the co.'s bankers. It was expressly stated in the prospectus, in the conditions on the second debentures, & in the trust deed that the second debentures were to be subject to the whole of the first debenture

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secured by them is advanced on that security & is then paid off, no further charge on them can be created without creating an additional charge which purports to rank *pari passu* with the debentures of the original issue, applies to a current account.—*Re RUSSIAN PETROLEUM & LIQUID FUEL CO., LTD., LONDON INVESTMENT TRUST, LTD. v. RUSSIAN PETROLEUM & LIQUID FUEL CO. LTD.*, [1907] 2 Ch. 540; 77 L. J. Ch. 21; 97 L. T. 564; 23 T. L. R. 746; 51 Sol. Jo. 718; 14 Mans. 318, C. A.

4802. Order “as between the parties to the proceedings in which the order was made”—**Companies Act, 1907 (c. 50), s. 15 (5).**—*Re NEW LONDON & SUBURBAN OMNIBUS CO., APLEYARD v. NEW LONDON & SUBURBAN OMNIBUS CO.*, No. 4798, *ante*.

See, now, 1908 Act, s. 104 (5) (a).

Cancellation of defective issue—Issue of fresh series.—*See* No. 4789, *ante*.

G. Priorities.

(a) In General.

4803. Determined by order of date.—By an agreement in writing, dated Nov. 11, 1910, M. & Co., Limited, agreed to supply & erect upon the works owned by the firm of J. & Co.—the predecessors of deft. co.—a complete installation of a patent automatic sprinkler for the protection of the premises from fire, at the price of £237, payable by annual instalments. In the event of default being made in any annual instalment, or of any breach of the agreement by the purchasers, the whole unpaid balance of principal & interest was immediately to become due. The agreement further provided that the basis of the contract was that the sprinkler installation remained the sole & exclusive property of the contractors until the whole sum of £237 had been paid, & in the event of default the contractors might enter upon the premises & remove the installation. Deft. co. was incorporated in 1911 & took over the assets & liabilities of the firm of J. & Co., including their interest under the agreement. In Dec. 1911, deft. co. issued a series of first mtge. debentures containing a charge in the usual form on the undertaking, such charge to be a floating security. On Oct. 18, 1912, a receiver & manager was appointed in an action brought by the debenture-holders to enforce their security. On Oct. 21, the last instalment under the agreement fell due & was not paid. The debenture-holders had no notice of the agreement. On an application by M. & Co., for liberty to enter upon deft. company's premises & remove therefrom the sprinkler installation:—*Held*: the effect of the hire-purchase agreement was to confer upon appcts. an interest in the land to which the sprinkler installation

was affixed & to authorise them, in the events which had happened, to enter & remove it; the interest of the debenture-holders being also equitable the ordinary principles of priorities applied; & the interest being subsequent in date was therefore postponed to the interest of appcts.

What the co. did was this: they entered into this contract & they subsequently borrowed money on an equitable security creating only an equitable mtge. It is not disputed that equitable mtgees. without notice rank in order of date. In my opinion this contract does effectually create an equitable interest in land, & the result is that the parties entitled must rank according to the dates of their respective securities (*SWINFEN EADY, L.J.*).—*Re MORRISON, JONES & TAYLOR, LTD., COOKES v. MORRISON, JONES & TAYLOR, LTD.*, [1914] 1 Ch. 50; 83 L. J. Ch. 129; 109 L. T. 722; 30 T. L. R. 59; 58 Sol. Jo. 80, C. A.

Annotation:—*Consd. Hamer v. London City & Midland Bank* (1918), 87 L. J. K. B. 973.

4804. Statutory rights of gas company for gas supplied—**As against debentures not secured by trust deed.**—At the date when a receiver was appointed in a debenture-holders' action against a co., the co. owed a sum of money to a gas co. for gas supplied, which the receiver refused to pay. The debentures were not secured by a trust deed & operated only as an equitable charge on the co.'s property & assets. The gas co. obtained, under Gasworks Clauses Act, 1871 (c. 41), s. 23, & sect. 74 of their special Act, which provided that sums payable to the co. might be recovered summarily or by action, an order & warrant from justices empowering them to levy a distress on the co.'s goods & chattels for the amount of the debt, & then applied in the debenture-holders' action for leave to proceed with the distress:—*Held*: the statutory rights of the gas co. overrode the equitable rights of the debenture-holders, & leave was granted them to proceed with the distress.—*Re ADOLPHE CROSBIE, LTD., JOHNSON & HUGHES v. ADOLPHE CROSBIE, LTD.* (1909), 74 J. P. 25; 8 L. G. R. 50.

Preferential payments.—*See* No. 4981, *post*.

(b) Between Holders of Successive Series of Debentures.

4805. Successive series issued & sealed on same day.—Two sets of mtge. debentures bearing the same date were issued & sealed by a co. The debentures of each set were expressed to rank *pari passu inter se*. One set was numbered consecutively from 501 to 600, the other from 601 to 650. The debentures were sealed on the same day in order of their numbers:—*Held*: the set sealed the earlier had priority.—*GARTSIDE v. SILKSTONE & DODSWORTH COAL & IRON CO.* (1882), 21 Ch. D. 762; 47 L. T. 76; 31 W. R. 36; *sub nom.* *GARTSIDE v. SILKSTONE & DODSWORTH*

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p. Between debenture-holders—Mortgagee—Judgment creditors—& liquidator.—A co. mortgaged its property to B., & R. P. & S. held mtge. debentures. Two creditors recovered judgments against the co. & obtained an order for winding up, & ultimately the liquidator sold the assets of the co. In a contest between the parties as to priority of their claims:—*Held*: the liquidator was entitled to priority for his expenses of realisation & preservation of the property, but that subject to these expenses B.'s mtge. had priority.—*Re TOUQUOY GOLD*

MINING CO. (1906), 2 E. L. R. 39.—CAN.

q. — d. judgment mortgagee.—A co. issued certain debentures pursuant to the powers of their special Acts, by which the “undertaking” of the co., tolls, etc., were pledged. A., a judgment creditor of the co., converted his judgment into a statutable mtge., binding certain lands vested in the co. for the purpose of their undertaking. The co. became bankrupt, & an Act of Parliament was passed, enabling the assignees in bkpcy. to sell the undertaking of the co., including a line of railway, & works, & all the lands acquired by the co., the

purchaser being declared bound, & empowered, to maintain the railway as such. The railway & lands were sold accordingly, & the proceeds paid into the Ct. of Bkpcy.:—*Held*: the debenture holders were entitled to be paid out of the fund in Ct. in priority to the judgment mtgee.—*Re BAGNALS-TOWN & WEXFORD RY. CO., Ex p. SMITH* (1867), 1 R. 1 Eq. 275.—*IR.*

PART III. SECT. 34, SUB-SECT. 3.—G. (b).

r. Successive series issued on different dates—Second series alleged to constitute first charge—Part issued as security for past indebtedness—Part

COLLIERIES CO., HOLDEN v. SILKSTONE & DODSWORTH COLLIERIES CO., 51 L. J. Ch. 828.

Annotation:—Consd. James v. Boythorpe Colliery Co. (1890), 2 Meg. 55.

4806. Successive series issued on different dates—No provision as to ranking—First series cancelled & reissued for extended period.]—*Re* WRIGHT (JOSEPH) & CO., LTD. (1887), 4 T. L. R. 105.

4807. ———.]—A co. issued debentures in two series, not secured on any specific property, but by way of equitable charge upon the whole undertaking. No special provision was made in them as to how they were intended to rank. The assets in the liquidation of the co. having proved insufficient to pay all the debentures in full:—*Held*: the debentures did not rank *pari passu* but took priority according to their issue.—JAMES v. BOYTHORPE COLLIERY CO. (1890), 2 Meg. 55.

4808. ——— Second series alleged to constitute first charge—Whether notice of first series material.]—SMITH v. ENGLISH & SCOTTISH MERCANTILE INVESTMENT TRUST, LTD. (1896), 40 Sol. Jo. 717.

4809. ——— Second series alleged to rank with first series.]—A co. in 1894 created a series of debentures headed "Issue of Debentures for £2,000." By clause 5 of each debenture the co. charged, with payment of £100 interest, its undertaking & all its property both present & future, "subject to any mtges. now affecting or which may hereafter affect the same or any part thereof." Clause 6 stated that the debenture was one of a series of twenty debentures for £100 each, & that "all such debentures shall rank *pari passu* without regard to the date of issue thereof"; & clause 7 provided that "notwithstanding the charge hereby created, the co. may in the course of its business & for the purpose of carrying on the same, deal with its property as it may think fit, & in particular may mtge. & sell the same or any part thereof." In 1901 the co. created a second series of debentures each in the same form as those of the first series, except that each debenture was headed "Second Issue of Debentures for £2,000," & that clause 6 stated that the debenture was one of "a second series of twenty debentures for £100 each," & that "all of such debentures, of this & the first series, shall rank *pari passu* without regard to the date thereof":—*Held*: the second debentures did not rank *pari passu* with the first debentures, but after them.—*Re* COPE (BENJAMIN) & SONS, LTD., MARSHALL v. COPE (BENJAMIN) & SONS, LTD., [1914] 1 Ch. 800; 83 L. J. Ch. 699; 110 L. T. 905; 58 Sol. Jo. 432; 21 Mans. 251.

4810. ——— Second series expressly postponed to first—Issue of debentures of second series before all of first series issued.]—The co. issued a series of debentures, which were expressed to be a first charge upon the undertaking & property of the co. The principal money & interest were, according to the conditions of the debentures, to be paid to the holders "ratably & equally, *inter se*, & without any preference or priority one over another." The co. afterwards issued a second series of debentures, which were a charge on the

as security for present advances. After a first issue of its bonds a co. carried on business for a time, but, pressing claims of creditors arising, by the action of the bondholders & shareholders a trust deed was executed to secure a second issue of bonds, which purported to be in priority to the first issue. All proper proceedings were taken to give effect to this arrangement for the express purpose of borrowing a certain sum upon the credit of the co.:—*Held*: those creditors to whom the second issue

bonds were issued & delivered as collateral security for the co.'s past indebtedness to them, even though they became holders without any actual knowledge of any alleged irregularity in respect to the issuance thereof, were not entitled to priority over the original bondholders as there was no authority given to use the bonds as such collateral security, but holders of the second issued bonds pledged to them for present advances, were entitled to priority over the first issued.—*Re* BRITISH COLUMBIA

same property as the debentures of the first series, & were similar to them in all respects, except that they were stated by the conditions to be subject to the debentures which had been already issued, or such of them as were then outstanding. Some of the debentures of the second series were issued before some of the debentures of the first series; also, some of the first debentures which were issued before any second debentures were, after the issue of some of those debentures, paid off, & new debentures, bearing the same numbers as those paid off, were issued to persons other than the holders of the former ones. There was no debenture trust deed for either series. The first series was never fully issued:—*Held*: the conditions of the second debentures postponed the whole of them to the whole of the first debentures whenever issued, but not to debentures issued in the place of paid-off debentures.—*LISTER v. LISTER (HENRY) & SON, LTD.* (1893), 62 L. J. Ch. 568; 68 L. T. 826; 41 W. R. 330; 9 T. L. R. 296; 37 Sol. Jo. 285; 3 R. 363.

4811. ——— Reissue of debentures of first series subsequently to issue of second series.]—*LISTER v. LISTER (HENRY) & SON, LTD.*, No. 4810, *ante*.

4812. ——— Set off of present debt against second mortgage.]—Deft., who was the holder of second mtge. debentures issued by pltf. co., gave a bill of exchange payable to the co. When the bill became due the debentures had become payable, & deft. dishonoured the bill. In an action on the bill deft. claimed to be entitled to set off the debt due on the debenture against the amount of the bill. The second mtge. debentures-holders were not entitled to payment until the first series of debentures had been redeemed:—*Held*: deft. was not entitled to the set-off, as the effect of it would be to give him a preference over the first debenture-holders.—*WILKINS (H.) & ELKINGTON, LTD. v. MILTON* (1916), 32 T. L. R. 618.

(c) *Between Subsequent Perfected Charge and Prior Unperfected Charge.*

4813. Company with property in Italy—Creation of obligations—Subsequent mortgage in form required by Italian law to bank—Bank's mortgage registered in Italy.]—A co. with an office in London & having house property at Florence raised under powers in their arts. a sum of money by the issue of "Obligations" payable to bearer whereby they purported to "bind themselves their successors & assigns & all their estate property & effects" reserving the right to redeem a certain part of the obligations in each of 8 successive years. Subsequently by a mtge. in the Italian form registered at Florence the co. mortgaged the property to a bank with a London office who had notice of the obligations. The bank having taken proceedings in the tribunal at Florence to enforce their mtge., an action was brought on behalf of the holders of the obligations against the co. & the bank claiming to be mtgees. of the Florence property in priority to the bank. On motion to

LAND CEMENT CO., LTD. (1915), 31 W. L. R. 938; 22 B. C. R. 443.—CAN.

PART III. SECT. 34, SUB-SECT. 3.—G. (c).

s. *Between creation by sheriff—& unregistered debentures—Goods & chattels.]—*TRANSPORT TRADING & AGENCY CO. OF W. A., LTD. v. SMITH (1906), 8 W. A. L. R. 33.—AUS.

t. *Lien agreement—Failure to renew registration—Subsequent unregistered debenture.]—*Deft. in 1913 sold under a lien agreement some

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restrain the sale of the property:—*Held*: (1) the debentures were mere bonds & not mtges.; (2) if the obligations created a charge on the co.'s property they could not be enforced as against the bank claiming under a registered mtge. at Florence.

—*NORTON v. FLORENCE LAND & PUBLIC WORKS CO.* (1877), 7 Ch. D. 332; 38 L. T. 377; 26 W. R. 123.

Annotations:—*As to* (1) *Reid*. *British India Steam Navigation Co. v. I. R. Comrs.* (1881), 50 L. J. Q. B. 517. *As to* (2) *Distd.* *Re Florence Land & Public Works Co., Ex p. Moor* (1878), 10 Ch. D. 530. *Reid*. *Re Maudslay, Sons & Field, Maudslay v. Maudslay, Sons & Field*, [1900] 1 Ch. 602.

4814. Debentures creating floating charge with restrictive clause—Subsequent mortgage of debt due—Notice by mortgagee to debtor—Constructive notice of restrictive clause.—*ENGLISH & SCOTTISH MERCANTILE INVESTMENT CO. v. BRUNTON*, No. 4738, *ante*.

4815. Deposit by debenture-holder of debentures with banker to secure loan—Payment off of debentures in debenture-holders' action—Call in winding up on ordinary shares held by same debenture-holder—Right of company as against bank to set off call against money due on debentures.—A debenture-holder, who was also a holder of ordinary shares in a co., deposited debentures with a bank as a security, & executed a memorandum of deposit & a blank transfer, but no notice of the deposit or transfer was given to the co. On Nov. 3, 1890, a resolution was passed by the directors for a call payable on Nov. 20, at the same bank; under the arts. this call was deemed to have been made at the date when the resolution was passed. On Nov. 4, notice of the call was given to the bank. On Nov. 6, the bank gave the co. formal notice of the deposit, & this notice was entered on the register of debentures. On Nov. 12 a debenture-holder's action was brought; & on Nov. 13 resolutions for a voluntary winding up were passed & confirmed. On Dec. 5, a call was made in the winding up. The bank claimed as assignees to be paid in full the amount secured by the debentures; & the co. contended that they were entitled to set off against this claim the amount due by the assignor on his shares in respect of the call made on Nov. 3 & also that made in the winding up:—*Held*: the co. were entitled to set off the call made on Nov. 3, but not that made in the winding up.—*CHRISTIE v. TAUNTON, DELMARD, LANE & CO., Re TAUNTON, DELMARD, LANE & CO.*, [1893] 2 Ch. 175; 62 L. J. Ch. 385; 68 L. T. 638; 41 W. R. 475; 37 Sol. Jo. 304; 3 R. 404.

4816. Mortgage of ships under trust deed to trustees—Subsequent legal mortgage in statutory form under Merchant Shipping Acts.—The M. S. Act, 1854 (c. 104), must be read as if it included sect. 3 of the Act of 1862, & effect must be given to every word of the former Act as explained by that sect. Equitable interests must not be ignored; but on the other hand, the words of sect. 69 of the Act of 1854, "notwithstanding any express, implied, or constructive notice," must not be disregarded. Therefore a statutory registered mtge. of a ship has priority over an unregistered incumbrance which is earlier in point of date, & of which the mtgee. had notice.

An intending mtgee. of a ship belonging to a

co. had notice that the co. had issued debentures, but not, as was the fact, that the debentures affected the ship in question:—*Held*: he was not affected by constructive notice of the debenture-holders' title.—*BLACK v. WILLIAMS*, [1895] 1 Ch. 408; 64 L. J. Ch. 137; 43 W. R. 346; 11 T. L. R. 77; 2 Mans. 86; 13 R. 211.

Annotations:—*Reid*. *The Benwell Tower* (1895), 72 L. T. 664; *Barclay v. Poole*, [1907] 2 Ch. 284.

See, generally, SHIPPING AND NAVIGATION.

4817. Priority between equitable mortgagees—Equitable mortgage by way of floating charge—Subsequent deposit of title deeds with bank without notice of former charge—Possession of title deeds gives priority.—*Re CASTELL & BROWN, LTD., ROPER v. CASTELL & BROWN, LTD.*, No. 4735, *ante*.

Debentures creating charge on unpaid capital—Call made but not paid—"Arrestment" by Scottish law on shares held in Scotland.—*See CHOSSES IN ACTION*, Vol. VIII., p. 476, No. 460.

4818. Unregistered mortgage—Subsequent registered mortgage debenture with notice of prior charge.—1908 Act, s. 93, avoids an unregistered mtge. as against a subsequent registered incumbrancer even though he had express notice of the prior mtge. at the time when he took his own security.—*Re MONOLITHIC BUILDING CO., TACON v. MONOLITHIC BUILDING CO.*, [1915] 1 Ch. 643; 84 L. J. Ch. 441; 112 L. T. 619; 59 Sol. Jo. 332; 21 Mans. 380, C. A.

Annotation:—*Mentd.* *Barron v. Potter*, [1915] 3 K. B. 593.

(d) *Where Company's Interest in charged Assets Qualified.*

4819. Whether company's interest qualified—Purchase of business by company—Undertaking by company to pay business creditors—Business conveyed to company "subject to" such debts.—*Re HARDEN STAR, ETC. CO., LTD., MORRIS v. THE CO.* (1903), 47 Sol. Jo. 368.

4820. Property vested in trustee on behalf of company—Trustee's right to indemnity.—The right of a trustee to be indemnified out of the trust property is the first charge thereon, & it has priority to any charge created upon it by the *cestuis que trust*. Consequently the right of a trustee of a public co. to be indemnified out of the property has priority over the debenture creditors.

The debenture-holders can only claim the property belonging to the co. after payment of the charges previously & properly attaching thereto, of which I think the indemnity of the trustees is one. The debenture-holders can only take all that the co. could give, the co. could only give the net produce of the property, after discharging the charges properly attaching thereto, & in my opinion, the first charge on the property is the indemnity of the trustees (LORD ROMILLY, M.R.).—*Re EXHALL COAL CO., LTD., Re BLECKLEY* (1866), 35 Beav. 449; 14 L. T. 280; 12 Jur. N. S. 757; 55 E. R. 970.

Annotations:—*Expld.* *Re Pooley Hall Colliery Co.* (1869), 21 L. T. 690. *Mentd.* *St. Thomas's Hospital v. Richardson*, [1910] 1 K. B. 271; *Re Pain, Gustavson v. Haviland*, [1919] 1 Ch. 38.

4821. Floating charge—Subsequent purchase of property—Simultaneous equitable mortgage.—A co. issued debentures creating a floating charge upon their undertaking & all their property present & future, one of the conditions of the

printing machines to a co. The agreement was duly registered but was not renewed in Oct. 1918, as it should have been under the amendment in 1916 of Conditional Sales Ordinance. The co. in 1915 gave to plffs. as security for an advance a first mtge. debenture charging its undertaking & all its

property both present & future, the charge as to the fixed assets & goodwill to be a specific charge & as to the other assets to be a floating security, but so that the co. was not to be at liberty to create any mtge. or charge on its property ranking in priority to or *pari passu* with the debenture. This

document was never registered:—*Held*: the failure to renew the registration of deft.'s lien agreement lost its priority over the debenture & the latter had priority.—*FOSTER v. INTERNATIONAL TYPESETTING MACHINE CO.*, [1920] 2 W. W. R. 697; 51 D. L. R. 229; 60 S. C. R. 416.—CAN.

debentures being that the co. should not be at liberty to create any other mtge. or charge in priority to the debentures. All the debentures were duly registered under the Companies Act, 1900 (c. 48). The co. desiring to purchase certain property, which they had not the money to pay for, borrowed £1,000 from O. upon terms that she should have a charge upon the property so purchased. The co. then bought the property for £1,100 & paid a deposit of £150. Upon completion of the purchase O. was present & gave her cheque for £1,000 which was paid into the co.'s banking account, the co. paying the balance of the purchase-money to the vendor in cash. The same solr. acted for all parties, & he took & retained the title deeds of the property on behalf of O. A week later the co. executed in favour of O. a memorandum of equitable charge upon the property. The solr. did not investigate the title nor search the register of debentures on O.'s behalf. In an action to realise the debentures:—*Held*: what the co. acquired upon the purchase was only the equity of redemption in the property subject to the equitable charge of O., who was accordingly entitled to priority over the debentures.—*Re CONNOLLY BROTHERS, LTD. (No. 2), WOOD v. THE Co., [1912] 2 Ch. 25; 81 L. J. Ch. 517; 106 L. T. 738; 19 Mans. 259, C. A.*

4822. Hire purchase agreement—Subsequent issue of debentures.—*Re MORRISON, JONES & TAYLOR, LTD., COOKES v. MORRISON, JONES & TAYLOR, LTD., No. 4803, ante.*

(c) *Effect of Charge over Specific Assets subject to Floating Charge.*

4823. No restriction to future specific charges—Specific charge on after-acquired property.—*Re CAMDEN BREWERY, LTD., FORDER v. CAMDEN BREWERY, LTD. (1911), 106 L. T. 598, n., C. A.*
Annotation:—Refd. Re Stephenson, Poole v. Stephenson (1912), 106 L. T. 595.

4824. Restriction as to subsequent charges—Specific charge on after-acquired property—Subject to first charge.—By a debenture-stock trust deed a co. gave a specific & a floating charge reserving power to deal with its assets but not to create any further charge over its property generally to rank *pari passu* with or in priority to or otherwise than subject or in subordination to the security thereby created. After the date of this deed the co. purchased freeholds. By a subsequent debenture-stock trust deed the co. granted to trustees & their heirs certain freeholds, including the after-acquired property, by way of mtge., upon the trusts thereafter mentioned, subject to the provisions of the first deed. The second deed also contained a general charge on all the co.'s assets subject to the first issue. The security constituted by the first deed was now crystallised:—*Held*: the security of the debenture-stock holders under the second deed was postponed to that of the stockholders secured by the first deed.—*Re STEPHENSON (ROBERT) & Co., LTD., POOLE v. STEPHENSON (ROBERT) & Co., LTD., [1913] 2 Ch.*

201; 83 L. J. Ch. 121; 107 L. T. 33; 56 Sol. Jo. 648; 20 Mans. 358, C. A.

4825. — Subsequent specific mortgage taking priority over debentures—Compromise between mortgagee & debenture-holders.—A co. having a lease of a brickfield issued debentures creating a floating charge & prohibiting the creation of any mtge. to have priority. Any debenture-holder was empowered to appoint a receiver with power to make arrangements in the debenture-holders' interests. The co. requiring money, the debenture-holders agreed to the creation of a mtge. of the lease to have priority of the debentures. By that mtge. the co. assigned the premises comprised in the lease with erections & plant then or thereafter thereon—so far as legal without registration as a bill of sale—for the residue of the term. The business not succeeding, the mtgee., being also a debenture-holder, appointed a receiver for the debenture-holders, who eventually had to close down the works, & an arrangement was entered into between the mtgee.—who was a solr.—& the receiver for the receiver to offer the loose & fixed plant together for sale, the proceeds of the former to go to the debenture-holders & those of the latter to the mtgee. In an action by a debenture-holder claiming that the debenture-holders were entitled to all the proceeds of sale in priority to the mtgee.:—*Held*: the co.'s interest in the fixtures as mtgor. continued only so long as it had an interest in the term, & ceased on a sale by the mtgee.; the right, which the mtge. carried, of the mtgee. to remove the fixtures as against the co.'s lessor at the end of the lease did not render the mtge. obnoxious to the Bills of Sale Acts; the receiver was under no duty to insist that the removal should be delayed till the end of the term; the arrangement between the receiver & the mtgee. was beneficial to the debenture-holders, & the mtgee. had obtained no undue advantage; & the action must be dismissed.—*Re ROGERSTONE BRICK & STONE Co., SOUTHALE v. WESCOMB, [1919] 1 Ch. 110; 88 L. J. Ch. 49; 120 L. T. 33, C. A.*

H. Statutory Rights of Debenture-Holders.

Right to inspect register of debenture-holders & have copies.—*See 1908 Act, s. 102.*

Compare Sect. 13, sub-sect. 4, ante.

Right to balance-sheets.—*See 1908 Act, s. 114.*

I. Transfer of Debentures.

4826. The contract for sale—Whether enforceable—Floating charge on land—Compliance with Statute of Frauds, s. 4.—An action was brought to recover damages for breach of an oral contract to sell debentures issued by a limited trading co., incorporated under 1862 Act. These debentures charged the undertaking of the co. & all its property whatsoever & wheresoever, both present & future. The conditions indorsed on the debentures provided that the charge thereby created should be a "floating security," & accordingly, until the appointment of a receiver or the

PART III. SECT. 34, SUB-SECT. 3.—H.

a. Right to vote in respect of railway bonds.—If the holders of railway bonds desire to acquire the right of voting thereon under 37 Vict. c. 63, s. 25, all the transfers must be evidenced in such a way as to enable the co. to register them in the same manner as they register shares. No special provision by bye-law for the registration of such bonds is requisite. It is enough that the bondholders on the application for a *mandamus* should

make out a *prima facie* title, & the mere fact that they were directors of the co. is no objection, when they have done what was necessary to entitle them to become holders.—*Re THOMSON & VICTORIA RY. Co. (1881), 9 P. R. 119.—CAN.*

PART III. SECT. 34, SUB-SECT. 3.—I.

b. Registration—Debentures held by trustee to secure creditors—Transfer to creditors on default made by company.—A trustee held certain

debentures of a co. on trust to secure certain creditors of the co. for advances made by them, which debentures were to be handed over to the creditors for sale, upon the co. making default in payment of the advances. The co. made default, & the debentures were delivered over to the creditors:—*Held*: the creditors were entitled under 34 Vict. c. 43, s. 33, to be registered as holders of the debentures, to enable them to qualify & vote for directors; & a *mandamus* should issue to compel

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commencement of a winding up, that the co. was to be at liberty, in the ordinary course of its business, to sell, deal with, & dispose of the property charged; & that in the event of default by the co. in payment of principal or interest, or in the event of a winding up, a receiver might be appointed by the debenture-holders, who was to have power to sell the mortgaged property. The co. was at the time, both of the issue of the debentures & of an oral contract for the sale of certain of them by a holder, possessed of leasehold property:—*Held*: the contract was a contract for an interest in land within Stat. of Frauds, sect. 4, & pltf. could not recover.—*DRIVER v. BROAD*, [1893] 1 Q. B. 744; 63 L. J. Q. B. 12; 69 L. T. 169; 41 W. R. 483; 9 T. L. R. 440; 4 R. 411, C. A.

Annotations:—*Consd.* *Re Dawson, Pattison v. Bathurst*, [1915] 1 Ch. 626. *Refd.* *Jarvis v. Jarvis* (1893), 63 L. J. Ch. 10; *Wallace v. Evershed*, [1899] 1 Ch. 891.

See, generally, SALE OF LAND.

4827. What constitutes a transfer—Equitable assignment—Deposit of debenture indorsed in blank with creditor.]—A trader deposited a debenture of a mining co., which he had indorsed in blank, with a creditor as a security for a debt. The trader became bkpt. Prior to the act of bkpcy., no notice of the deposit had been given to the co., & the bkpt.'s name was on the list of debenture-holders:—*Held*: there was a good equitable assignment to the creditor.—*Re PRYCE, Ex p. RENSBURG* (1877), 4 Ch. D. 685; 36 L. T. 117; 25 W. R. 432.

Annotation:—*Mentd.* *Re Jenkinson, Ex p. Nottingham & Nottinghamshire Bank* (1885), 15 Q. B. D. 441.

4828. — Voluntary gift—Retention of life interest.]—Some time before his death a testator informed his daughter's companion that he intended to give her a debenture bond for £1,000 in a railway co. Shortly afterwards he signed the following memorandum: "I wish to communicate to my exors. that I have to-day given to Miss F. P. my £1,000 debenture bond of the M. S. & L. Ry. Co.; but, as I shall require the annual dividends to meet my necessary expenses, I retain the document in my own possession for my lifetime, requesting you, on my decease, to hand it over to Miss F. P., & communicate to the secretary of the railway co. at the Manchester office, relative to the transfer of the said bond being entered in their books. Given under my hand this 9th day of Feb., 1882. As witness my hand—G. S.—P.S. You will find the bond in my deed-box attached to this memorandum." After testator's death a certificate of debenture stock for £1,000 in the M. S. & L. Ry. Co. was found with the memorandum in the deed-box:—*Held*: the memorandum was an ineffectual attempt to assign the debenture-stock, & did not amount to a good declaration of trust, & F. P. had no interest in the debenture stock.—*Re SHIELD, PETHYBRIDGE v. BURROW* (1885), 53 L. T. 5, C. A.

See, generally, GIFTS.

4829. Effect of registered transfer—Transferee with notice of prior unregistered transfer.]—In 1893 forty-five debentures of a limited co. secured by a trust deed were settled by

the co. so to register them.—*Re THOMSON & VICTORIA RY. Co.* (1881), 8 P. R. 423.—**CAN.**

c. — Proof of title — Production of intermediate transfers.]—O., being the holder of fourteen bonds of a co., requested the secretary of the co. to register the bonds under 38 Vict.

c. 56 (O). This the secretary refused to do unless the intermediate transfers were produced & registered at the same time:—*Held*: the secretary was bound to register the bonds without the production or registration of the transfers, & a summons for a *mandamus* was made absolute with costs.—*Re*

registered owner upon trusts for herself for life, with remainder to her three sons in equal shares, & she executed a deed of transfer of the debentures to C., who was the sole trustee of the settlement, & he had possession of the transfer & of the debentures, but he did not register his transfer in the books of the co. He was also the sole trustee of the debenture trust deed. In 1894 one of the sons assigned his one-third share, or fifteen of the debentures, to F. for value.

In 1911 the settlor, who was a director of the co. & in some way then had possession of the forty-five debentures, deposited them with the bankers of the co. as security for the co.'s overdraft & signed the usual declaration of charge. Before taking the charge the bank ascertained that the settlor was the registered owner of the debentures in the books of the co. The bank gave notice of their charge to C., as the trustee of the debenture trust deed, which he acknowledged, but made no reference to the settlement.

In 1914, after C.'s death, the bank first had notice of the settlement & C.'s deed of transfer, & they at once took a transfer of the forty-five debentures from the settlor & were registered as the owners in the books of the co. In an action by F. & the executors of C. claiming fifteen of the debentures in priority to the bank:—*Held*: that neither C.'s omission to register his transfer nor his silence when he received notice of the bank's charge estopped the pltf. from asserting their title; & also that F.'s assignment, being prior in date to the bank's charge, was the better in equity.—*COLEMAN v. LONDON COUNTY & WESTMINSTER BANK, LTD.*, [1916] 2 Ch. 353; 85 L. J. Ch. 652; 115 L. T. 152.

4830. Action for rescission on ground of misrepresentation — Plaintiff's lien for purchase-money.]—*IMPERIAL OTTOMAN BANK v. TRUSTEES, EXECUTORS & SECURITIES INSURANCE CORPN.*, No. 5120, *post*.

4831. Forged transfer—Forgery by one of three co-trustees.]—One of three trustees, being in possession with the consent of his co-trustees, of railway debentures executed to the three, sold them to a *bonâ fide* purchaser, & forged the names of his co-trustees to the deed of transfer, which was regularly entered in the books of the co. Upon a bill, filed by the other trustees praying that the alleged transfer might be declared void with consequential relief:—*Held*: the possession of the debentures by one trustee gave him no implied authority to deal with them, & the transfer was void.—*COTTAM v. EASTERN COUNTIES RY. Co.* (1860), 1 John. & H. 243; 30 L. J. Ch. 217; 3 L. T. 465; 6 Jur. N. S. 1367; 9 W. R. 94; 70 E. R. 737.

Annotations:—*Refd.* *Johnston v. Renton Johnston v. Forsey* (1869), L. R. 9 Eq. 181. *Mentd.* *Stackhouse v. Jersey* (1861), 30 L. J. Ch. 421; *Carshore v. N. E. Ry.* (1885), 54 L. J. Ch. 760; *Barton v. L. & N. W. Ry.* (1888), 38 Ch. D. 144; *Sheffield Corpn. v. Barclay*, [1903] 2 K. B. 580.

See, now, Forged Transfers Acts, 1891 (c. 43), & 1892 (c. 36).

4832. After voluntary winding up begun—Assignment by shareholder—Subject to calls.]—After a resolution to wind up a co. voluntarily has been made, a debenture issued by the co. & in the

v. TORONTO, GREY & BRUCE RY. Co. (1881), 8 P. R. 506.—**CAN.**

d. — — — — —.]—A bank received bonds of a railway co., represented as belonging to different persons named, & tendered them for registration at the railway office, in order that these persons might vote thereon.

hands of a shareholder can only be assigned subject to future calls.—*Re CHINA S.S. Co., Ex p. MACKENZIE* (1869), L. R. 7 Eq. 240; 38 L. J. Ch. 199; 19 L. T. 667; 17 W. R. 343.

Annotations:—**Consd.** *Christie v. Taunton Delmar Lane, Re Taunton Delmar Lane*, [1893] 2 Ch. 175. **Refd.** *Re Milan Tram. Co., Ex p. Theys* (1882), 22 Ch. D. 122.

4833. & judgment in debenture-holder's action—Right to registration.—After resolutions for the voluntary winding up of a co. had been passed & a liquidator appointed, & judgment had been given in a debenture-holder's action against the co., R. became transferee, by way of security for a loan, of certain debentures from C., who had been a director of the co. The conditions of the debentures provided that transfers must be delivered at the registered office of the co. with a fee, & such evidence of identity or title as the co. might reasonably require, & thereupon the transfers would be registered; & that the principal & interest secured by the debentures would be paid without regard to any equities between the co. & the original or any intermediate holder. After R. had taken his transfer it was discovered that C. had been guilty of misfeasance, & he was ordered to pay a sum of money to the liquidator in respect thereof. R., who had had no notice of any cross-claim by the co., duly sent his transfer to the liquidator, who was also receiver in the action, for registration, but the liquidator declined to register it, & claimed to deduct C.'s debt to the co. from the amount due on his debentures:—**Held**: the right to transfer & to have the transfer registered was not affected either by the winding up or by the judgment in the action, & consequently R. was entitled to receive without deduction any dividend payable in respect of C.'s debentures.—*Re GOY & Co., LTD., FARMER v. GOY & Co., LTD.*, [1900] 2 Ch. 149; 69 L. J. Ch. 481; 83 L. T. 309; 48 W. R. 425; 16 T. L. R. 310; 8 Mans. 221.

Annotations:—**Distd.** *Re Brown & Gregory, Shepherd v. Brown & Gregory, Andrews v. Brown & Gregory*, [1904] 1 Ch. 627; *Re Palmer's Decoration & Furnishing Co.*, [1904] 2 Ch. 743. **Consd.** *Re Rhodesia Goldfields, Part-ridge v. Rhodesia Goldfields*, [1910] 1 Ch. 239. **Refd.** *Re National Live Stock Insee., Re National General Insee.*, [1917] 1 Ch. 628. **Mentd.** *Rainford v. Keith & Blackman Co.*, [1905] 1 Ch. 296; *Re Peruvian Ry. Construction Co.* (1915), 85 L. J. Ch. 129.

Whether transferee takes subject to equities.—*See Sub-sect. 3, J., post.*

J. Equities affecting Debentures.

(a) In Hands of Transferee.

i. Equities affecting Transferor.

4834. Debentures transferable by instrument—Bonâ fide purchaser for value without notice.—Debentures under the common seal of a joint-stock co. incorporated under 1844 Act, were given to P. in July, 1854, in pursuance of an arrangement made between P. & the chairman of the directors, which was a fraud on the co. These debentures were afterwards bought by L. in the market in the ordinary course of business. The transfer to L. was registered in the books of the co., & interest was paid to July, 1855, inclusive, but the matter

was not made known to the shareholders till Dec. in that year, when an investigation of the affairs of the co. took place, in consequence of which the directors resigned, & the further payment of interest was refused:—**Held**: L., though a purchaser *bonâ fide* for value without notice, yet being only the purchaser of a chose in action not assignable at law, must take it subject to the equities attaching to it; & under the above circumstances, neither the registration nor the payment of interest had the effect of a confirmation of L.'s title, & he ought to be restrained from suing at law upon the debentures.—*ATHENÆUM LIFE ASSURANCE SOCIETY v. POOLEY* (1858), 3 De G. & J. 294; 28 L. J. Ch. 119; 32 L. T. O. S. 247; 5 Jur. N. S. 129; 7 W. R. 167; 44 E. R. 1281, L. JJ.

Annotations:—**Distd.** *Re South Essex Gaslight & Coke Co., Huletts Case* (1862), 2 John & H. 306; *Re Northern Assam Tea Co., Ex p. Universal Life Assco.* (1870), L. R. 10 Eq. 458. **Dbtd.** *South Essex Estuary Co., Carey's Claim*, [1873] W. N. 17; *Re Hercules Insee., Bruntons Claim* (1874), L. R. 19 Eq. 302. **Refd.** *Aberaman Iron-works v. Wickens* (1868), L. R. 5 Eq. 485; *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim* (1883), 24 Ch. D. 85.

4835. — The arts. of assocn. of a co. contained no provisions as to the issue of negotiable instruments, but the objects of the co. were such that a power to issue them was to be implied. The directors gave to H. for value an instrument under the seal of the co., headed "debenture," & stamped as a deed, by which the co. undertook to pay to the order of H., on July 1, 1867, £1,000, with interest half-yearly, on presentation of the annexed interest warrants:—**Held**: the indorsee & transferee for value of this instrument was entitled to prove on it against the co. free from equities between H. & the co.—*Re GENERAL ESTATES Co., Ex p. CITY BANK* (1868), 3 Ch. App. 758; 18 L. T. 894; 16 W. R. 919, L. JJ.

Annotations:—**Folld.** *Re Imperial Land Co. of Marseilles, Ex p. Colborne & Strawbridge* (1870), L. R. 11 Eq. 478; *Re South Essex Estuary Co., Ex p. Chorley* (1870), L. R. 11 Eq. 157; *Re Hercules Insee., Bruntons Claim* (1874), L. R. 19 Eq. 302. **Refd.** *Higgs v. Assam Tea Co.* (1869), L. R. 4 Exch. 387; *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374; *British India Steam Navigation Co. v. I. R. Comrs.* (1881) 7 Q. B. D. 165; *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim* (1883), 24 Ch. D. 85.

4836. — Special condition in debenture.—*Re GOY & Co., LTD., FARMER v. GOY & Co., LTD.*, No. 4833, *ante*.

4837. — Unregistered transferee.—Debentures obtained from a co. by misrepresentation were, after the co. had gone into voluntary liquidation, transferred for value to a person having no notice that the transferor's title was open to dispute. The transferee gave notice of the transfer to the liquidator, but did not demand registration. The debentures contained a covenant for payment by the co. to the registered holder; & indorsed conditions provided that the registered holder or his personal representative would be regarded as exclusively entitled to the benefit, that a transfer would be registered on delivery at the registered office of the co. with the prescribed fee & evidence of title or identity, & that the principal & interest would be paid without

The secretary of the co. registered such of the bonds as stood in the names of the original holders, but refused to register the others unless written transfers from the original holders were produced:—**Held**: the co. should register the bonds without the production of the transfers, the proof of title in the alleged owners was sufficient, & a *mandamus* to register the bonds was granted.—*Re JOHNSON & TORONTO, GREY & BRUCE RY. Co.* (1881), 8 P. R. 535.—**CAN.**

PART III. SECT. 34, SUB-SECT. 3.

J. (a) i.

e. Transfer without consideration.—*By indorsement—Claims of creditors of transferor.*—The holder of a debenture issued by the trustees of a Methodist church, transferred it without consideration, by signing an indorsement as follows:—"Pay to J. G. or order"—& delivered the same to the indorsee:—**Held**: such transfer did not vest the debt in the transferee so as to prevent the claims of the

creditors of the original holder attaching upon it.—*GORT v. GORT* (1862), 9 Gr. 165.—**CAN.**

f. Debenture deposited with bank.—*No transfer executed—Depositor indebted to company.*—The registered holder of debentures issued by a co. deposited them with a bank to secure advances, but no transfer was executed, nor any notice of the deposit given to the co. At the date of the deposit & of the winding up the registered holder was indebted to the co. in a

Sect. 34.—Borrowing and securing money: Sub-sect. 3, J. (a) i. & ii., & (b) i. & ii.]

regard to equities between the co. & the original or any intermediate holder, & the receipt of the registered holder should be a good discharge:—

Held: the transferee was not entitled to hold the debentures free from equities between the co. & the transferor.

Semble: even if the transferee had demanded registration, the co. would have been entitled to enforce its equities.

Conditions such as those indorsed are only a protection to the transferee when he has got upon the register.—*Re PALMER'S DECORATION & FURNISHING CO.*, [1904] 2 Ch. 743; 73 L. J. Ch. 828; 91 L. T. 772; 53 W. R. 142.

Annotation:—*Reid. Rainford v. Keith & Blackman Co.*, [1905] 1 Ch. 296.

4838. — Assignment to trustee for creditors of debenture-holder.]—Debentures in a limited co. were assigned by a firm, with other property, to P. as the trustee of a creditor's deed, & P. was registered as the holder of these debentures. The conditions on the debentures provided that the money thereby secured should be paid without regard to any equities between the co. & the original or any intermediate holder, & that the registered holder would be regarded as exclusively entitled to the benefit of the debenture, & that the co. should not be bound to enter in the register notice of any trust, or to recognise any right in any other person. The firm owed the co. £1,666, & the master had certified that the property comprised in the debentures included this debt. On application by the debenture-holders for the distribution of a fund in ct. in this action in payment of a dividend to the debenture-holders:—**Held:** P. as assignee of the firm was in no better position than his assignors, being simply general assignee in trust for creditors—neither the co. nor the debenture-holders having come in under the deed—& he could only be entitled to the debentures subject to the same equities as his assignors were subject to; the conditions in the debentures did not prevent the co. or the debenture-holders from insisting upon their rights against P., just as they could have insisted against his assignors, & P. must therefore bring into account the £1,666 before he could share in the fund now ready for distribution.—*Re BROWN & GREGORY, LTD., SHEPHEARD v. BROWN & GREGORY, LTD., ANDREWS v. BROWN & GREGORY, LTD.*, [1904] 1 Ch. 627; 73 L. J. Ch. 430; 52 W. R. 412; 11 Mans. 218; *subsequent proceedings*, [1904] 2 Ch. 448, C. A.

Annotations:—**Consd.** *Re Rhodesia Goldfields, Partridge v. Rhodesia Goldfields*, [1910] 1 Ch. 239; *Re Peruvian Ry. Construction Co.*, [1915] 2 Ch. 144.

4839. — No special provision in debenture.]—Where an estate is being administered by the ct.,

larger sum than the amount of the debentures, & was also indebted to the bank in a less sum for advances. The conditions of the debentures provided that the registered holder would be regarded as exclusively entitled to the benefit of the debentures, & that all persons might act accordingly, that the co. should not be bound to enter in the register notice of any trust, or to recognise the right of any other person, save as therein provided; that the money secured by the debentures would be paid without regard to any equities between the co. & the original or any intermediate holder thereof, & the receipt of a registered holder for such money should be a good discharge to the co.:—**Held:** the co. was entitled to set off the amount due to it from the registered holder as against

the amount of the debentures payable to him, & the co. was not bound to have regard to the claim of the bank as against the registered holder.—*Re SMITH (RICHARD) & CO.*, [1901] 1 I. R. 73.—**IR.**

g. Bonds transferable by ...
(*Charged to company by original holder.*)
—By 34 Vict. c. 47, s. 13, defts. were empowered to issue bonds or debentures in such form & amount, & payable at such times & places as the directors might from time to time appoint, etc.; & by 35 Vict. c. 12, s. 2, the bonds or debentures of corpsns. made payable to bearer, or any person named therein as bearer, may be transmitted by delivery, & such transfer should vest the property thereof in the holder, to enable him to maintain an action in his own name. Defts.

or a fund distributed, a party cannot take anything out of the fund until he has made good what he owes to it, whether his indebtedness is actually ascertained or not at the date of distribution. The application of this rule is general & wider than that of the doctrine of set off. So where the assets of a co. in liquidation consisted partly of an unascertained claim against a director for moneys of the co. come to his hands:—**Held:** in a distribution of assets in ct. the director could not receive anything in respect of debenture-stock for which his name was on the co.'s register until the amount of his indebtedness was ascertained; & persons to whom he had transferred the stock since the liquidation commenced, but who had not been registered as owners, were in no better position, the trust deed not containing a provision that transferees should be recognised as entitled free from any equity, set off, or cross-claim of the co. against their transferor.—*Re RHODESIA GOLD-FIELDS, LTD., PARTRIDGE v. RHODESIA GOLD-FIELDS, LTD.*, [1910] 1 Ch. 239; 79 L. J. Ch. 133; 102 L. T. 126; 54 Sol. Jo. 135; 17 Mans. 23.

Annotations:—**Consd.** *Re Peruvian Ry. Construction Co.*, [1915] 2 Ch. 144; *Re Smelting Corp'n., Seaver v. Smelting Corp'n.*, [1915] 1 Ch. 472. **Appld.** *Re National Live Stock Insco., Re National General Insco.*, [1917] 1 Ch. 628. **Consd.** *Re Melton, Milk v. Towers*, [1918] 1 Ch. 37. **Mentd.** *Re Jewell's Settltmt. Watts v. Public Trustee*, [1919] 2 Ch. 161; *Re Pain, Gustavson v. Haviland*, [1919] 1 Ch. 38.

4840. Debenture to bearer—Debentures invalidly issued.]—*MOWATT v. CASTLE STEEL & IRON WORKS CO.*, No. 4791, *ante*.

See, generally, BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS, Vol. VI., pp. 499, 450, Nos. 2877-2882.

Estoppel of company.]—*See Sub-sect. 3, J. (b),*

ii. Equities not affecting Transferor.

4841. Issue of debentures to company's agents—Claim by company to set off against debenture sums due from agents.]—Debentures were issued by a limited co., & certain ships were assigned to trustees upon trust to secure "to the holders for the time being" of the debentures the amount therein expressed to have been lent to the co. Some of these debentures were issued to agents of the co. who had incurred expense on its account. An assignee for value from the agents now sought to have the debentures paid out of the proceeds of the sale of the ships. The co. alleged that there were outstanding accounts between themselves & their agents, on which a large balance would be found due to them, & they claimed to set off this balance against the amount payable on the debentures:—**Held:** even without reference to the peculiar form of the trust deed, the co. had no such equity against the parties to whom they issued the debentures, & therefore they had none

issued bonds or debentures, with coupons attached for the payment of the interest half-yearly, payable to bearer, & delivered them to C. & Co., the contractors for the building of the road. The coupons for the first instalment of interest not having been paid, the pltf. brought an action thereon, alleging an assignment to him, & that he was the lawful holder thereof:—**Held:** the pltf. held the coupons freed from any equities arising between the defts. & C. & Co. under an agreement creating a charge upon such instruments, & a plea setting up the forfeiture of such debentures under such agreement, was held bad.—*MCKENZIE v. MONTREAL (CITY) & OTTAWA JUNCTION RY. CO.* (1873), 29 C. P. 333.—**CAN.**

against the assignee.—*ASLATT v. FARQUHARSON* (1862), 10 W. R. 458.

Annotation :—*Consd. Re Imperial Land Co. of Marseilles, Ex p. Colborne & Strawbridge* (1870), L. R. 11 Eq. 478.

4842. Debenture alleged to be improperly issued—Properly issued as against original holder.]—*Re RENSHAW & CO., LTD.*, [1908] W. N. 210.

4843. Transfer by cestui que trust for value—Subsequent transfer by registered owner—Transferee with notice of prior unregistered transfer.]—*COLEMAN v. LONDON COUNTY & WESTMINSTER BANK, LTD.*, No. 4829, *ante*.

(b) *Estoppel of Company from Setting up Equities.*

i. *In General.*

4844. Who may take advantage of estoppel—Original holder.]—Where a co. has power to issue legally transferable securities an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia rite acta*. If such securities be legally transferable such an irregularity & *a fortiori* any equity against the original holder, cannot be asserted by the co. against a *bonâ fide* transferee for value without notice. Nor can such an equity be set up against an equitable transferee, whether the securities were transferable at law or not, if by the original conduct of the co. in issuing the securities or by their subsequent dealing with the transferee he has a superior equity. If the original conduct of the co. in issuing debentures was such that the public were justified in treating it as a representation that they were legally transferable, there would be an equity on the part of any person who had agreed for value to take a transfer of these debentures to restrain the co. from pleading their invalidity, although that might be a defence at law to an action by the transferor.

A co. having, subject to the conditions in the 1845 Act, the power of borrowing, issued, after resolutions passed at a meeting at which an insufficient number of shareholders were present, debentures to the contractor P., who was present at the meeting & knew of the irregularities of the co. P. transferred some of the debentures to Y., a sub-contractor, for a nominal consideration, & some to C. for value. Y. had a bill against P., & P. discounted it & took as security a deposit of some of the debentures which had been registered in the name of P. These debentures were not transferred to P. & the transfer to Y. was not registered. T. took a transfer of other debentures from Y. for a nominal consideration which had not been registered in the name of P., but the transfer to Y. had been registered & T. alleged that he gave value to Y. Registration of the transfer to T. was refused. He brought an action against the co. for payment & for registration, but it was stopped by the winding up. C. had a transfer for full value & registered :—*Held* : (1) C. had a valid claim to be paid his debentures, & the co. were estopped from setting up the irregularity in the issue of them ; (2) P. & T. must be treated as equitable transferees only, but without reason to suspect any irregularity in the issue, & they could be allowed to recover only such a sum as each of them might be able to prove he *bonâ fide* advanced upon the securities which he received.—*Re ROMFORD CANAL CO., POCOCK'S CLAIM*,

TRICKETT'S CLAIM, CAREW'S CLAIM (1883), 24 Ch. D. 85 ; 52 L. J. Ch. 729 ; 49 L. T. 118.

4845. — Equitable transferee.]—*Re ROMFORD CANAL CO., POCOCK'S CLAIM, TRICKETT'S CLAIM, CAREW'S CLAIM*, No. 4844, *ante*.

4846. Against whom estoppel operates—Liquidator.]—*Re SOUTH ESSEX ESTUARY CO., Ex p. CHORLEY*, No. 4850, *post*.

See, generally, ESTOPPEL.

ii. *What operates as Estoppel.*

4847. Registration of transfer—& payment of interest.]—*ATHENÆUM LIFE ASSURANCE SOCIETY v. POOLEY*, No. 4834, *ante*.

4848. — & issue of certificates in name of transferee.]—*Pltf.*, having sold an estate to *defts.*, a limited co., received from them in part-payment of the purchase-money a large number of debentures for £100 each, expressed to be payable to him or his assigns. Some of these debentures he afterwards assigned to C. & S., transfers to whom were duly registered. *Defts.* also issued certificates to C. & S. describing them as “registered proprietors” & in other dealings with them treated them as being in fact such proprietors. After the assignment, but previous to the day fixed for payment of the debentures & previous to some of the dealings with C. & S. above mentioned, *pltf.* became indebted to *defts.* for unpaid calls on shares held by him in their co. *Defts.*, under their arts. of assocn., had a primary lien on the debentures of any member of the co. who might be absolutely or contingently liable to the co. in any amount or on any account whatsoever ; & the debentures assigned to C. & S. having become due, *defts.* sought in actions brought against them in the name of *pltf.*, to recover the amounts due to C. & S. respectively, to set off the debt due to them from *pltf.* :—*Held* : *defts.* had by their original contract with *pltf.* so contracted & by their subsequent dealings with C. & S. so conducted themselves as to have lost in equity the right to set off *pltf.*'s debt against the claims of C. & S.—*HIGGS v. ASSAM TEA CO.* (1869), L. R. 4 Exch. 387 ; 28 L. J. Ex. 233 ; 21 L. T. 336 ; 17 W. R. 1125.

Annotations :—*Folld. Re Northern Assam Tea Co., Ex p. Universal Life Assoc.* (1870), L. R. 10 Eq. 458. *Consd. Re South Essex Estuary Co., Ex p. Chorley* (1870), L. R. 11 Eq. 157 ; *Re Hercules Insce., Brunton's Claim* (1874), L. R. 19 Eq. 302 ; *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim* (1883), 24 Ch. D. 85. *Refd. Re Imperial Land Co. of Marseilles, Ex p. Colborne & Strawbridge* (1870), 23 L. T. 515 ; *Sankey Brook Coal Co. v. Marsh* (1871), L. R. 6 Exch. 185 ; *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374 ; *Pellias v. Neptune Marine Insce.* (1879), 42 L. T. 35.

4849. — — —.]—A. sold lands to a co. in which he was a shareholder, & received in part-payment of the purchase-money debentures payable to him, his exors., administrators, or assigns. He transferred some of these debentures in Aug. 1865, & the transferees were registered as proprietors of the debentures, & the co. issued certificates to them, describing them as “registered proprietors.” In 1866 & 1867 calls were made upon A.'s shares, & were not paid, & the co. was afterwards ordered to be wound up. By the arts. of assocn. of the co., it was provided that the co. should have a primary lien on the debentures of any member of the co. who might be either absolutely or contingently indebted to the co. in

PART III. SECT. 34, SUB-SECT. 3.—
J. (b) ii.

k. *Negligence in leaving signed bonds in hands of president—Bonâ fide holder for value without notice.]—*A

certain number of bonds were handed to H., president of the co., by trustee D., after he had signed them. H. borrowed money for his own use from R., & gave bonds as collateral security,

also depositing sixteen of them with R. for safe keeping. R. used all the bonds as collateral security for a loan subsequently obtained by him for his own use. The holders of these bonds

Sect. 31.—Borrowing and securing money: Sub-sect. 3, J. (b) ii. & K. (a) i. & ii.]

any amount or on any account whatsoever, & that the directors might, after such debt became actually payable, sell & transfer any debentures of any member so indebted. On an application by the transferees for leave to prove in the winding up for the full amount of the debentures which had become payable:—*Held*: the co. had by their course of conduct released the equities subsisting between themselves & A., & they were, therefore, not entitled to set off the calls due from A. against the claim of the transferees of the debentures.—*Re NORTHERN ASSAM TEA CO., Ex p. UNIVERSAL LIFE ASSURANCE CO.* (1870), L. R. 10 Eq. 458; 39 L. J. Ch. 829; 23 L. T. 639.

Annotations:—*Refd.* *Sankey Brook Coal Co. v. Marsh* (1871), L. R. 6 Exch. 185; *Re Hercules Insce., Brunton's Case* (1874), 31 L. T. 747.

4850. — Consent judgment in action on security.—Lloyd's bonds payable in three years, with interest in the meantime, were given by a co. to their contractor as compensation for the surrender of the contract. Two of these bonds were purchased for value from the contractor, without notice of the arrangement between him & the co. The bonds & the transfers were registered in the co.'s books. The transferee sued the co. for eighteen months' interest, & recovered the amount due. Subsequently proceedings at law were taken against the co. to recover principal & interest, & judgment was entered up by consent against the co., which was then ordered to be wound up:—*Held*: upon adjourned summons, whether the bonds were valid or invalid in the hands of the contractor, the official liquidator was precluded by the subsequent conduct of the co. from questioning their validity in the hands of a purchaser for value without notice.—*Re SOUTH ESSEX ESTUARY CO., Ex p. CHORLEY* (1870), L. R. 11 Eq. 157; 40 L. J. Ch. 153; 19 W. R. 430.

Annotations:—*Folld.* *Re South Essex Estuary Co., Carey's Claim*, [1873] W. N. 17. *Refd.* *Re Hercules Insce., Brunton's Claim* (1874), L. R. 19 Eq. 302.

4851. — Of one of two bonds held by transferee—Whether company estopped as to both.—*Re SOUTH ESSEX ESTUARY CO., CAREY'S CLAIM*, [1873] W. N. 17.

Annotation:—*Refd.* *Re Hercules Insce., Brunton's Claim* (1874), L. R. 19 Eq. 302.

4852. ——*Re ROMFORD CANAL CO., POCOCK'S CLAIM, TRICKETT'S CLAIM, CAREW'S CLAIM, No. 4844, ante.*

4853. Notice of assignment accepted—Transferee not registered.—A bond issued by an insurance co. to S., the condition of which was that it should be void on payment to S., his exors., administrators, & assigns, of a sum of money on a future day, was assigned for value by S. to B. B. made no enquiry as to the validity of the bond before taking the assignment, but gave notice of the assignment to the co. The co. accepted notice of the assignment but did not register it. Before the money secured by the bond became payable, the co. was ordered to be wound up:—*Held*: upon the application of the representatives of B. for leave to prove in the winding up against the co., the co., & not persons dealing with it, were answerable for the neglect of its officers to register the assignment of the bond, & whatever equities might have existed between the co. & the original obligee of the bond, the co. by accept-

ing notice of the assignment had precluded themselves from setting up those equities as against the assignee for value.—*Re HERCULES INSURANCE CO., BRUNTON'S CLAIM* (1874), L. R. 19 Eq. 302; 44 L. J. Ch. 450; 31 L. T. 747; 23 W. R. 286.

4854. Representation to transferee that debentures validly issued—Request for time for payment of interest.—Although debentures issued by a joint-stock co. to a director in payment for work contracted to be done by him for the co. are invalid in his hands under 1844 Act, their invalidity will not affect a *bonâ fide* assignee for valuable consideration without notice, if the co. have encouraged him in the belief that they were valid, asking for time for payment of arrears of interest on the debenture.—*Re SOUTH ESSEX GAS-LIGHT & COKE CO., HULETT'S CASE* (1862), 2 John. & H. 306; 31 L. J. Ch. 293; 5 L. T. 668; 8 Jur. N. S. 357; 10 W. R. 226; 70 E. R. 1073.

Annotation:—*Folld.* *Re South Essex Estuary, Ex p. Chorley* (1870), L. R. 11 Eq. 157.

4855. Negotiation for loan by company's agent—Ostensible authority.—If a co. entrusts its agent with a certificate of debenture-stock issued by itself, it will be assumed in favour of a purchaser or mtgee., in whose name the certificate is made out, & who has no notice to the contrary, that the agent had authority to deal with it to the full extent of its face value.

A. co. being desirous of borrowing £3,000, requested its brokers to negotiate the loan. The brokers applied to G. to advance not £3,000, but £6,000, which he agreed to do upon having a debenture-stock certificate for £8,000 deposited at his bank by way of security. The certificate was made out in the name of G., & stated that he was the registered holder of £8,000 debenture-stock in the co., & G. advanced the £6,000 & paid the same to the brokers, but only £3,000 of this sum was handed to the co.:—*Held*: G. was not bound to enquire what were the relations between the brokers & the co., but had a right to assume that the brokers had authority from the co. to deal with the certificate; & therefore he was, as regards the co. & other debenture-holders, in the position of a *bonâ fide* purchaser for value to the extent of his advance, & entitled in the liquidation of the co. to prove for the full amount of £8,000 until he obtained dividends not exceeding the amount due in respect of his loan of £6,000.—*ROBINSON v. MONTGOMERYSHIRE BREWERY CO.*, [1896] 2 Ch. 841; 65 L. J. Ch. 915; 3 Mans. 279.

4856. Implied representation by company that debentures legally transferable—Debentures irregularly issued.—*Re ROMFORD CANAL CO., POCOCK'S CLAIM, TRICKETT'S CLAIM, CAREW'S CLAIM, No. 4844, ante.*

See, generally, ESTOPPEL.

K. Modification of Rights.

(a) Modification Clause.

i. In General.

4857. Exercise of voting powers by holders—Whether fiduciary.—*SMITH v. KENT COLLIERIES, LTD.* (1908), *Times*, Apr. 3.

4858. — Bribe.—The power conferred by a trust deed on a majority of debenture-holders to bind a minority must be exercised *bonâ fide*, & the ct. will interfere to prevent unfairness or oppression; subject to this, each debenture-

for value & without notice made claim:—*Held*: they were entitled to recover against the co. on the ground that the co. had by their negligence

in allowing H. to have the bonds under his control made it possible for the bonds to find their way into the hands of *bonâ fide* purchasers.—*RAIL-*

WAYS & CANALS MINISTER v. QUEBEC SOUTHERN RY. CO. & SOUTH SHORE RY. CO., PILLING'S CLAIM (1908), 12 Exch. C. R. 152.—*CAN.*

holder may vote with regard to his individual interests, though those interests may be peculiar to himself & not shared by other debenture-holders.

A secret bargain by one debenture-holder for special treatment might be considered as corrupt & in the nature of bribery, but there can be no question of bribery, where a scheme openly provides for the separate treatment of persons with special interests, & such persons are not incapacitated from voting on the scheme. Where, however, there are diverse interests, & none the less where those diverse interests are specially provided for, the ct. ought to consider carefully the fairness of any scheme by which a majority seeks to bind a minority.—*GOODFELLOW v. NELSON LINE (LIVERPOOL), LTD.*, [1912] 2 Ch. 324; 81 L. J. Ch. 564; 107 L. T. 344; 28 T. L. R. 461; 19 Mans. 265.

ii. Construction of Clause.

Power of majority to bind minority.]—See Nos. 4859–4873, post.

4859. Powers given by clause—Not exercisable in manner inconsistent with right under trust deed.]—HAY v. SWEDISH & NORWEGIAN RY. CO., LTD. (1889), 5 T. L. R. 460, C. A.

Annotations:—Consd. Follit v. Eddystone Granite Quarries, [1892] 3 Ch. 75. *Mentd. Re Hyderabad (Deccan) Co.* (1896), 75 L. T. 23.

4860. General powers to modify—Not cut down by earlier express powers.]—SPICER v. HILLINGDON (1908), *Times*, May 20, C. A.

4861. What amounts to a modification or compromise—Postponement of security.]—Re DOMINION OF CANADA FREEHOLD ESTATE & TIMBER CO., LTD., No. 4878, *post*.

4862. ———.]—A co. issued debentures, each of which, under the provisions therein, or in the debenture-holders' covering deed contained, constituted a first charge upon the undertaking & property of the co., & was held upon the condition that a general meeting of the debenture-holders should have the power, by extraordinary general resolution passed by a certain majority, to sanction any modification or compromise of the rights of the debenture-holders, against the co. or against its property, so as to bind all the debenture-holders, whether present or not. A meeting of the debenture-holders was afterwards held, at which an extraordinary resolution was duly passed sanctioning a loan to the co. of £5,000, & resolving that such loan should take priority over the existing debentures, & should be a first charge upon the co.'s properties. A similar resolution was then passed by the shareholders, & in pursuance of these resolutions, a mtge. was executed whereby the co. charged all its property to secure £5,000 advanced by C., & the trustees for the debenture-holders postponed their security in favour of C.'s mtge.:—*Held*: the resolution sanctioning the loan, & giving priority to the mtge. by which it was secured, was valid, & the transaction a modification of the rights of the debenture-holders within the condition & binding upon a dissentient minority.—*FOLLIT v. EDDYSTONE GRANITE QUARRIES*, [1892] 3 Ch. 75; 61 L. J. Ch. 567; 40 W. R. 667; 8 T. L. R. 535; 36 Sol. Jo. 503.

4863. ——— Exchange of debentures for shares.]

PART III. SECT. 34, SUB-SECT. 3.—K. (a) ii.

4863 i. What amounts to a modification or compromise—Exchange of debentures for shares.]—The holders of three-fourths in value of certain debentures issued by a co. were empowered to modify the rights of all the debenture
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holders, by sanctioning any modification proposed by the co., or any compromise or arrangement which would under the Cos. Act Amendment Act, 1889, be such as the ct. would have jurisdiction to sanction:—*Held*: an arrangement that the debenture holders should accept fully paid-up shares

—The holders of the debentures of a co. had power by special resolution to sanction any modification or compromise of the rights of debenture-holders against the co. or against its property. The assets, business, & liabilities of this co. were afterwards transferred to another co., & subsequently a majority of the debenture-holders passed a resolution approving of a scheme to exchange the debentures for shares in the new co. The rights of the debenture-holders were undisputed & capable of being enforced without difficulty:—*Held*: no question of compromise had arisen; & the resolution did not bind a dissentient minority of the debenture-holders.—*MERCANTILE INVESTMENT & GENERAL TRUST CO. v. INTERNATIONAL CO. OF MEXICO* (1891), [1893] 1 Ch. 484, n.; 68 L. T. 603, n.; 7 T. L. R. 616, C. A.

Annotations:—Appl. Follit v. Eddystone Granite Quarries, [1892] 3 Ch. 75. *Follit v. Sneath v. Valley Gold*, [1893] 1 Ch. 477. *Consd. Re Hyderabad (Deccan) Co.* (1896), 75 L. T. 23. *Follit v. Stocks, Willey v. Stocks* (1909), [1912] 2 Ch. 134, n.; *Northern Assee. v. Farnham United Breweries*, [1912] 2 Ch. 125. *Consd. Re Guardian Assee.*, [1917] 1 Ch. 431. *Refd. Mercantile Investment & General Trust Co. v. River Plate Trust, Loan & Agency Co.*, [1891] 1 Ch. 578.

4864. ———.]—A co. issued certain debentures which were a charge on all its property. It was provided by a clause in the debentures that a general meeting of debenture-holders should have power by special resolution to sanction any modification or compromise of the rights of the debenture-holders against the co. or against the property. The co. was afterwards wound up voluntarily, & its assets were transferred to a new co. subject to the debentures. In Aug. 1892, the new co. passed resolutions for a voluntary winding up with a view to reconstruction. Its property consisted of certain mining rights which would be forfeited unless a large sum in fees was paid by the end of 1892, & there was no money to make these payments. A scheme was formed for the constitution of a new co., & amongst other things, it provided that the debenture-holders should accept ordinary shares in the new co. in place of their debentures. This scheme was duly sanctioned by the shareholders & also by a special resolution at a meeting of debenture-holders:—*Held*: what was proposed to be done was a compromise of the rights of the debenture-holders within the clause, & a majority of the debenture-holders had power to bind the minority.—*SNEATH v. VALLEY GOLD, LTD.*, [1893] 1 Ch. 477; 68 L. T. 602; 9 T. L. R. 137; 2 R. 292, C. A.

Annotation:—Follit v. Eddystone Granite Quarries, [1892] 3 Ch. 75. *Mentd. Re Hyderabad (Deccan) Co.* (1896), 75 L. T. 23.

4865. ———.]—X. Co., having issued debentures charging all its property, sold its land in M. subject to the debentures to Y. Co., which undertook to indemnify X. Co. against all claims. A majority of the debenture-holders of X. Co. subsequently passed a resolution that the debentures be exchanged for shares in Y. Co.:—*Held*: the resolution was a *bonâ fide* exercise of a power to consent to "any modification or compromise of the rights" of the debenture-holders, & was binding upon the minority.—*MERCANTILE INVESTMENT & GENERAL TRUST CO. v. RIVER PLATE TRUST, LOAN & AGENCY CO.*, [1891] 1 Ch. 578; 63 L. J. Ch. 366; 70 L. T. 131; 42 W. R. 365; 10 T. L. R. 186; 8 R. 791.

in a new co. in satisfaction of the debenture debt was a compromise which the ct. would have jurisdiction in sanctioning, & having been *bonâ fide* agreed to by the required majority was binding on all the debenture holders.—*ISLES v. DAILY MAIL NEWSPAPER* (1912), 14 C. L. R. 193.—*AUS.*

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4866. —.]—By a trust deed to secure debenture-stock in a co. the stockholders had power to sanction any compromise or arrangement proposed to be made between the company & the stockholders provided it was one which the ct. would have jurisdiction to sanction under the Joint-Stock Companies Arrangement Act, 1870 (c. 104), if the co. were being wound up & the requisite majority agreed thereto, & also power generally to sanction any modification or compromise of the rights of the stockholders against the co. or its property. A scheme of reconstruction proposed to make over the undertaking of the co. to a new co. & to give £1 fully-paid preference shares in the new co. for each £1 of debenture-stock to the debenture-stockholders, with power to the new co. to create an issue of debentures:—*Held*: the debenture-stockholders had power to sanction the scheme so as to bind dissentient stockholders.—*Re LABUAN & BORNEO, LTD., PEIRSON v. LABUAN & BORNEO, LTD.* (1901), 18 T. L. R. 216.

4867. — Exchange of debentures for debentures of purchasing company.]—The debenture-stock deed of a co. contained a majority clause giving a general meeting of the stockholders power to agree to accept any other property or securities instead of the stock, & in particular any debentures or debenture-stock of the co., & power to sanction any scheme for the reconstruction of the co. or for the amalgamation of the co. with any other co. The co. agreed to sell its assets to another co., the debenture-stock of the vendor co. to be exchanged for debenture-stock of the purchasing co., & the agreement being conditional on its approval by the stockholders. A resolution of approval was passed by them:—*Held*: the proposed scheme came within the majority clause & the trustees of the deed could properly act on it.—*Re HUTCHINSON (W. H.) & SONS, LTD., THORNTON v. HUTCHINSON (W. H.) & SONS, LTD.* (1915), 31 T. L. R. 324.

4868. — Postponement of date of payment.]—A trust deed securing debentures provided by clause 15 thereof for their redemption, but so as that in every case overdue debentures should be redeemed before debentures not overdue, & those maturing at an earlier date before those maturing at a later date; but as between debentures maturing at the same date, then by a drawing in the manner therein prescribed. The deed contained a power to a general meeting of debenture-holders to sanction any modification or compromise of the rights of the debenture-holders. Pltf. was the holder of a debenture which became due in 1895. By a general meeting a resolution was passed, clause 2 of which provided that, subject to the provisions of clause 15 of the trust deed, the outstanding debentures were to be redeemed at dates not earlier than 1898, & by clause 3, no debenture becoming due before Dec. 31, 1907, was to be payable unless & until it was drawn for:—*Held*: clauses 2 & 3 of the resolution must be read together; their effect was to postpone all debenture-holders till 1898, but to preserve the privilege given by priority of date, & the resolution was within the scope of the authority conferred upon the general body of debenture-holders by the trust deed.—*FINLAY v. MEXICAN INVESTMENT CORPN.*, [1897] 1 Q. B. 517; 66 L. J. Q. B. 151; 76 L. T. 257; 13 T. L. R. 63.

Annotations:—*Reid*. *Shaw v. Royce*, [1911] 1 Ch. 138; *Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insee. Case*, [1914] 2 Ch. 617. *Mentd.* *Seaton v. Heath, Seaton v. Burnand*, [1899] 1 Q. B. 782; *Parrs Bank v. Albert Mines Syndicate* (1900), 5 Com. Cas 116.

4869. — —.]—By one of the conditions as to the issue of the debenture-stock of a co. it was provided that a meeting of the holders might, by a resolution of three-fourths, agree to any compromise or adjustment of any claim by the holders against the co., or for the settlement of any question in dispute, or the giving of time to the co. for the payment of any principal or interest or the release of the property or any portion thereof charged to secure the stock; & that such resolution should bind all the holders. Debenture-stock to the extent of £75,000 had been issued by the co., which was redeemable on Oct. 1, 1901. The directors had endeavoured to raise funds to redeem the stock, but the negotiations were unsuccessful. The co. therefore was not in a position to redeem on Oct. 1, 1901, & the redemption could not be carried out without prejudicing the stockholders themselves. The co. convened a meeting of the stockholders under the above condition, at which two resolutions were passed by a majority present, one extending the period for redemption of the stock until July 1, 1904, & the other authorising the increase of the stock up to £100,000 by the issue of £25,000 further stock to rank *pari passu* with the existing stock:—*Held*: the condition was not limited to cases where disputes had arisen within the strict meaning of that term, but was applicable to a case where difficulties had to be met & the majority of the debenture-stockholders, acting honestly & *bona fide*, & with a view to the preservation & improvement of their security, had power to bind the minority under the language of the condition when passing the resolutions.—*WALKER v. ELMORE'S GERMAN & AUSTRO-HUNGARIAN METAL CO., LTD.* (1901), 85 L. T. 767, C. A.

Annotation:—*Consd.* *Northern Assco. v. Farnham United Breweries*, [1912] 2 Ch. 125.

4870. — —.]—By a trust deed, dated in 1898, & made between a co. & trustees, certain debenture-stock was charged on the assets & property of the co. & was to be redeemed on Oct. 1, 1907. The deed gave to a certain majority in value of debenture-stockholders present at a meeting wide powers, including a power to sanction any modification or compromise of the rights of stockholders as against the co. At a meeting of the debenture-stockholders held in 1904 a resolution was passed by a large majority that the debenture-stockholders consented to the conversion of their existing 4 per cent. mortgage debenture-stock, redeemable at par on Oct. 1, 1907, into or for 4½ per cent. irredeemable debenture-stock, interest on the new stock to commence as from Oct. 1, 1904:—*Held*: the resolution was a modification of the rights of the debenture-stockholders; it was competent for the majority in meeting to make such modification; & the true meaning of the resolution was that the debenture-stock which by the trust deed was to be paid off on Oct. 1, 1907, was to be replaced by stock which was not so liable.—*Re STOCKS (JOSEPH) & CO., LTD., WILLEY v. STOCKS (JOSEPH) & CO., LTD.* (1909), [1912] 2 Ch. 134, n.; 26 T. L. R. 41; 54 Sol. Jo. 31.

Annotation:—*Reid*. *Northern Assce. v. Farnham United Breweries*, [1912] 2 Ch. 125.

4871. — Reissue of redeemed debentures.—To rank *pari passu* with existing debentures.]—A co. issued debentures which were to rank *pari passu* with each other, & which were secured by a trust deed. By the deed the registered holders of the debentures were entitled to vote at any meeting of debenture-holders, & each voter at a poll was entitled to one vote in respect of every principal sum of £10 secured by his debentures.

The deed also gave power to a meeting, by extraordinary resolution, to modify the rights of debenture-holders & the provisions of the deed; & extraordinary resolution was defined as meaning a resolution passed by a majority consisting of holders of not less than three-fourths in value of the debentures represented at the meeting. At a meeting of debenture-holders called for the purpose of modifying the trust deed so as to enable the directors to reissue paid-off debentures, a bank, to whom the co. had issued debentures for £55,000 as security for an over-draft of £25,000, voted in respect of the face value of their debentures:—*Held*: the bank were entitled to do so under the provisions of the trust deed; & the trust deed might be modified so as to empower the company to issue debentures in the place of those paid off in such a way as to make them rank *pari passu* with the outstanding debentures.—*Re KENT COLLIERIES, LTD., DAY v. KENT COLLIERIES, LTD.* (1907), 23 T. L. R. 559; 51 Sol. Jo. 498, C. A.

4872. — Conversion of redeemable to irredeemable debentures.—A debenture trust deed conferred upon a general meeting of the debenture-holders a power, exercisable by extraordinary resolution passed by a majority of not less than three-fourths of the number of persons voting thereat, to sanction any modification or compromise of the rights of the debenture-holders against the co. or against its property, whether arising under the debentures, or the trust deed or otherwise, & provided that an extraordinary resolution duly passed should be binding upon all the debenture-holders:—*Held*: the conversion of redeemable debentures into irredeemable or perpetual debentures was a modification of the rights of the debenture-holders within the meaning of the power, & the existence of some serious or special circumstances was not a condition precedent to the exercise of the power.—*NORTHERN ASSURANCE CO., LTD. v. FARNHAM UNITED BREWERIES, LTD.*, [1912] 2 Ch. 125; 81 L. J. Ch. 358; 106 L. T. 527; 28 T. L. R. 305; 56 Sol. Jo. 360; 19 Mans. 178.

4873. — Sale of assets charged by debentures — Use of proceeds to redeem debentures at lowest price offered.—*Re NEW YORK TAXICAB CO., LTD., SEQUIN v. NEW YORK TAXICAB CO., LTD.*, No. 4999, *post*.

(b) *By Scheme Sanctioned by Court.*

4874. What court may sanction — Exchange of debentures for fully-paid shares — Or cash.—A railway co. incorporated under 1862 Act, issued debentures to a large amount, the payment of which was secured by a mtge. of the railway to trustees on behalf of the debenture-holders, & the mtge. deed empowered the trustees, in case default should be made in payment of the debentures & interest, to sell the railway with the sanction of three-fourths in number & value of the debenture-holders present at a meeting, of which the quorum was to be fifty persons holding not less than a moiety of the outstanding debentures. The co. went into voluntary liquidation, which was afterwards continued under the supervision of the ct., & a bill was filed for the administration of the trusts of the mtge. deed. At a meeting held for the purpose, 29 out of 31 debenture-holders then present, & holding a moiety of the outstanding debentures, agreed to a scheme,

whereby it was proposed that a new co. should be formed to take over the railway, & that in exchange for their debentures, the debenture-holders should receive certain paid-up shares in the new co., or should be paid off in cash at a fixed sum which was estimated to be the value on the debentures. Two out of the 31 dissented from the scheme:—*Held*: the ct. had power in the suit for administering the trusts of the mtge. deed & to sanction the scheme, as it really amounted to a sale under the power contained in the deed.—*Re TUNIS RYS. CO., LTD., TOLME v. TUNIS RYS. CO., LTD.* (1874), 31 L. T. 264, L. J.

4875. — — — — ——*Re NORTH WESTERN, ETC. CO., LTD.* (1882), Palmer's Company Precedents 3rd. ed., p. 603.

Annotation:—*Folld. Re Alabama, New Orleans, Texas & Pacific Junction Ry.*, [1891] 1 Ch. 213.

4876. — — — — ——The power given to the ct. by the Joint-Stock Companies Arrangement Act, 1870 (c. 104), to sanction a scheme between a co. & its creditors, extends to debenture-holders, & the ct. has jurisdiction to deprive dissentient debenture-holders of their security, & to sanction a scheme which provides that they shall accept fully-paid shares in satisfaction of their claims. The ct. will not sanction a scheme merely because it has been approved by a large majority of creditors; it will require to be satisfied that the proposed arrangement is fair & equitable—*Re EMPIRE MINING CO.* (1890), 44 Ch. D. 402; 59 L. J. Ch. 345; 62 L. T. 493; 38 W. R. 747; 2 Meg. 191.

Annotations:—*Folld. Re Alabama, New Orleans, Texas & Pacific Junction Ry.*, [1891] 1 Ch. 213. *Appl. Sneath v. Valley Gold*, [1893] 1 Ch. 477. *Folld. Re Labuan & Borneo, Peirson v. Labuan & Borneo* (1901), 18 T. L. R. 216. *Refd. Re Guardian Assce.*, [1917] 1 Ch. 431.

4877. — Receipt of less than full amount due.—*Re MADRAS IRRIGATION CO.* (1882), cited, [1891] 1 Ch. 228.

Annotation:—*Folld. Re Alabama, New Orleans, Texas & Pacific Junction Ry.*, [1891] 1 Ch. 213.

4878. — Creation of prior charge.—A co., registered in 1881 issued debentures to the extent of £60,000 which did not charge its property, but were secured by a trust deed, made between the co. & trustees for the debenture-holders. The trust deed expressly provided that the debenture-holders might assent to any modification of the provisions thereof by passing resolutions to that effect. Such resolutions were to be passed at meetings summoned by the trustees of the deed, notice whereof was to be given by means of advertisements. A meeting of the debenture-holders was duly called, & resolutions were passed for the purpose of creating a rentcharge of £720 *per annum*, & the debenture-holders gave to the holders of the rentcharge priority over the debentures. Subsequently the co. determined upon a voluntary winding up. In the course of the winding-up proceedings, the liquidator prepared a scheme of arrangement, pursuant to the Joint-Stock Companies Arrangement Act, 1870 (c. 104), under which the assets of the co. were, in the first place, to be charged with the payment of the sum of £20,000, whereof £12,000 was to represent the claims of the holders of the rentcharge & £8,000 certain fresh moneys obtained, & in the second place, with the payment of the £60,000 debenture moneys. The scheme having been approved by the statutory majority both of the debenture-holders & the rentcharge security holders, a petition

PART III. SECT. 34, SUB-SECT. 3.—
K. (b).

1. *What court may sanction—Conversion of debenture-bonds into debenture-stock.*—On a petition under

Cos. (Consolidation) Act, 1908, s. 120, at the instance of a co. which was not being wound up, the ct. sanctioned an arrangement whereby debentures & debenture bonds, repayable at periods of from three to five years, were

converted into debenture stock, repayable only on the occurrence of certain contingencies.—*Re SHANDON HYDROPATHIC CO., LTD.*, [1911] S. C. 1153; 48 Sc. L. R. 943; 2 S. L. T. 267.—SCOT.

Sect. 34.—Borrowing and securing money: Sub-sect. (b) & L.

was presented to the ct. for its sanction thereto. One of the debenture-holders opposed the petition on the ground that the proposed scheme was not fair to the debenture-holders; that the majority of the debenture-holders had no power to bind the minority; & that if they had such power the resolution of the debenture-holders approving the scheme was invalid, because the notice sent to the debenture-holders did not state that there was a question of priority between the secured creditors of the co.:—*Held*: the scheme was within the scope of the authority given by the trust deed, & was a fair scheme such as the ct. ought to sanction under the above Act.—*Re DOMINION OF CANADA FREEHOLD ESTATE & TIMBER CO., LTD.* (1886), 55 L. T. 347.

Annotation:—*Appld.* *Follit v. Eddystone Granite Quarries* [1892] 3 Ch. 75.

4879. — Deprivation of part of security.—The power given by the Joint-Stock Companies Arrangement Act, 1870 (c. 104), s. 2, to sanction a scheme of arrangement between a co. in liquidation & its creditors extends to debenture-holders & other secured creditors, & enables the ct. to sanction a scheme, although it deprives debenture-holders of their security wholly or in part. In exercising the power of sanctioning a scheme of arrangement conferred on it by the Act, the ct. will not only ascertain that all the statutory conditions have been complied with, but will also consider whether the class of creditors summoned to the meeting was fairly represented by those who attended, & whether the statutory majority who approved of the scheme were acting *bonâ fide* or were seeking to promote interests adverse to those of the class whom they professed to represent, & generally whether the arrangement is such as a man of business would reasonably approve.—*Re ALABAMA, NEW ORLEANS, TEXAS & PACIFIC JUNCTION RY. CO.*, [1891] 1 Ch. 213; 60 L. J. Ch. 221; 64 L. T. 127; 7 T. L. R. 171; 2 Meg. 377, C. A.

Annotations:—*Appld.* *Re English & Australian Chartered Bank*, [1893] 3 Ch. 385; *Sneath v. Valley Gold*, [1893] 1 Ch. 477. *Consd.* *Re London Chartered Bank of Australia*, [1893] 3 Ch. 540. *Follid.* *Re Labuan & Borneo, Poirson v. Labuan & Borneo* (1901), 18 T. L. R. 216. *Refd.* *Walker v. Elmore's German & Austro-Hungarian Metal Co.* (1901), 85 L. T. 767; *Re Guardian Assoc.*, [1917] 1 Ch. 431. *Mentd.* *Re A Debtor, Ex p. Peak Hill Goldfield*, [1909] 1 K. B. 430.

4880. — Release of guarantors of issue—Increase in rate of interest.—An arrangement whereby the guarantors of an issue of debentures are released from their guarantee, the interest on the debenture debt is increased, new trustees of the trust deed securing the debentures are appointed, & the sinking fund discontinued, is an arrangement or compromise which the ct. has jurisdiction to sanction under the Joint-Stock Companies Arrangement Act, 1870 (c. 104).—*SHAW v. ROYCE, LTD.*, [1911] 1 Ch. 138; 80 L. J. Ch. 163; 103 L. T. 712; 55 Sol. Jo. 188; 18 Mans. 159.

Annotation:—*Refd.* *Re Law, Guarantee, Trust & Accident Soc., Liverpool Mortgage Insee. Case*, [1914] 2 Ch. 617.

4881. How far absent parties bound—Sum set aside to meet claims of dissentients.—A scheme for the distribution of a fund in the hands of trustees in this country, representing money subscribed for mtge. bonds in a foreign railway co., such distribution being rendered necessary by

the failure of the co. to complete the railway, was sanctioned by the ct. in the interest of absent bondholders, many of whom resided abroad & could not easily be ascertained, the ct. being satisfied that the compromise was for the benefit of the absent parties; but a sum was set apart to provide for the maximum amount which could be required to meet the claims of the dissentient bondholders.—*COLLINGHAM v. SLOPER, FOREIGN, AMERICAN & GENERAL INVESTMENTS TRUST CO. v. SLOPER, FOREIGN, AMERICAN & GENERAL INVESTMENTS TRUST CO. v. SLOPER*, [1894] 3 Ch. 716; 64 L. J. Ch. 149; 71 L. T. 456; 12 R. 87, C. A.

Annotation:—*Mentd.* *Collingham v. Sloper*, [1901] 70 L. J. Ch. 361.

4882. — Limitation of time to come in or be excluded from scheme.—An action having been brought on behalf of the holders of bonds, payable to bearer, issued by a railway co. against the trustees for the bondholders & the co., the ct. in 1894 sanctioned a scheme for the compromise of the action under which all the bondholders should receive a certain sum in respect of each bond delivered up to be cancelled & ordered that the scheme should be binding on all the bondholders who were not parties to the proceedings:—*Held*: the ct. had jurisdiction to make an order on the holders of outstanding bonds, whose names & addresses had not been discovered, to come in within a period of six months & accept the sum per bond or be excluded from the benefit of the scheme.—*SARAGOSSA & MEDITERRANEAN RY. CO. v. COLLINGHAM*, [1904] A. C. 159; 73 L. J. Ch. 568; 52 W. R. 609; 20 T. L. R. 354; *sub nom.* *COMPANIA DE LOS FERROCARRILES DE ZARAGOZA v. COLLINGHAM*, 90 L. T. 212, H. L.; *reversg.* S. C. *sub nom.* *COLLINGHAM v. SLOPER*, [1901] 1 Ch. 769, C. A.

L. Redemption of Debentures.

(a) Right of Company to Redecm.

i. In General.

4883. Meaning of “redeemable.”—Debentures issued by a co. provided that the co. should carry to the credit of a sinking fund in each half-year the sum of £2,500 which should be applied in redeeming at a specified premium, on Jan. 1 & July 1 in each year, so many of the debentures issued as the sum from time to time standing to the credit of the sinking fund should suffice to pay off, the particular debentures to be redeemed on each occasion being determined by half-yearly drawings. The prospectus which the co. had previously issued, inviting subscriptions for the debentures, stated that they were to be “redeemable within seventeen years by half-yearly drawings on Jan. 1 & July 1 in each year by the application of a sinking fund of £5,000 *per annum*”:—*Held*: even if the prospectus could be looked at in order to ascertain the contract between the co. & the debenture-holders, the word “redeemable” meant only that the debentures were to be liable to redemption during the seventeen years, but there was no obligation upon the co. that they should all be redeemed within that period.—*Re CHICAGO & NORTH WEST GRANARIES CO., LTD., MORRISON v. CHICAGO & NORTH WEST GRANARIES CO., LTD.*, [1898] 1 Ch. 263; 67 L. J. Ch. 109; 77 L. T. 677.

Annotations:—*Consd.* *Re Stocks, Willey v. Stocks*, [1912] 2 Ch. 134, n. *Refd.* *Re Tewkesbury Gas Co., Tysoe v. Tewkesbury Gas Co.*, [1911] 2 Ch. 279.

L. (a) i.

m. Whether company may redeem—By sinking fund.—A co. desirous of borrowing on the security of

3.

terminable debentures, entered into an agreement with a trustee for the establishment of a sinking fund to redeem the debentures within ten years. It was agreed that the co. should pay to the trustee 25 per cent

of its free annual profits, payment to be made in cash or discharged debentures of equal value. A number of cash payments were made by the co. to the trustee who invested these sums:—*Held*: the interest of the sums

4884. Whether company may redeem—Interest on debentures of similar class in arrear.]—A railway co. had issued certain debentures, which provided that they should be redeemed by the co. by annual drawings. The debentures further provided that the holders should be treated *pari passu*, & without any priority or preference of one over the other. The interest on the debentures had fallen into arrear for seven half-years, during which time it had been the practice of the co. to hold drawings of a certain number of debentures, & to pay off the same, together with the interest on them which was in arrear. The co. by means of an additional traffic increased its revenue to a amount more than sufficient to pay the annual interest on the debentures, but not enough to pay off the arrears of interest & also provide for the payment of drawn bonds:—*Held*: the co. could not pay off any debentures while any interest on like debentures was in arrear; it was obligatory on the co. after the arrears of interest had been discharged to provide a sinking fund in order to pay off the drawn debentures; the co. could not capitalise the interest in arrear & give interest-bearing bonds for the amount in such a way as to interfere with the interest or capital due on any of their debentures; & they ought to suspend their drawings & sinking fund until the payment of arrears had been effected.—*HALE v. OTTOMAN RY. CO.* (1885), 2 T. L. R. 197.

4885. — Against wish of debenture-holder.]—Where debentures became enforceable on the happening of certain events, the debenture-holders have a right to require payment on the happening of those events, but they do not put the debenture-holders in a position of being compelled to accept payment. Where the events are entirely within the control of the co. to determine whether they shall happen or not, the co. cannot by determining the event compel the debenture-holder to accept his money at a moment's notice.—*Re GENERAL MOTOR CAB CO., LTD.* (1912), 56 Sol. Jo. 573.

Annotation:—**Expld.** Consolidated Goldfields of South Africa v. Simmer & Jack East (1913), 82 L. J. Ch. 214.

4886. — —.]—Where the principal moneys secured by debentures have become immediately payable according to a condition indorsed on the debentures on the ground that an order has been made for the winding up of the co., the co. or the guarantors of the loan are entitled to redeem the security, & the debenture-holders have no option to refuse payment unless the debenture itself so provides.—*CONSOLIDATED GOLDFIELDS OF SOUTH AFRICA v. SIMMER & JACK EAST, LTD.* (1913), 82 L. J. Ch. 214; 20 Mans. 214; *sub nom.* *Re SIMMER & JACK EAST, LTD., CONSOLIDATED GOLDFIELDS OF SOUTH AFRICA v. SIMMER & JACK EAST, LTD.*, 108 L. T. 488; 57 Sol. Jo. 358.

4887. — —.]—On Apr. 30, 1914, a limited co. issued a first mtge. debenture for £2,000 charging its property & undertaking in favour of X. Bank. On Aug. 4, 1914, the co. issued a second mtge. debenture upon the same security in favour of a Swiss firm, but subsequent to the first debenture. On May 19, 1915, X. Bank gave notice to the co. demanding repayment of the money due from the first debenture. Pltf., who was chairman of the co., paid off the debenture & took a transfer of the same to himself. He then commenced a debenture-holder's action against the co. & gave notice of motion to the co. & the second debenture-holder for the appointment of a receiver & manager on the ground that his

security was in jeopardy. The co. then tendered payment to pltf. of his debenture & requested a transfer to their nominee. Pltf. refused on the ground that the consent of the second debenture-holders was necessary, & no reply had been received as yet from them stating their wishes:—*Held*: pltf. was justified in refusing to accept payment from the co. without the consent of the second debenture-holders of whose charge he had notice.—*Re MAGNETA TIME CO., LTD., MOLDEN v. MAGNETA TIME CO., LTD.* (1915), 84 L. J. Ch. 814; 113 L. T. 986.

— **Effect of clogging the equity.]**—*See* Subsect. 3, L. (a) ii., *post*.

4888. Exercise of right—Advertisement of intention to redeem—Must clearly identify debenture to be redeemed.]—*FIRST NATIONAL BANK OF CHICAGO v. ORINOCO SHIPPING & TRADING CO., LTD.* (1904), 21 T. L. R. 39.

4889. — Place of payment—Duty of company to seek out debenture-holders.]—Where the registered debenture of a co. does not contain any provision appointing a particular place for payment, it is the duty of the co. to seek the debenture-holder, if he is within the realm, & make legal tender of the money on the due date without request; & in a case where no such legal tender has been made the holder of such a debenture, who from oversight, carelessness, or other cause has neglected to present his debenture for payment off on the due date, can recover from the co. interest on the principal moneys thereby secured down to the date of actual payment.—*FOWLER v. MIDLAND ELECTRIC CORPN. FOR POWER DISTRIBUTION, LTD.*, [1917] 1 Ch. 656; 86 L. J. Ch. 472; 117 L. T. 97; 33 T. L. R. 322; 61 Sol. Jo. 459, C. A.

ii. Clog on the Equity.

See, generally, MORTGAGE.

4890. Whether doctrine of clogging applies to debentures secured by floating charge.]—By an agreement made between pltf. co. & deft. co., after reciting that pltf. co. contemplated an issue of mtge. debentures, it was agreed that an existing advance made by deft. co. to pltf. co. under a prior agreement should remain outstanding until the issue of the debentures & that debentures for the amount of the advance should be accepted by deft. co. in satisfaction of the debt; that the debentures should be secured by a floating charge on pltf. co.'s undertaking; that deft. co. should make a further advance of a fixed amount to pltf. co. against debentures for that amount; & that in consideration of the assistance thus rendered & to be rendered pltf. co. should grant to deft. co. an exclusive right to work in perpetuity all the diamondiferous ground in the territories of pltf. co. The further advance was made & debentures in accordance with the agreement were issued by pltf. co. to deft. co. for the total amount of the advances. These debentures had since been paid off, but deft. co. insisted upon the grant of the mining licence. Pltf. co. impeached the validity of the stipulation for a licence on the ground that it was a clog on the equity of redemption under the debentures:—*Held*: the agreement imposed upon pltf. co. an absolute & immediate obligation to grant a licence but no absolute or immediate obligation to issue debentures; the stipulation for the licence was not part of the mtge. transaction & was not a clog on the equity of redemption.

Qu.: whether the doctrine against clogging the

invested by the trustee were accumulations of the sinking fund, & not profits of the co., for which the co. could take

credit in estimating the 25 per cent payable into the sinking fund by them.—*ARIZONA COPPER CO. v. LON-*

DON SCOTTISH-AMERICAN TRUST, LTD. (1897), 21 R. (Cl. of Sess.) 658; 34 Sc. L. R. 482; 4 S. L. T. 330.—*SCOT.*

Sect. 34.—Borrowing and securing money: Sub-sect. 3, L. (a) ii. & (b).]

equity of redemption applies to debentures secured by a floating charge.—**DE BEERS CONSOLIDATED MINES, LTD. v. BRITISH SOUTH AFRICA CO.**, [1912] A. C. 52; 81 L. J. Ch. 137; 105 L. T. 683; 28 T. L. R. 114; 56 Sol. Jo. 175, H. L.; *reversg.* S. C. *sub nom.* BRITISH SOUTH AFRICA CO. v. DE BEERS CONSOLIDATED MINES, LTD., [1910] 2 Ch. 502, C. A.

Annotations:—*Reid.* Kreglinger v. New Patagonia Meat & Cold Storage Co., [1914] A. C. 25. *Mentd.* *Re* MacKenzie, MacKenzie v. Edwards-Moss, [1911] 1 Ch. 578; *Re* Smith, Lawrence v. Kitson, [1916] 2 Ch. 206; Jenkin v. Pharmaceutical Soc. of Great Britain, [1921] 1 Ch. 392.

4891. —By an agreement dated Aug. 24, 1910, a firm of woolbrokers agreed to lend to a co. carrying on the business of meat preservers a sum of £10,000 at 6 per cent. If the interest was punctually paid the loan was not to be called in until Sept. 30, 1915, but the co. might pay off at any time on giving one calendar month's notice. The loan was secured by a floating charge on the undertaking of the co. The agreement provided that for a period of five years from the date thereof the co. should not sell sheepskins to any person other than the lenders so long as the latter were willing to buy at the best price offered by any other person & that the co. should pay to the lenders a commission on all sheepskins sold by the co. to any other person. The loan having been paid off by the co. in Jan., 1913, in accordance with the agreement, the lenders claimed to exercise their option of pre-emption notwithstanding the payment off of the loan:—*Held*: the stipulation for the option of pre-emption formed no part of the mtge. transaction, but was a collateral contract entered into as a condition of the co. obtaining the loan; it was not a clog on the equity of redemption or repugnant to the right to redeem & the lenders were entitled to an injunction restraining the co. from selling sheepskins to any person other than the lenders in breach of the agreement.

Semble: the equitable doctrine against clogging applies to a floating charge as much as to any other mtge. security.—**KREGLINGER v. NEW PATAGONIA MEAT & COLD STORAGE CO., LTD.**, [1914] A. C. 25; 83 L. J. Ch. 79; 109 L. T. 802; 30 T. L. R. 114; 58 Sol. Jo. 97, H. L.

Annotations:—*Appld.* *Re* Rainbow Syndicate, Owen v. Rainbow Syndicate, [1916] W. N. 178; Hopkinson v. Mortimer, Harley, [1917] 1 Ch. 646; *Re* Cuban Land Co., [1921] 2 Ch. 147.

4892. What constitutes a clog—Collateral agreement to purchase mortgaged property.]—*Appltd.* agreed to make an advance to resp. co. upon the security of first mtge. debenture stock of the co. with an option of purchasing the whole or any part of the stock so pledged at an agreed price at any time within twelve months. The co. were desirous of paying off the loan before the expiration of the twelve months, & appltd. gave notice that he intended to exercise his option of purchasing. The co. thereupon brought an action claiming a declaration that the agreement was not binding on them, & for consequential relief, & appltd. counterclaimed for specific performance or damages:—*Held*: the case came within the rule that a mtgee. is not allowed at the time of making the loan to enter into a contract for the purchase of the mtged. property, & the option of purchasing could not be enforced.—**SAMUEL v. JARRAH TIMBER & WOOD PAVING CORPN., LTD.**, [1904] A. C. 323; 73 L. J. Ch. 526; 90 L. T. 731; 52

W. R. 673; 20 T. L. R. 536; 11 Mans. 276, H. L.; *affg.* S. C. *sub nom.* JARRAH TIMBER & WOOD PAVING CORPN., LTD. v. SAMUEL, [1903] 2 Ch. 1, C. A.

Annotations:—*Consd.* Kreglinger v. New Patagonia Meat & Cold Storage Co., [1914] A. C. 25. *Reid.* De Beers Consolidated Mines v. British South Africa Co., [1912] A. C. 52. *Mentd.* Haji Abdul Rahman v. Mahomed Hassan, [1917] A. C. 209.

4893. — Separate agreement to grant licence to mine.]—DE BEERS CONSOLIDATED MINES, LTD. v. BRITISH SOUTH AFRICA CO., No. 4890, *ante*.

4894. — Separate agreement of option to purchase output.]—KREGLINGER v. NEW PATAGONIA MEAT & COLD STORAGE CO., LTD., No. 4891, *ante*.

4895. — Agreement to pay bonus out of annual profits.]—*Re* RAINBOW SYNDICATE, LTD., OWEN v. RAINBOW SYNDICATE, LTD., [1916] W. N. 178.

4896. — Right to share of surplus assets in winding up.]—A private co. in 1912 created an issue of £20,000 6 per cent. debenture-stock secured by a deed-poll which gave the debenture-holders a right in a winding up to 50 per cent. of the surplus assets. This debenture stock, of which £15,950 was issued, could be paid off at any time by the co. on six months' notice. In 1913 the debenture-stockholders by extraordinary resolutions sanctioned the issue in priority to the existing debenture-stock of £20,000 perpetual Prior Lien Debenture Stock, carrying 6 per cent. interest payable out of profits only & the right to one-third of the surplus assets in a winding up; & they resolved that the interest on the 6 per cent. debenture-stock should only be payable out of profits & that they should be entitled to only one-third of the surplus assets in a winding up. £10,000 Prior Lien Debenture Stock were issued accordingly. In Apr. 1920, the co. sold its principal asset, & out of the purchase-money paid off the two debenture stocks. In Oct. 1920, it was resolved by special resolution that the co. should be voluntarily wound up:—*Held*: as to both debenture stocks, the holders were entitled to share in the surplus assets, as there was nothing in the bargains inconsistent with or repugnant to the right of redemption.—*Re* CUBAN LAND CO., [1921] 2 Ch. 147; 90 L. J. Ch. 440; 125 L. T. 792; 65 Sol. Jo. 680; [1921] B. & C. R. 168.

—.]—*See, generally*, MORTGAGE.

(b) Right of Holder to Require Redemption.

4897. On resolution to wind up—Before time for payment arrived.]—HODSON v. TEA CO., No. 4744, *ante*.

4898. — —.]—WALLACE v. UNIVERSAL AUTOMATIC MACHINES CO., No. 4745, *ante*.

4899. — For purposes of amalgamation.]—Certain debentures of a co. contained a condition that "if the co. commenced to be wound up otherwise than for the purposes of reorganisation or reconstruction," the principal should become immediately payable. The co. afterwards proceeded to wind itself up for the purpose of carrying out an agreement for its amalgamation with another existing co. that was carrying on business on a larger scale:—*Held*: the principal secured by the debentures became payable when the resolution for winding up took effect, & the debentures therefore were payable off at par.—**HOOPER v. WESTERN COUNTIES & SOUTH WALES TELEPHONE CO., LTD.** (1892), 68 L. T. 78; 41 W. R. 84; 9 T. L. R. 17; 37 Sol. Jo. 10; 3 R. 58.

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L. (b).

n. On resolution to wind up—
Right to bonus—Payable on payment

after notice.]—A co. issued debentures of the value of £100 each upon the condition that the principal should immediately become payable (a) if an

order was made or an effective resolution was passed winding up the co., or (b) if the co. gave six months' notice in writing to the holder of a debenture

4900. For purposes of reconstruction.]—*Re CROMPTON & Co., LTD., PLAYER v. CROMPTON & Co., LTD., No. 4749, ante.*

4901. On default of payment of interest—Place of payment provided for—Duty of debenture holder to apply for payment.]—Where there is a condition for payment of a sum at a time & place certain, the condition is not broken by non-payment at the time unless the demand is made at the specified place.

A principal sum payable at a future date & half-yearly interest was secured subject to conditions that if default for fourteen days should be made in payment of any interest the principal should be immediately payable, & that principal & interest should be paid at one of two places. A half-year's interest was not paid within fourteen days of the time stipulated for, but the creditor did not appear at either place at the time named for payment:—*Held*: the principal was not immediately payable.—*THORN v. CITY RICE MILLS* (1889), 40 Ch. D. 357; 58 L. J. Ch. 297; 60 L. T. 359; 37 W. R. 398; 5 T. L. R. 172.

Annotations:—*Folld. Re Escalera Silver Lead Mining Co., Tweedy v. Escalera Silver Lead Mining Co.* (1908), 25 T. L. R. 87. *Consd. Re Harris Calculating Machine Co., Sumner v. Harris Calculating Machine Co.*, [1914] 1 Ch. 920. *Refd. Shrewsbury v. Shrewsbury* (1906), 23 T. L. R. 277.

4902. ———.]—By the conditions endorsed on a debenture it was provided that the principal money should become payable "if the co. makes default for a period of six months in payment of any interest hereby secured," & it was further provided that "the principal moneys & interest hereby secured will be paid at the registered office of the co." Interest was payable on Aug. 1 & Feb. 1, & had not been paid since Aug. 1, 1907, but the debenture-holder had not since then presented himself and demanded payment at the co.'s office at the dates fixed for payment. On an application by the debenture-holder for the appointment of a receiver of the assets of the co. upon the ground that the principal money secured by the debenture was due:—*Held*: as the debenture-holder had not given the co. the opportunity of performing the obligation of payment at its registered office, there had been no default by the co., & the debenture-holder's application failed.—*Re ESCALERA SILVER LEAD MINING CO., LTD., TWEEDY v. ESCALERA SILVER LEAD MINING CO., LTD.* (1908), 25 T. L. R. 87.

Annotation:—*Consd. Re Harris Calculating Machine Co., Sumner v. Harris Calculating Machine Co.*, [1914] 1 Ch. 920.

4903. ——— Waiver of default by subsequent receipt of interest.]—In 1895 a co. issued debenture stock which was secured by a debenture trust deed. The deed provided that the security should become enforceable in the event of default by the co. in the payment of interest on the stock

of its intention to pay it off, "but so that in such case a bonus of £5 shall be paid along with such principal moneys." The co. having sold all its assets, a resolution was passed & confirmed placing it in voluntary liquidation:—*Held*: the debenture holders were not entitled to claim the bonus of £5.—*CAPE PENINSULA LIGHTING CO., LTD. (IN LIQUIDATION) v. DEBENTURE-HOLDERS TRUSTEE* (1912), 3 C. P. D. 709.—S. AF.

o. On amalgamation of companies—New bonds issued to retire old bonds—Dissentient bond holders.]—Deft. co. took over the property of three other cos., subject to certain outstanding bonds. The bonds of deft. co. were issued to retire the bonds of the other cos., & by this means all the outstanding bonds were retired except certain bonds of two of the cos. respectively. The holders of these bonds contended that the bonds retired by deft. co. had been

paid & cancelled by such retirement, & that these bonds should be paid in full out of a fund in ct.:—*Held*: the redemption of the bonds by deft. co., by the issue & substitution therefor of bonds of its own, did not operate as a payment of the bonds so redeemed, but that the bonds so redeemed continued to be subsisting securities & entitled to share in the fund in ct. proportionately with the bonds not so redeemed.—*PRATT v. CONSOLIDATED ELECTRIC CO.* (1894), 34 N. B. R. 23.—CAN.

p. Proof of title of holder—Bonds destroyed—Payment of interest for twenty years.]—A corpn. issued debentures, charging the rates, duties & revenues under its control with payment of the interest half-yearly, but not mentioning any date for payment of the principal. Five of these bonds were destroyed in a fire, which occurred accidentally in the owner's residence.

for a period of three months after such interest ought to have been paid. In 1896 the co. made default in payment of the interest on the debentures. Thereupon a petition was presented by a debenture-stockholder to wind up the co., but was withdrawn by him on certain terms which included the payment to him of the interest due on his debentures. A petition was now presented by the same debenture-stockholder, who had received payment of all interest due on his debentures, to wind up the co. alleging that the co. was only able to pay the interest on the debenture-stock by borrowing the amount required; that default had been made in payment of the interest on the debentures; and that the principal of his debenture-stock had thereupon become due & was payable to him:—*Held*: petitioner, by receiving the interest on his debentures, had waived the default by the co. in 1896, & could not now take advantage of it, & as no interest was due to him & the debentures were not repayable until 1904, there was no debt presently due to him in respect of which he could petition, & the petition must be dismissed.—*Re MELBOURNE BREWERY & DISTILLERY*, [1901] 1 Ch. 453; 70 L. J. Ch. 198; 84 L. T. 228; 49 W. R. 250; 17 T. L. R. 173; 8 Mans. 403.

4904. ——— No place of payment provided for.]—A co. having borrowing powers limited to £3,000, procured an overdraft from their bankers on the guarantee, up to £3,000 of pltf. & two others. When the overdraft was nearly £3,000, each guarantor at the request of the co. gave the co. his cheque for £1,000, & the co. afterwards paid off the overdraft with these cheques. The co. issued to each guarantor a debenture for £1,000 & interest with conditions which made the principal payable if the holder should serve a notice on the co. requiring payment of principal & interest & the co. should make default for three days in payment of any part thereof & that the principal should be paid at Lloyds Bank, 222, Strand. Pltf. & another debenture-holder gave the co. notice to pay off the principal & interest; the co. made default for three days & thereupon pltf. brought this action to enforce the debentures, asking the usual relief. The principal defence pleaded was that the limit had been exceeded. No demand for payment had been made at Lloyds Bank. This objection was not pleaded, but was raised at the hearing:—*Held*: (1) the conditions for payment at Lloyds Bank applied only to principal, & as the co. had made default in payment of interest for three days after pltf.'s demand, the principal had become due; (2) the money was advanced by pltf. & the others for the purpose of, & was applied in, paying off the overdraft at the bank, & therefore the limit on the directors' borrowing

The corpn. paid interest for twenty years on the debentures. No claim to the debentures had been made by any other party, notwithstanding the publication of advertisements:—*Held*: the owner of the debentures was entitled to require payment of the principal money thereby secured.—*WAISH v. DUBLIN PORT & DOCKS BOARD* (1881), 7 L. R. Ir. 533.—IR.

q. ——— Bearer debentures—Deposited with bank.]—In an action brought against the liquidator of a co., pltf. claimed to be a creditor in respect of certain debentures payable to bearer which had been issued by the co., as being the legal holder thereof. Pltf. was not in possession of the debentures, but they were produced in ct. by an official of the A. Bank, who stated that he did not recognise pltf. as the legal holder. It appeared that the A. bank held the debentures on account of its London office, which had

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powers had not been in substance exceeded.—*Re HARRIS CALCULATING MACHINE CO., SUMNER v. HARRIS CALCULATING MACHINE CO.*, [1914] 1 Ch. 920; 83 L. J. Ch. 545; 110 L. T. 997; 58 Sol. Jo. 455.

4905. Seizure of goods under distress.]—A debenture issued by a co. contained a condition that the principal moneys should become payable if any of the property of the co. should be seized under a distress. A bailiff called at 10 a.m. at the co.'s shop with a warrant to collect a sum of £10 due for rent. The secretary of the co. tendered a cheque for £20 which was refused. The secretary then said that he would go & pay some rates & thus obtain change. While he was gone the bailiff & his man remained in the shop. The secretary returned in a few minutes, saying that the collector would not take the cheque, & he left again to get it cashed at the bank. During his absence the bailiff went home, leaving his man in the shop. The bailiff returned at 2 p.m. & was paid the £10. He did not ask for any expenses.—*Held*: there had been no seizure under a distress, & the principal moneys secured by the debentures had not become due.—*CENTRAL PRINTING WORKS, LTD. v. WALKER & NICHOLSON* (1907), 24 T. L. R. 88.

See, generally, DISTRESS.

4906. Proviso for repayment by ballot—Failure to hold ballot.]—A co. issued a series of debentures each of which contained a covenant by the co. that it would "on or after" Jan. 1, 1898, pay to the registered holder of the debenture the principal sum thereby secured. The debenture then stated as follows: "The debentures to be paid off will be determined by ballot, & six calendar months' notice will be given by the co. of the debentures drawn for payment." The co. never paid off any of the debentures or held any ballot, but after Jan. 1, 1898, one of the debenture-holders gave the co. six calendar months' notice to pay off her debenture, & at the expiration of the notice, commenced an action to enforce her security.—*Held*: on the construction of the covenant & in the events that had happened the principal money secured by pltf.'s debenture was presently due & payable, & if the provision as to balloting & notice meant that the co. was never to be bound to pay off any debenture unless it elected to do so & balloted & gave notice accordingly, the provision was void for repugnancy.—*Re TEWKESBURY GAS CO., TYSOE v. TEWKESBURY GAS CO.*, [1912] 1 Ch. 1; 80 L. J. Ch. 723; 105 L. T. 569; 28 T. L. R. 40; 56 Sol. Jo. 71; 18 Mans. 395, C. A.; *affg.* [1911] 2 Ch. 279; 80 L. J. Ch. 590; 105 L. T. 300; 27 T. L. R. 511; 55 Sol. Jo. 616; 18 Mans. 301.

Annotation:—*Reid. Wylie v. Carlyon*, [1922] 1 Ch. 51.

M. Duties and Stamps.

4907. Stamp Act, 1870 (c. 97), s. 2 (10)—"Marketable security"—Equitable charge upon debentures.]—*READ v. ELEY*, [1900] W. N. 57.

4908. Stamp Act, 1891 (c. 39), s. 82 (1) (b)—Foreign marketable security—Reconstruction of English company by transfer of business to foreign company.]—Under a binding scheme of arrangement for reconstruction the property & assets of an English co. were transferred to a new American co., & it was agreed that the debenture-holders of the old co. should receive bonds of the new co. in exchange for their debentures. The holder of a

received them from the L. & C. Bank. The latter bank had given an undertaking not to part with the debentures without the consent of pltf.:—*Held*: the undertaking of the L. & C. Bank was not an acknowledgment that the

debentures were held on behalf of pltf., & in the absence of proof that pltf. was the legal holder of the debentures, the action must fail.—*WALKER v. GRAND JUNCTION RYS., LTD. (LIQUIDATOR)* (1900), 26 S. C.

debenture in England received a circular from the London office of the new co., signed by its London agent, saying: "Your debenture will have to be sent to Chicago to be exchanged there for the new bond. I shall be pleased to forward your debenture to Chicago free of all cost to yourself if you will lodge the same at this office, taking my receipt for the same." The debenture-holder sent his debenture to the London agent, who sent it to the officials of the new co. in America; a bond of the new co. was transmitted by them to the London agent, who delivered it to the debenture-holder in England:—*Held*: the bond was not "issued," or "offered for subscription & given or delivered to a subscriber," or "assigned or transferred," in the United Kingdom, within the above sub-sect.—*CHICAGO RAILWAY TERMINAL ELEVATOR CO. v. INLAND REVENUE COMRS.* (1896), 75 L. T. 572; 45 W. R. 242; 13 T. L. R. 124, C. A.
Annotations:—*Distd. Brown v. I. R. Comrs., Gordon v. I. R. Comrs.* (1899), 16 T. L. R. 94. *Reid. Speyer v. I. R. Comrs.* (1902), 66 J. P. 551.

4909. Stamp Act, 1891 (c. 39), Sched. I.—Principal repayable with premium—Whether duty payable on premium.]—A co. issued a series of debentures of £100 each, each debenture containing an undertaking by the co. to pay to the registered holder upon a specified date "£100, together with a premium thereon at £7 10s." The debentures were marketable securities not transferable by delivery within the meaning of the above sched.:—*Held*: each debenture was a security for the payment by the co. of £107 10s., the amount of the principal & the premium, & was liable to *ad valorem* stamp duty upon that amount.—*ROWE v. INLAND REVENUE COMRS.*, [1897] 2 Q. B. 194; 66 L. J. Q. B. 528; 13 T. L. R. 324; 41 Sol. Jo. 407.

Annotation:—*Consd. Knights Deep v. I. R. Comrs.*, [1900] 1 Q. B. 217.

4910. ————.]—A limited co. issued a series of debentures for £100 each redeemable at par by annual drawings on & after July 1, 1902. Each debenture contained a stipulation that the co. might, at any time after July 1, 1900, on giving six months' previous notice in writing to the registered holder, redeem the debenture at £103, which sum, at the expiration of the six months, should become payable, as if the same were the amount of the principal moneys thereby secured:—*Held*: *ad valorem* stamp duty was chargeable on each debenture under the head of "marketable security" in the above sched. upon £100 only, as being the "money secured" by the debenture within the meaning of the sched.—*KNIGHTS DEEP, LTD. v. INLAND REVENUE COMRS.*, [1900] 1 Q. B. 217; 69 L. J. Q. B. 66; 81 L. T. 625; 48 W. R. 198; 16 T. L. R. 68; 44 Sol. Jo. 99, C. A.

4911. ———— "Additional or substituted security"—Trust deed securing stock raised to pay off previous issue.]—A limited co. issued in 1892 £500,000 4 per cent. debenture stock, secured by a trust deed duly stamped, by which freehold & leasehold property of the co. were conveyed to trustees to secure payment of the amount of the stock & interest as provided for by the deed. By a subsequent trust deed for securing debenture stock made in 1897, the trustees of which were the same as those of the deed of 1892 after reciting that the £500,000 debenture stock was still outstanding & that the co. were intending to issue further irredeemable 3½ per cent. debenture stock,

66.—S. AF.

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it was provided that the amount of stock to be issued was limited in the first instance to £300,000, the co. acknowledging in the deed that they were indebted to the trustees in that sum carrying interest at $3\frac{1}{2}$ per cent. *per annum*; that the co. should be at liberty to issue further irredeemable $3\frac{1}{2}$ per cent. debenture stock not exceeding £540,000 making a total of £840,000, but only for the purpose of redeeming or paying off the £500,000 4 per cent. stock at the rate of not more than £108 of the new stock for every £100 of the stock redeemed or paid off:—*Held*: in respect of the £540,000 as well as the £300,000 the deed of 1897 was chargeable with the *ad valorem* duty specified in the above sched. under the heading "Mtge., Bond, Debenture, Covenant," & not being an "additional" or "substituted" security within the meaning of those words in the sched., it was chargeable with the full duty of 2s. 6d. per cent.—CITY OF LONDON BREWERY CO. v. INLAND REVENUE COMRS., [1899] 1 Q. B. 121; 68 L. J. Q. B. 62; 78 L. T. 39, 648; 47 W. R. 216; 15 T. L. R. 49; 43 Sol. Jo. 61, C. A.

Annotations:—*Consd.* Mount Lyell Mining & Ry. Co. v. I. R. Comrs., [1904] 1 K. B. 757. *Refd.* Underground Electric Rys. of London & Glyn, Mills, Currie v. I. R. Comrs., [1916] 1 K. B. 306.

4912. ——— **Conveyance of additional property in substitution of property withdrawn.**—By a trust deed made between a joint-stock co. & trustees for the debenture-holders, the former stipulating that they might redeem the debenture stock after giving certain notice, covenanted that after giving such notice they would redeem at nominal value, plus 10 per cent. By further clauses of the deed certain freeholds & leaseholds were assured to the trustees to secure payment of all principal moneys, bonuses, & interest which might become payable in respect of the debenture stock, & a floating charge on all the co.'s property was created for the same purpose. There was a clause giving the co. power to withdraw any of the freeholds or leaseholds assured to the trustees & substitute other property of equal value. By a subsequent indenture a small part of the leaseholds so assured was withdrawn & other leaseholds belonging to the co. assured to the trustees to be held on the trusts of the earlier indenture. This second indenture contained no covenant for payment of the debenture principal money or interest, & no express declaration of the trusts on which the property acquired was to be held:—*Held*: the second indenture was a "mtge." within sect. 86, sub-sect. 1 of the above Act, & a "substituted security" within the above sched. & heading "Mtge., Bond, Debenture, Covenant" of that Act, & the Comrs. of Inland Revenue were right in holding that the stamp duty was to be calculated at the rate of 6d. per cent. on the whole principal money of the debenture stock.—GARTSIDES (BROOKSIDE BREWERY), LTD. v. INLAND REVENUE COMRS. (1900), 82 L. T. 686, D. C.

4913. ——— **Debentures of purchasing company exchanged for existing debentures.**—Applt. co., incorporated under the laws of Victoria, was formed to take over the assets & liabilities of two existing cos., one of which was a co. registered in England having an issue of debentures. The holders of these debentures by agreement delivered them up, & accepted in lieu thereof debentures of an equivalent amount issued by applt. co.:—*Held*: the debentures of applt. co. were not "given in substitution for a like security" within the meaning of sub-head 4 of the heading "Market-

able Security" in the above sched., & were liable to bear stamp duty to the full amount.—MOUNT LYELL MINING & RAILWAY CO. v. INLAND REVENUE COMRS., [1905] 1 K. B. 161; 74 L. J. K. B. 4; 92 L. T. 134; 53 W. R. 225; 21 T. L. R. 112; 49 Sol. Jo. 117, C. A.

4914. ——— **"Auxiliary security"**—**Conveyance in pursuance of consent contained in trust deed.**—A limited co., upon the issue of debenture stock, by deed entered into with trustees for the holders of the stock, acknowledged that the co. was indebted to the trustees to the amount of the stock, & agreed to convey to the trustees certain freehold property, not at the time in the possession of the co., & power was given to the trustees to enforce payment by foreclosure. The co. subsequently acquired the property & conveyed it to the trustees upon the trusts & purposes & subject to the provisions of the trust deed, Stamp duty was paid on the trust deed under the above sched. on the amount of the debenture stock. The comrs. assessed the duty on the second deed under the same sched. clause 2, at 6d. per cent., on the amount of the debenture stock. On appeal:—*Held*: the deed of conveyance was liable, to the duty assessed by the comrs. as a mtge. "being an auxiliary security or by way of further assurance" for the repayment of money "where the principal or primary security is duly stamped."—BRITISH OIL & CAKE MILLS, LTD. v. INLAND REVENUE COMRS., [1903] 1 K. B. 689; 72 L. J. K. B. 312; 88 L. T. 526; 67 J. P. 145; 51 W. R. 388; 19 T. L. R. 262, C. A.

4915. ——— **Conveyance to trustees upon the trusts of former indenture between the parties.**—By an indenture dated May 28, 1897, certain freehold & leasehold hereditaments were by direction of a brewery co., respectively conveyed & demised to trustees. The indenture contained a covenant to surrender to the use of the trustees certain copyholds, & an assignment to them of a goodwill & other matters. By the indenture it was agreed that the trustees should stand possessed of the hereditaments & premises upon the trusts contained in an indenture dated May 20, 1897. The indenture of May 20, 1897, after reciting that the co. had determined to issue certain debenture stock, to be constituted & secured as therein provided, contained a covenant by the co. with the trustees that the co. would cause the hereditaments to be forthwith conveyed to & vested in the trustees for securing the payment by the co. of the debenture stock & the dividends thereon, with a provision for reconveyance to the co. upon proof that all the stock-holders had been paid off or satisfied & upon payment of all costs incurred by the trustees in relation to the indenture. The indenture also created a floating charge upon all the property & assets for the time being of the co. In addition to other provisions for the maintenance & enforcement of the security thereby created, the indenture contained a provision that if default should be made in keeping the mortgaged premises in a good state of repair & working condition, & so insured as in the indenture specified, the trustees might from time to time repair or renew, or insure the mortgaged premises or any part thereof, & the co. would on demand repay to the trustees every sum of money expended by them for the above purposes, with interest at the rate of 5 per cent. *per annum* from the time of the same having been expended, & until such repayment the same should be a charge upon the mortgaged premises. The

Debentures of a land & cattle co. incorporated under Cos. Act, fall within the definition of marketable security contained in the above Act & Customs

& Inland Revenue Act, 1888 (c. 8), & transfers on sale thereof are liable under sect. 13 of the 1888 Act to a stamp duty of 10s. per cent on the

price as conveyances on sale.—TEXAS LAND & CATTLE CO., LTD. v. INLAND REVENUE COMRS. (1888), 16 R. (Ct. of Sess.) 69; 26 Sc. L. R. 49.—SCOT.

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indenture was stamped with 2s. 6d. per cent. upon £230,000, the amount to which the stock was limited, & £23,000, the premium at which the stock was redeemable at the co.'s option. Debenture stock to the amount of £223,200 was subsequently issued by the co. upon the security of the indentures:—*Held*: the indenture of May 20, 1897, was the primary security & the indenture of May 28, 1897, a mortgage by way of further assurance, within the meaning of the head of the above sched., & in addition to the duty to which the indenture of May 28, 1897, was liable as a conveyance on sale, duty at the rate of 6d. per cent. upon £223,200, the amount of the debenture stock issued, was payable upon it.—*SUFFIELD (LORD) v. INLAND REVENUE COMRS.*, [1908] 1 K. B. 865; 77 L. J. K. B. 746; 98 L. T. 405; 24 T. L. R. 371; 15 Mans. 233, D. C.

4916. — “Discharge” — Indorsement by trustees that stock has been redeemed.]—On an indenture securing redeemable debenture stock an instrument was endorsed, which was signed by the trustees for the debenture-holders, acknowledging that all the debenture stock was secured by the within written indenture & all interest thereon had been redeemed, paid off, & satisfied:—*Held*: this was not a “discharge” within the meaning of that term in sub-heading 5 of the heading “Mtge.” in the above sched. & it was not chargeable with *ad valorem* duty, but it was merely a receipt, & being indorsed on a duly stamped instrument it was exempt from duty under the eleventh exemption to the heading “Receipt” in the same sched.—*FIRTH & SONS, LTD. v. INLAND REVENUE COMRS.*, [1904] 2 K. B. 205; 73 L. J. K. B. 632; 91 L. T. 138; 52 W. R. 622; 20 T. L. R. 447; 48 Sol. Jo. 460, D. C.

4917. — “Sale transfer or other disposition” of interest in ship—Ship mortgaged to trustees as security for issue of debentures.]—A limited co. mortgaged certain ships to trustees for debenture-holders as security for the sums borrowed on the issue of debentures:—*Held*: a debenture, one of the above issue, was not an instrument “for the sale, transfer, or other disposition” of an interest in any ship within the second general exemption in the above sched. inasmuch as no interest was thereby disposed of that had not already been disposed of by the mtges.—*DEDDINGTON S.S. CO., LTD. v. INLAND REVENUE COMRS.*, [1911] 2 K. B. 1001; 81 L. J. K. B. 75; 105 L. T. 482; 18 Mans. 373, C. A.

SUB-SECT. 4.—REGISTRATION OF MORTGAGES AND CHARGES.**A. Registration at Company's Office.****(a) In General.**

See, now, 1908 Act, ss. 100, 101.

4918. What mortgages must be registered—Mortgage created before formation of company.]—An equitable charge over certain leasehold property had been given in 1879 to B. by A. On Mar. 18, 1880, A. formed a co., of which B. acted as the solr. On Mar. 17, 1880, A. agreed to sell to a trustee for the

co. the property in question, free from incumbrances. The purchase-money, if paid, would have been sufficient to have paid off all the then incumbrances in full. The agreement was adopted by the co., but it was unable to carry out the same, & in Jan. 1881, A. agreed to waive his vendor's lien until the co. should pay a certain dividend. Before it was able to do so it had been wound up. No register of mtges. had ever been kept by the co. B. claimed the property in question under his equitable charge. It was contended by the official liquidator, that B. was an officer of the co., that by 1862 Act, s. 43, the equitable charge “specifically affected” property of the co., & ought to have been registered, & that in default of registration it was void:—*Held*: the words “if any property is mortgaged” in sect. 43 had a future meaning, & referred to any mtges. & charges created by the co. itself; the equitable charge in question thereof did not require registration, & was a valid one which could be enforced & the contention of the official liquidator failed.—*Re GENERAL HORTICULTURAL CO., WHITEHOUSE'S CLAIM* (1885), 53 L. T. 699.

4919. What is sufficient registration—Registration after seven years—In book wrongly described.]

—In 1874 a limited co. mortgaged their property to a partnership consisting of three persons, of whom two were directors of the co. The mtge. was made for a term of seven years. It was not registered as required by 1862 Act, s. 43. In 1876 the partner who was not a director assigned his interest in the mtge. to the other two. In 1881 it was arranged that the mtge. should be continued for another seven years. The directors having been then informed that the mtge. ought to be registered, the secretary entered the particulars required by sect. 43 on a blank page in the co.'s register of transfers, altering the headings accordingly. The book in which the entries were made was marked on the outside “Register of Transfers.” No other mtge. was ever made by the co., & the secretary deposed that no one had ever inquired for the register of mtges. The co. being in liquidation:—*Held*: there had been a sufficient registration of the mtge. in compliance with sect. 43, & the mtgees. were entitled to enforce their mtge.—*Re UNDERBANK MILLS COTTON SPINNING & MANUFACTURING CO.* (1885), 31 Ch. D. 226; 55 L. J. Ch. 255; 53 L. T. 957; 34 W. R. 181; 2 T. L. R. 109.

Annotation:—*Mentd. Re Printing Telegraph & Construction Co. of Agence Havas, Ex p. Cammell*, [1894] 2 Ch. 392.

4920. Effect of omission to register—Whether charge avoided—As against officer of company—Solicitor.]—A solr. not usually employed by a co. was employed by them to act in a particular matter, & having required security for costs, they gave him a charge on certain debts due to them. About five weeks after this a winding-up petition was presented, on which an order was shortly afterwards made. The charge had not been registered:—*Held*: though, under 1862 Act, s. 43, the want of registration did not make the charge void, yet the solr. could not avail himself of the charge, for it was his duty, as being the solr. of the co. in this transaction, to see that the directions of the Legislature as to registration were obeyed.—

PART III. SECT. 34, SUB-SECT. 4.—A. (a).

4920 i. Effect of omission to register—Whether charge avoided—As against officer of company.]—Upon the true construction of the explanation to Indian Cos. Act, 1882, s. 68, when a charge specifically affecting property of a co. has been granted in favour of an officer of the co., he cannot avail himself of it unless it is registered in

accordance with the above sect., even though he has ceased to be an officer.—*KRISHNA AYYANGAR v. NALLAPERUMAL PILLAI* (1919), 47 L. R. Ind. App. 33.—**IND.**

4920 ii. — — — — —.]—Directors, managers, & other persons, standing in a fiduciary relation to a co., holding securities affecting its property, are bound to see that their securities are

properly registered, as required by Companies Act, 1862, s. 43; & if they knowingly & wilfully omit to do so, they not only subject themselves to the penalty imposed by that sect., but they forfeit their unregistered securities as against the general creditors of the co.—*Re DUBLIN DRAPERY CO., Ex p. COX* (1884), 13 L. R. Ir. 174.—**IR.**

Re PATENT BREAD MACHINERY CO., Ex p. VALPY & CHAPLIN (1872), 7 Ch. App. 289; 26 L. T. 228; 20 W. R. 347, L. JJ.

Annotations:—Consd. *Re* General Provident Assce., *Ex p.* National Bank (1872), L. R. 14 Eq. 507; *Re* International Pulp & Paper Co., Knowles' Mortgage (1877), 6 Ch. D. 556; *Re* Globe New Patent Iron & Steel Co. (1879), 48 L. J. Ch. 295; *Re* South Durham Iron Co., Smith's Case (1879), 11 Ch. D. 579; *Re* Underbank Mills Cotton Spinning & Manufacturing Co. (1885), 55 L. J. Ch. 255; *Wright v. Horton* (1887), 12 App. Cas. 371. **Refd.** *Re* Native Iron Ore Co. (1876), 2 Ch. D. 345; *Re* Great Western Forest of Dean Coal Consumers Co., Carter's Case (1886), 31 Ch. D. 496. **Mentd.** *Re* General South American Co. (1876), 34 L. T. 706; *Withington L. B. v. Manchester Corpn.* (1893), 62 L. J. Ch. 393; *Re* Kingston Cotton Mill Co. (1895), 44 W. R. 210.

4921. ————.]—Where a director or officer of a limited co. advances money upon mtge. or charge, specifically affecting any property of the co., the entry in the register, pursuant to 1862 Act, s. 43, must contain a short description of the property charged, in order to give such charge priority over the general creditors in a winding up.—*Re* NATIVE IRON ORE CO. (1876), 2 Ch. D. 345; 45 L. J. Ch. 517; 34 L. T. 777; *sub nom.* *Re* NATIVE IRON ORE CO., *Ex p.* ELPHINSTONE, 24 W. R. 503, C. A.

Annotations:—Consd. *Re* International Pulp & Paper Co., Knowles' Mortgage (1877), 6 Ch. D. 556; *Re* Globe New Patent Iron & Steel Co. (1879), 48 L. J. Ch. 295; *Re* South Durham Iron Co., Smith's Case (1879), 11 Ch. D. 579; *Wright v. Horton* (1887), 12 App. Cas. 371. **Mentd.** *Re* Kingston Cotton Mill Co. (1895), 44 W. R. 210.

4922. ————.]—Neglect by secretary to carry out instructions of directors.]—A co. mortgaged chattels to two of the directors, who furnished the secretary with the necessary particulars for entering it in the register of mtges., & directed him to register it, but he omitted to do so. The directors put in force the powers in their mtge. & realised their security & subsequently the co. was ordered to be wound up:—*Held*: as the directors had not "knowingly & wilfully authorised or permitted the omission" of the entry of the mtge. on the register, & had realised their security before the commencement of the winding up, the liquidator could not compel them to refund the proceeds of the security.—*Re* HACKNEY BOROUGH NEWS-PAPER CO. (1876), 3 Ch. D. 669.

Annotations:—Refd. *Re* Globe New Patent Iron & Steel Co. (1879), 48 L. J. Ch. 295; *Wright v. Horton* (1887), 12 App. Cas. 371.

4923. ————.]—A co. conveyed nearly all its property to trustees by deed, in trust to secure the repayment of money lent to the co. In pursuance of the terms of the deed, debentures for the amounts lent by them were issued to the lenders. Neither the trust deed nor any of the debentures were registered in manner provided by 1862 Act, s. 43. Some of the debenture-holders were directors of the co. The co. was afterwards wound up:—*Held*: notwithstanding the want of registration, the directors were entitled to claim, as against the other creditors of the co., payment of the amount due on the debentures held by them.—*Re* GLOBE NEW PATENT IRON & STEEL CO., LTD. (1879), 48 L. J. Ch. 295; 40 L. T. 380; 27 W. R. 424.

Annotations:—Consd. *Wright v. Horton* (1887), 12 App. Cas. 371. **Refd.** *Re* Monolithic Building Co., *Tacon v. The Co.*, [1915] 1 Ch. 643.

4924. ————.]—The firm of S. & Co., consisting of three partners, of whom S. was the managing partner, advanced a sum of money to the D. Co., Ltd., of which S. was one of the directors, the co. accepting the bill of exchange drawn on them by S. & Co. This bill was subsequently renewed in the name of S. alone, but it was known to the co. that the debt remained a debt due to the firm. When the renewed bill became due the co. deposited with S. certain iron as a security, which he held on behalf of his firm.

The register of mtges. kept by the co. contained no notice of this transaction. The co. having afterwards been ordered to be wound up, the liquidator claimed to have the iron delivered to him, on the ground that as S. was a director the security was bad for want of registration:—*Held*: the rule in *Re Native Iron Ore Co.*, No. 4921, *ante*, did not apply to a case where the mtge. was made to partners who were not all directors of the co.—*Re* SOUTH DURHAM IRON CO., SMITH'S CASE (1879), 11 Ch. D. 579; 48 L. J. Ch. 480; 40 L. T. 572; 27 W. R. 845, C. A.

Annotations:—Consd. *Re* Underbank Mills Cotton Spinning & Manufacturing Co. (1885), 31 Ch. D. 226; *Dublin City Distillery v. Doherty*, [1914] A. C. 823. **Refd.** *Wright v. Horton* (1887), 12 App. Cas. 371; *Freeman v. Laing*, [1899] 2 Ch. 355. **Mentd.** *Re* Kingston Cotton Mill Co., *Ex p.* Pickering & Peasegood (1895), 73 L. T. 482.

4925. ————.]—The omission to register, as required by 1862 Act, s. 43, debentures of a limited co. held by a director does not render such debentures invalid against the creditors of the co.—*WRIGHT v. HORTON* (1887), 12 App. Cas. 371; 56 L. J. Ch. 873; 56 L. T. 782; 52 J. P. 179; 36 W. R. 17, II. L.

Annotations:—Refd. *Re* Monolithic Building Co., *Tacon v. The Co.*, [1915] 1 Ch. 643. **Mentd.** *Withington L. B. v. Manchester Corpn.* (1893), 62 L. J. Ch. 393; *Pearks, Gunston & Tee v. Thompson, Talmey* (1901), 17 T. L. R. 250; *Randall v. British & American Shoe Co.*, [1902] 2 Ch. 354.

4926. ————.]—As against person claiming under officer of company.]—The rule that where a director or other officer of a limited co. fails to register a mtge. made to him of the co.'s property, his security becomes void against the creditors of the co., is not to be extended to the case of a person claiming title under such director or officer who is unconnected with the co.—*Re* INTERNATIONAL PULP & PAPER CO., KNOWLES' MORTGAGE (1877), 6 Ch. D. 556; 46 L. J. Ch. 625; 37 L. T. 351; 25 W. R. 822.

Annotations:—Dbtd. *Re* Great Western Forest of Dean Coal Consumers Co., *Carter's Case* (1886), 31 Ch. D. 496. **Refd.** *Wright v. Horton* (1887), 12 App. Cas. 371.

4927. ————.]—As against shareholders.]—A co. having power to borrow money by debentures, charging "all or any of the property" of the co., issued debentures charging "all the property of which the co. was or should at any time during the continuance of that security become possessed," with repayment of the money borrowed by instalments at specified times, with interest in the meantime. Before the first instalment became due the co. was wound up:—*Held*: the debenture-holders acquired a charge upon all the property of the co., past & future, & they were entitled to be paid out of the property of the co. at the commencement of the winding up in priority to the general creditors.

The register of mtges. kept by the co. stated the amount of the charge & gave the name of the mtgee., but gave no description of the "property charged." All the debenture-holders but one were also shareholders:—*Held*: these shareholders, not being officers of the co., were not affected by the insufficient registration, although 1862 Act, s. 43, had not been complied with, as it was no part of their duty to see that the register was duly kept.—*Re* GENERAL SOUTH AMERICAN CO. (1876), 2 Ch. D. 337; 34 L. T. 706; 24 W. R. 891, C. A.

Annotations:—Consd. *Re* Globe New Patent Iron & Steel Co. (1879), 48 L. J. Ch. 295; *Re* South Durham Iron Co., Smith's Case (1879), 11 Ch. D. 579. **Refd.** *Re* Native Iron Ore Co. (1876), 2 Ch. D. 345; *Anderson v. Butler's Wharf Co.* (1879), 48 L. J. Ch. 824. **Mentd.** *Re* Florence Land & Public Works Co., *Ex p.* Moor (1878), 10 Ch. D. 530; *Re* Pyle Works (1890), 38 W. R. 674.

(b) Inspection of Register.

Sec, now, 1908 Act, ss. 100, 101.

4928. Who may inspect—Solicitor of shareholder.]—In opposition to a petition presented by

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a shareholder whose shares were fully paid-up, for a compulsory winding-up order, the managing director filed an affidavit, in which he stated what were the liabilities & assets of the co. as shown by the co.'s books. The solr. of petitioner gave notice in writing to the solr. of the co. that he would attend at the co.'s office upon the morrow morning to inspect the books which had been referred to, & on his attending in pursuance of the notice given the previous afternoon, the secretary of the co. refused inspection of the register of mtges. Upon motion:—*Held*: the refusal to allow the solr. to inspect was a refusal to petitioner; as regarded the register of mtges., petitioner, his solr. or agent, was under 1862 Act, sect. 43, entitled to inspect it.—*Re CREDIT CO.* (1879), 11 Ch. D. 256; 48 L. J. Ch. 221; 27 W. R. 380.

Annotation:—*Consd.* *Bevan v. Webb*, [1901] 2 Ch. 59.

4929. Right to inspect includes right to take copies.—The right of a creditor or member of a co. to inspect the register of mtges. under 1862 Act, s. 43, includes a right to take copies of the register.—*NELSON v. ANGLO-AMERICAN LAND MORTGAGE AGENCY CO.*, [1897] 1 Ch. 130; 66 L. J. Ch. 112; 75 L. T. 482; 45 W. R. 170; 13 T. L. R. 77; 41 Sol. Jo. 112.

Annotations:—*Expld.* *Boord v. African Consolidated Land & Trading Co.*, [1898] 1 Ch. 596. *Distd.* *Re Balaghat Gold Mining Co.* (1901), 49 W. R. 625. *Consd.* *Bevan v. Webb*, [1901] 2 Ch. 59.

4930. Right of court to order inspection—After order for winding up or under supervision.—The word “books” in 1862 Act, s. 156, includes the register of mtges. required to be kept by sect. 43. When an order has been made for winding up a co. by or under the supervision of the ct., the power given by sect. 43 to order inspection of the register by any creditor or member of the co. no longer exists, & the only right on inspection which a creditor contributory has is such as he obtains “in conformity with the order of the ct.” under sect. 156.—*SOMERSET v. LAND SECURITIES CO.*, [1897] W. N. 29.

B. Registration at Office of Registrar.

(a) In General.

See, now, 1908 Act, s. 93.

4931. Filed with the registrar — 1900 Act, s. 14 (1).—The certificate of the Registrar of Joint-Stock Cos. under Companies Act, 1900 (c. 48), s. 14, is conclusive evidence that all the requirements of the sect. as to the registration of debentures have been complied with, & where such a certificate has been granted the ct. will refuse to go into the question whether such requirements have in fact been complied with.

In sect. 14, sub-sect. 1, which requires every mtge. or charge of the kind therein mentioned to be filed with the Registrar for registration, the expression “filed with the Registrar” means “supplied or furnished to the Registrar for registration.”—*Re YOLLAND, HUSSON & BIRKETT, LTD., LEICESTER v. YOLLAND, HUSSON & BIRKETT, LTD.*, [1908] 1 Ch. 152; 77 L. J. Ch. 43; 97 L. T. 824; 14 Mans. 346, C. A.

Annotation:—*Apld.* *Cunard S.S. Co. v. Hopwood*, [1908] 2 Ch. 564.

See, now, 1908 Act, s. 93 (1).

PART III. SECT. 34, SUB-SECT. 4.—B. (a).

s. Description of property mortgaged—Whether necessary.—A co. issued debentures which created a charge upon all its property without describing the property:—*Held*: the debentures were capable of registration under Land Registry Act.—*Re LAND REGIS-*

TRY ACT (1904), 10 B. C. R. 370; 24 C. L. T. 259.—*CAN.*

t. Non-registration—Who may take advantage of.—It is only purchasers, mtgees. or creditors in relation to the mtgor. who are entitled to the benefit of Companies Act, 1911, s. 102, requiring mtges. or charges created by a co. to be filed with the registrar

4932. Certificate of registrar—Whether conclusive that formalities complied with.—*Re YOLLAND, HUSSON & BIRKETT, LTD., LEICESTER v. YOLLAND, HUSSON & BIRKETT, LTD.*, No. 4931, *ante*.

4933. — — — Due registration—Particulars of property charged insufficiently entered.—*NATIONAL PROVINCIAL & UNION BANK OF ENGLAND v. CHARNLEY*, [1923] W. N. 315, C. A.

4934. Memorandum of satisfaction filed by inadvertence of company—Cancelled on application of company—1908 Act, s. 96.—Where a mtge. had been registered under 1908 Act, & there had been a subsequent sale of the equity of redemption with a covenant by the purchasers to indemnify against the debt, & the co. without legal advice executed a memorandum of satisfaction & caused the same to be registered, on an application by the co. under 1908 Act, s. 96, the memorandum of satisfaction & the entry of such memorandum on the register should be cancelled.—*Re LIGHT (C.) & CO., LTD.* (1917), 61 Sol. Jo. 337.

(b) Necessity for.

See, now, 1908 Act, s. 93.

4935. Charges created before Companies Act, 1900 (c. 48)—Issued after.—Debentures “created,” that is, sealed by the co. before the above Act came into operation, but not actually issued until after that date, do not require to be registered under sect. 14 of the Act.—*Re SPIRAL GLOBE, LTD.* (No. 2), *WATSON v. SPIRAL GLOBE, LTD.*, [1902] 2 Ch. 209; 71 L. J. Ch. 538; 86 L. T. 499; 18 T. L. R. 532.

Annotations:—*Folld.* *Re New London & Suburban Omnibus Co., Appleyard v. New London & Suburban Omnibus Co.*, [1908] 1 Ch. 621. *Refd.* *Esberger v. Capital & Counties Bank*, [1913] 2 Ch. 366.

4936. — — ——*Re NEW LONDON & SUBURBAN OMNIBUS CO., APLEYARD v. NEW LONDON & SUBURBAN OMNIBUS CO.*, No. 4798, *ante*.

When charge created, *see* Sub-sect. 4, B. (c), *post*.

4937. Debentures registered as series—Part of series subsequently issued.—Under Cos. Act, 1900 (c. 48), s. 14, mtges. or charges being floating charges or other securities specified in sub-sect. 1 must be registered within 21 days from their creation, unless there is registration under sect. 14, sub-sect. 4. The “creation” of the charge is not by the resolution, but takes place when the debenture is issued to the holder. The registration of each debenture within 21 days is required even when the debentures form a series, if registration under sub-sect. 4 is not effected. When registration under sub-sect. 4 is effected, the time-limit of 21 days does not apply except to this extent, that the registration protects debentures issued within 21 days prior to such registration. The registration therefore protects all debentures of the *pari passu* series whenever subsequently issued, & this is the case whether the charge is created by the covering deed or by the debentures, or by both.—*Re HARROGATE ESTATES, LTD.*, [1903] 1 Ch. 498; 72 L. J. Ch. 313; 88 L. T. 82; 51 W. R. 334; 19 T. L. R. 246; 47 Sol. Jo. 298; 10 Mans. 113.

Annotation:—*Consd.* *Cunard S.S. Co. v. Hopwood*, [1908] 2 Ch. 564.

4938. — — — Agreement to issue debentures.—*Re FIREPROOF DOORS, LTD., UMNEY v. FIREPROOF DOORS, LTD.*, No. 4630, *ante*.

of joint-stock cos.—*DALTON v. DOMINION TRUST CO.*, [1918] 3 W. W. R. 42.—*CAN.*

PART III. SECT. 34, SUB-SECT. 4.—B. (b).

a. Assignment of future debt—Under executory contract.—Assign-

4939. Sale by company of property charged & purchase of other property with proceeds—Sub-demise of new property to trustees.]—Debenture-stock was secured by a covering deed made in 1897, under which the proceeds of sale of any specifically mortgaged property & the property on which the same should be invested were to be held by the trustees upon the trusts of the covering deed. A leasehold public-house was subsequently purchased out of the proceeds of sale of certain of the specifically mortgaged property, & was in Aug. 1902, sub-demised by the co. to the trustees to be held by them upon the trusts of a covering deed:—*Held*: the sub-demise was a “mtge. or charge” created by the co. upon the property thereby sub-demised, & required registration under Cos. Act, 1900 (c. 48), s. 14 (1).—**CORNBROOK BREWERY CO., LTD. v. LAW DEBENTURE CORPN., LTD.**, [1904] 1 Ch. 103; 73 L. J. Ch. 121; 89 L. T. 680; 52 W. R. 242; 20 T. L. R. 140; 48 Sol. Jo. 154; 10 Mans. 60, C. A.

Annotation:—**Consd. Cunard S.S. Co. v. Hopwood**, [1908] 2 Ch. 564.

4940. Sale by trustees of part of property & purchase of other property—Company not party to conveyance.]—Where property is conveyed by a co. to trustees to secure debentures or debenture-stock, & the trust deed empowers the trustees to sell any part of the property conveyed before the security is enforceable, & with the proceeds to purchase other property which is to be held upon the like trusts, & the trustees sell part of the property, & with the proceeds of sale purchase other property which is conveyed by the vendor to them upon the trusts of the trust deed, the co. not being a party to the conveyance, the conveyance is not a mtge. or charge requiring registration under Companies Act, 1900 (c. 48), s. 14.—**BRISTOL UNITED BREWERIES CO., LTD. v. ABBOT**, [1908] 1 Ch. 279; 77 L. J. Ch. 136; 98 L. T. 23; 24 T. L. R. 91; 52 Sol. Jo. 59; 15 Mans. 82.

4941. Subsequent mortgage of same or substituted assets—To secure debt already registered.]—(1) Debenture-stock of a co. secured by a trust deed & having the benefit of a charge on assets of the co. is equivalent to a series of debentures containing a charge within Cos. Act, 1900 (c. 48), s. 14 (4). Therefore, where particulars have been registered under that sub-sect. & a copy of the Registrar's certificate of registration indorsed on the debenture-stock certificates, no subsequent mtge. for securing the same debt, either of the same assets or of others substituted for them under a power in the trust deed, requires registration under sect. 14.

(2) It is not a convenient way of deciding whether a mtge. requires registration under Cos. Act, 1900 (c. 48), s. 14, to make a motion under sect. 15 of the Act for leave to extend the time for registration. Even if such an order is made on such a motion it does not decide that registration of the mtge. is in fact necessary. Such a point ought to be decided in an action properly constituted.—**CUNARD S.S. CO., LTD. v. HOPWOOD**, [1908] 2 Ch. 564; 77 L. J. Ch. 785; 99 L. T. 549; 24 T. L. R. 865; 11 Asp. M. L. C. 147; 15 Mans. 353.

4942. Deed charging all profits with bonus to allottees of debenture-stock.]—**HOARE v. BRITISH COLUMBIA DEVELOPMENT ASSOCN.**, No. 4694, *ante*.

4943. Letters of hypothecation on goods or proceeds thereof.]—Deft. co. consigned goods to their customers, & in order to obtain advances from pltfs., who were bankers, wrote to pltfs. enclosing for their acceptance the co.'s drafts drawn in respect of specified shipments then being

made & copies of the bills of lading & of the invoices relating thereto, & stating that deft. co. hypothecated the goods or the proceeds thereof to pltfs. As between deft. co. & their customers the terms of sale were such that the property in the goods passed on shipment to the customers to whose orders the bills of lading were drawn. Pltfs. having accepted drafts in the above circumstances, & deft. co. having gone into liquidation, pltfs. claimed to be entitled to the proceeds of the goods as against the liquidator:—*Held*: the effect of the transaction was that deft. co. had created a charge on the co.'s book debts within 1908 Act, s. 93 (1) (e), which charge, not having been registered as required by the sect., was void as against the liquidator, & pltfs.' claim failed.—**LADENBURG & CO. v. GOODWIN, FERREIRA & CO., LTD., & GARNETT**, [1912] 3 K. B. 275; 81 L. J. K. B. 1174; 107 L. T. 587; 28 T. L. R. 541; 56 Sol. Jo. 722; 18 Com. Cas. 16; 19 Mans. 383.

Annotation:—**Distd. Re Allester**, [1922] 2 Ch. 211.

4944. —.]—A limited co. pledged bills of lading with a bank to secure an overdraft. When it was time to sell the goods, the co. in accordance with the well-established mercantile practice obtained the bills of lading from the bank for realisation on the terms stated in the usual letter of trust given by the co. to the bank, to wit that the co. received the bills of lading in trust on the bank's account & undertook to hold the goods when received & the proceeds when sold as the bank's trustees & to remit the entire net proceeds as realised:—*Held*: as the letter of trust merely recorded the terms on which the co. was authorised to realise the goods on the bank's behalf, & did not really create any charge at all, it did not require registration under 1908 Act, s. 93 (1), either as a bill of sale within clause (c) or a charge on book debts within clause (e).—**Re ALLESTER (D.), LTD.**, [1922] 2 Ch. 211; 91 L. J. Ch. 797; 127 L. T. 434; 38 T. L. R. 611; 66 Sol. Jo. 486; [1922] B. & C. R. 190.

4945. Assignment of trade debt to banker.]—A limited co., in consideration of an advance from their bankers, executed an assignment which, after reciting that the co. were entitled to £80 7s. from deft., that it had been agreed that that debt should be assigned to the bankers, & that by a letter of even date deft. had been directed by the co. to pay the debt in question to the bankers, assigned unto the bankers so much of deft.'s debt “as may be necessary to indemnify the assignees” for the amount advanced by them to the co. After executing that deed the co. wrote to deft. requesting him to pay the debt due to them to the bankers. A few days later the co. went into voluntary liquidation. The assignment to the bankers was not registered. The liquidator claimed to recover the debt from deft. on the ground that the assignment to the bankers, being unregistered, was void as against him, but deft. insisted upon paying the debt to the bankers:—*Held*: the liquidator was entitled to recover, inasmuch as, by 1908 Act, s. 93, the unregistered assignment was void as against him.—**SAUNDERSON & CO. v. CLARK** (1913), 29 T. L. R. 579.

4946. Debentures creating floating charge on general assets of company.]—A co. issued debentures which purported to create a floating charge on the general assets of a co., & were further secured by a trust deed. The debentures were not registered under Cos. Act, 1900 (c. 48), s. 14:—*Held*: the debentures were void for want of

ments of certain moneys to become due under paving contracts are charges or mtges. within R. S. B. C. 1911,

s. 102, c. 39, & require registration as against the liquidator of the assignor co. & others.—**NICKSON CO., LTD. v.**

DOMINION CREOSOTING CO., [1917] 2 W. W. R. 330.—**CAN.**

Sect. 34.—Borrowing and securing money: Sub-sect. 4, B. (b) & (c), & C. (a), (b), (c) i. & ii.; sub-sect. 5, A.]

registration so far as they purported to create a general floating charge on the general assets of the co., but the holders were entitled, as *cestuis que trust* under the trusts deed, to a valid lien on the debentures, so far as they affected the freehold & leasehold properties comprised in that deed, for the amount of the advances made by them.—**DUBLIN CITY DISTILLERY, LTD. v. DOHERTY**, [1914] A. C. 823; 83 L. J. P. C. 265; 111 L. T. 81; 58 Sol. Jo. 413, H. L.

Annotations:—Consd. Wrightson v. McArthur & Hutchisons, [1921] 2 K. B. 807. *Distd. Re Allester*, [1922] 2 Ch. 211.

4947. Procedure to ascertain—Whether by motion for extension of time.]—CUNARD S.S. CO., LTD. v. HOPWOOD, No. 4941, *ante*.

(c) *Time for.*

See, now, 1908 Act, s. 93.

4948. When charge “created”—Date of issue of debenture.]—Re HARROGATE ESTATES, LTD., No. 4937, *ante*.

4949. ———.]—Re DEFRIES (N.) & Co., LTD., BOWEN v. DEFRIES (N.) & Co., LTD., No. 4789, *ante*.

4950. ——— Not date of agreement to advance.]—Re COLUMBIAN FIREPROOFING CO., LTD., No. 4708, *ante*.

4951. ——— Date of execution of instrument of charge—Not date of advance of money.]—The date of the creation of a mtge. or charge by a co., within 21 days after which registration is required by 1908 Act, s. 93, is the date when the instrument of mtge. or charge is executed & not the date when any money is subsequently advanced on it.—ESBERGER & SON, LTD. v. CAPITAL & COUNTIES BANK, [1913] 2 Ch. 366; 82 L. J. Ch. 576; 109 L. T. 140; 20 Mans. 252.

C. Extending Time for Registration.

(a) *In General.*

4952. Right to apply to court under Companies Act, 1900 (c. 48), s. 15—Preserved by Interpretation Act, 1889 (c. 63), s. 38 (2).]—Cos. Act, 1900 (c. 48), s. 15, empowered the ct. to extend the time for the registration of debentures in certain cases. 1908 Act, s. 286, repealed 1900 Act:—*Held*: the right given by sect. 15 of the 1900 Act to apply to the ct. for an extension of time was preserved, notwithstanding the repeal of that Act, by Interpretation Act, 1889 (c. 63), s. 38 (2).—*Re LUSH & Co., LTD.* (1913), 108 L. T. 450; 57 Sol. Jo. 341.

(b) *Grounds for Granting or Refusing.*

See, now, 1908 Act, s. 96.

4953. “Inadvertence”—Ignorance of provisions of Act.]—Re MENDIP PRESS, LTD. (1901), 18 T. L. R. 38.

4954. ———.]—Re BEATTIE (E. & F.), LTD. (1901), 45 Sol. Jo. 671.

4955. ———.]—Re ALMOND (T.) & SON, LTD. (1905), 49 Sol. Jo. 283.

4956. ——— Of secretary of company—On notice

to principal creditor.]—Re HERTS & ESSEX WATERWORKS Co., LTD., [1909] W. N. 48.

4957. “Other sufficient cause”—Transaction being carried to completion abroad—When Act passed.]—Re TINGRI TEA Co., LTD., [1901] W. N. 165.

4958. ——— Delay at stamp office.]—Re BOOTLE COLD STORAGE & ICE Co., [1901] W. N. 54.

4959. ——— Part of issue not registered.]—The directors of a co. resolved in 1899 to raise £85,000 on debentures. The debentures were secured on property included in a covering deed & by a charge on all the property of the co., including its uncalled capital, for the time being as a floating charge, & were stated to form one series all of which were to rank *pari passu*. Some of the series were issued before Cos. Act, 1900 (c. 48), came into operation, & therefore, did not require registration. 327 of the remaining debentures were issued after that date, but were not registered. The holders of these debentures & the co. applied for an extension of time to enable them to carry out the registration. The ct. extended the time, but added to the order the qualification introduced by *Re Joplin Brewery Co.*, No. 4963, *post*, for the protection of creditors. On appeal:—*Held*: the order must be varied in such a way as to preserve the rights of equality of the debenture-holders *inter se*.—*Re JOHNSON (I. C.) & Co., LTD.*, [1902] 2 Ch. 101; 71 L. J. Ch. 576; 86 L. T. 791; 50 W. R. 482; 46 Sol. Jo. 498; 9 Mans. 307, C. A.

Annotations:—Consd. Re Anglo-Oriental Carpet Manufacturing Co., [1903] 1 Ch. 914; *Re Ehrmann, Albert v. Ehrmann*, [1906] 2 Ch. 697. *Extd. Re Cardiff Workmen’s Cottage Co.*, [1906] 2 Ch. 627.

4960. ———.]—The directors of a co. in 1898 resolved to raise £5,500 on debentures of £100 each charging the co.’s assets, including its uncalled capital, & ranking *pari passu*. Before Jan. 1, 1901, fifty of the debentures were issued. The remaining five debentures were issued to D. in July, 1901. D. never registered his debentures, having been advised by his solr., who had considered the provisions of Cos. Act, 1900 (c. 48), that registration was unnecessary. In Oct. 1901, the co. passed an extraordinary resolution for voluntary winding up, & subsequently D. applied, under sect. 15 of the Act, for an order extending the time for registration of his debentures. The assets were valued at £5,030 without providing for costs:—*Held*: although the omission to register was not “accidental” or “due to inadvertence” within sect. 15, it was due “to some other sufficient cause”; but it would be unjust to the other creditors to grant the extension of time without qualifying the order as in *Re Joplin Brewery Co.*, No. 4963, *post*, & to make an order in that form in a case where the winding up of the co. had commenced could not benefit any one.—*Re ABRAHAMS (S.) & SONS*, [1902] 1 Ch. 695; 71 L. J. Ch. 307; 86 L. T. 290; 50 W. R. 284; 18 T. L. R. 336; 46 Sol. Jo. 281; 9 Mans. 176.

Annotations:—Consd. Re Ehrmann, Albert v. Ehrmann, [1906] 2 Ch. 697. *Refd. Re Anglo-Oriental Carpet Manufacturing Co.*, [1903] 1 Ch. 914.

4961. Where winding-up order already made.]—Re ABRAHAMS (S.) & SONS, No. 4960, *ante*.

PART III. SECT. 34, SUB-SECT. 4.—C. (a).

b. *After winding up—Power of liquidator to prevent—Priority of liquidator.]—Re PEOPLES’ TRUST Co., LTD., & CENTURY INSURANCE Co.*, [1918] 1 W. W. R. 343; 25 B. C. R. 138.—CAN.

c. ——— *Liquidator’s costs.]—Registration of mtge. with the registrar of joint-stock cos. under Companies Act Amendment Act, 1916, c. 10, s. 4,*

allowed without being subject to liquidator’s costs.—Re WINDING-UP ACT & COMPANIES ACT & DOMINION TRUST Co. (IN LIQUIDATION) & ALVO VON ALVENSLEBEN (IN LIQUIDATION), [1919] 3 W. W. R. 209.—CAN.

PART III. SECT. 34, SUB-SECT. 4.—C. (b).

d. *“Inadvertence.”]—Where a co. issuing debentures under a resolution*

passed before the coming into force of Companies Act, 1900, omitted to register some of the debentures issued after the passing of the Act, the ct., on being satisfied that such omission was solely due to inadvertence, made an order under sect. 15 of the Act extending the time for such registration.—Re CORK ELECTRIC TRAMWAYS & LIGHTING Co., LTD. (1902), 36 L. L. T. 187.—IR.

(c) *Practice and Procedure.*

i. *In General.*

4962. Application in Chancery Division—Assigned to judge by ballot.]—*Re* LEGAL & GENERAL INVESTMENT Co., [1901] W. N. 72.

ii. *The Order.*

4963. Form of order—Whether words inserted to protect rights of parties acquired prior to actual registration.]—An order under Cos. Act, 1900 (c. 48), s. 15, extending the time for registration of debentures ought to contain the words: "but that this order be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered."—*Re* JOPLIN BREWERY Co., LTD., [1902] 1 Ch. 79; 71 L. J. Ch. 21; 85 L. T. 411; 50 W. R. 75; 40 Sol. Jo. 51; 8 Mans. 426.

*Annotations:—*Folld. *Re* Abrahams, [1902] 1 Ch. 695. *Apld.* *Re* Spiral Globe, [1902] 1 Ch. 396. *Consd.* *Re* Johnson, [1902] 2 Ch. 101; *Re* Anglo-Oriental Carpet Manufacturing Co., [1903] 1 Ch. 914; *Re* Cardiff Workmen's Cottage Co., [1906] 2 Ch. 627; *Re* Ehrmann, Albert v. Ehrmann, [1906] 2 Ch. 697.

4964. ———.]—Where the omission to register debentures was due to inadvertence, & the assets of the co., which was in voluntary liquidation, were insufficient to satisfy the general creditors without recourse to the property charged by the debentures, the ct., in extending the time within which registration might be effected, qualified the order by the words: "This order to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered."—*Re* SPIRAL GLOBE, LTD., [1902] 1 Ch. 396; 71 L. J. Ch. 128; 85 L. T. 778; 50 W. R. 187; 18 T. L. R. 154; 9 Mans. 52; *subsequent proceedings, sub nom.* *Re* SPIRAL GLOBE, LTD. (No. 2), *WATSON v. SPIRAL GLOBE, LTD.*, [1902] 2 Ch. 209.

*Annotations:—*Folld. *Re* Abrahams (1902), 71 L. J. Ch. 307; *Re* Ehrmann, Albert v. Ehrmann, [1906] 2 Ch. 697. *Refd.* *Esberger v. Capital & Counties Bank*, [1913] 2 Ch. 366.

4965. ———.]—*Re* ABRAHAM (S.) & SONS, No. 4960, *ante*.

4966. ———.]—Preservation of right of debenture-holders *inter se.*—*Re* JOHNSON (I. C.) & Co., LTD., No. 4959, *ante*.

4967. ———.]—A co. issued debentures, but failed to register them under Cos. Act, 1900 (c. 48), s. 14. On an application for an extension of time for the registration of the debentures, an order was made extending the time without inserting any words for the protection of unsecured creditors of the co.—*Re* CARDIFF WORKMEN'S COTTAGE Co., LTD., [1906] 2 Ch. 627; 75 L. J. Ch. 769; 95 L. T. 669; 22 T. L. R. 799; 50 Sol. Jo. 696; 13 Mans. 382.

*Annotations:—**Refd.* *Esberger v. Capital & Counties Bank*, [1913] 2 Ch. 366; *Re* Monolithic Building Co., *Tacon v. Monolithic Building Co.*, [1915] 1 Ch. 643.

4968. Effect of order—How far creditors protected—Resolution to wind up voluntarily passed before actual registration.]—A co. in June, 1901, executed a trust deed & issued debentures creating a charge which required registration within 21 days under Cos. Act, 1900 (c. 48), s. 14. The charge was not registered within 21 days, but on Nov. 1, 1901, an order was made under sect. 15 of the Act extending the time for registration until Nov. 15, but "without prejudice to the rights of parties acquired prior to the time when such trust deed & debentures shall be actually registered." The charge was registered on Nov. 15, 1901, but on Nov. 11, the co. passed an extraordinary resolution for voluntary winding up:—

Held: the rights of the general body of creditors under the winding up were protected by the saving words of the order, & the debenture-holders were not as against them secured creditors.—*Re* ANGLO-ORIENTAL CARPET MANUFACTURING Co., [1903] 1 Ch. 914; 72 L. J. Ch. 458; 88 L. T. 391; 51 W. R. 634; 10 Mans. 207.

*Annotation:—**Distd.* *Re* Ehrmann, Albert v. Ehrmann, [1906] 2 Ch. 697.

4969. ———.]—Where debentures are inadvertently omitted to be registered within the 21 days prescribed by Cos. Act, 1900 (c. 48), & are subsequently registered under an order extending the time for registration, & the order contains the usual proviso that it is to be without prejudice to the rights which may have been or may be acquired against the holders of the debentures in question prior to the time when they shall be actually registered, an ordinary unsecured creditor of the co. at the date when the debentures are registered is not entitled to rank *pari passu* with such debenture-holders unless he has taken steps to enforce his debt, or unless a winding up has intervened.—*Re* EHRMANN BROTHERS, LTD., ALBERT v. EHRMANN BROTHERS, LTD., [1906] 2 Ch. 697; 75 L. J. Ch. 817; 95 L. T. 664; 22 T. L. R. 734; 13 Mans. 368, C. A.

*Annotation:—**Consd.* *Re* Cardiff Workmen's Cottage Co., [1906] 2 Ch. 627.

4970. ———.]—Not decision that registration necessary.]—*CUNARD S.S. Co., LTD. v. HOPWOOD*, No. 4941, *ante*.

SUB-SECT. 5.—ENFORCEMENT OF REMEDIES UNDER SECURITY.

A. *In General.*

4971. Appointment of receiver—Power given to one debenture-holder—Must be exercised for benefit of all ranking *pari passu*.]—A power for a debenture-holder of a co. to appoint a receiver, conferred by a debenture which states that all the debentures are to rank "*pari passu*," is a fiduciary power, & must be exercised for the benefit of all the debenture-holders.

If such a power is exercised by a debenture-holder not in the interests of all the debenture-holders, but with a view to the benefit of the shareholders of the co., the ct. has jurisdiction to appoint & will appoint its own receiver.—*Re* MASKELYNE BRITISH TYPEWRITER, LTD., *STUART v. MASKELYNE BRITISH TYPEWRITER, LTD.*, [1898] 1 Ch. 133; 67 L. J. Ch. 125; 77 L. T. 579; 46 W. R. 294; 14 T. L. R. 108; 42 Sol. Jo. 112, C. A.

4972. ———.]—Power given to majority—Majority must be beneficial holders.]—A receiver & manager was appointed, in accordance with the terms of a condition in the debentures that such receiver & manager might be appointed with the consent in writing of the holders of a majority in value of the debentures, but this majority was, in fact, obtained by the consents of holders, who had executed equitable mtges. of their shares. On a motion for the appointment of a receiver by the ct. to supersede such receiver appointed as aforesaid:—*Held:* as the beneficial interest in the shares equitably mortgaged had been parted with, a true majority had not been obtained in accordance with the terms of the condition, & the ct. accordingly appointed a receiver & manager.—*Re* SLOGGER AUTOMATIC FEEDER Co., LTD., *HOARE v. SLOGGER AUTOMATIC FEEDER Co., LTD.*, [1915] 1 Ch. 478; 84 L. J. Ch. 587; 112 L. T. 579; 59 Sol. Jo. 272; [1915] H. B. R. 138.

4973. Getting in uncalled capital—Debenture-

Sect. 34.—Borrowing and securing money: Sub-sect. 5, A., B., C. & D.; sub-sect. 6, A. & B. (a) & (b) i., ii. & iii.]

holders may not nominate person to recover.]—A debenture-holder, whose security was upon uncalled capital, applied in the liquidation alone of a co. that a person nominated by himself with the approval of the owners of subsequent mtges. comprising uncalled capital, might be allowed to recover the calls:—*Held*: there was no precedent for such an order, & there were serious objections to the proposed innovation.—*Re WESTMINSTER SYNDICATE, LTD.* (1908), 99 L. T. 924; 25 T. L. R. 95.

B. The Receiver as Agent.

4974. Receiver appointed by trustees—Deed providing receiver agent for company—Liability of receiver.]—A trading co. executed a trust deed to secure the payment of debentures issued by them. The deed empowered the trustees, on the happening of certain events, to enter into possession of the property therein comprised, & to carry on the co.'s business, to appoint managers, clerks, etc., & to use the name of the co. It was also provided that, at any time after the right of the trustees to enter upon the mortgaged premises should have arisen they might appoint a receiver of the property thereby charged, in like manner as if the trustees were mtgees. within the meaning of Conveyancing Act, 1881 (c. 41). Every receiver so appointed was to have all the powers conferred by that Act, & in particular, power to exercise any of the powers previously by the deed conferred upon the trustees, & he was to be deemed to be the agent of the co., & as such to be in the same position as a receiver duly appointed by a mtgee. under the Act:—*Held*: a receiver appointed by the trustees under this deed, & carrying on the co.'s business in their name, was a mere agent, & in so doing he did not incur any personal liability.—*OWEN & CO. v. CRONK*, [1895] 1 Q. B. 265; 64 L. J. Q. B. 288; 11 T. L. R. 76; 2 Mans. 115; 14 R. 229, C. A.

Annotations:—Consd. *Burt, Boulton & Hayward v. Bull*, [1895] 1 Q. B. 276; *Re Glasdir Copper Mines, English Electro-Metallurgical Co. v. Glasdir Copper Mines*, [1906] 1 Ch. 365. *Appld.* *Bissell v. Ariel Motors (1906) Ltd. & Walker* (1910), 27 T. L. R. 73. *Reid.* *Re Hale, Lilley v. Foad*, [1899] 2 Ch. 107; *Robinson Printing Co. v. Chic*, [1905] 2 Ch. 123; *Plumpton v. Burkinshaw*, [1908] 2 K. B. 572; *Whinney v. Moss Line S.S. Co.* (1910), 79 L. J. K. B. 1038; *Deyes v. Wood*, [1911] 1 K. B. 806; *Dyson v. Peat*, [1917] 1 Ch. 99.

4975. ———.]—A limited co. mortgaged all its assets to trustees for debenture-holders to secure payment of the debentures, & by the deed it was provided that the trustees might in writing appoint a receiver who should carry on the business of the co., & that any receiver so appointed should be the agent of the co. who alone should be liable for his acts & defaults. The trustees appointed a receiver under the deed, & he took possession of the assets & carried on the business of the co. Soon after his appointment the co. was ordered to be compulsorily wound up. The receiver continued to carry on the business & in so doing ordered goods from resps. In an action against the trustees for the price of the goods:—*Held*: though after the winding-up order the receiver ceased to be the agent of the co. he did not thereby or at any time receive any implied authority from the trustees to act as their agent, & as the trustees never gave him any authority in fact they were not liable for the goods.—*GOSLING v. GASKELL*, [1897] A. C. 575; 66 L. J. Q. B. 848; 77 L. T. 314; 46 W. R. 208; 13 T. L. R. 544, H. L.; *revsq.* S. C. *sub nom.* *GASKELL v. GOSLING*, [1896] 1 Q. B. 669, C. A. *Annotations:—Consd.* *Deyes v. Wood*, [1911] 1 K. B. 806

Reid. *Patterson v. Gas Light & Coke Co.* (1896), 74 L. T. 640; *Re Hale, Lilley v. Foad* (1899), 68 L. J. Ch. 517; *Robinson Printing Co. v. Chic*, [1905] 2 Ch. 123.

4976. Receiver appointed by debenture-holders—Agent of debenture-holders.]—Debentures gave power to the holders to appoint a receiver to realise the assets of the co., without stating what he was to do with the surplus, or that he was to be the agent of the mtgors. A receiver appointed under this power claimed to retain surplus assets as his remuneration, & the liquidator of the co. applied by summons in the winding up for an order fixing the remuneration, & that the balance should be paid over to him:—*Held*: the receiver was the agent of the mtgee., not of the co.—*Re VIMBOS, LTD.*, [1900] 1 Ch. 470; 69 L. J. Ch. 209; 82 L. T. 597; 48 W. R. 520; 8 Mans. 101.

Annotations:—Consd. *Robinson Printing Co. v. Chic*, [1905] 2 Ch. 123. *Follid.* *Deyes v. Wood*, [1911] 1 K. B. 806. *Reid.* *Cully v. Parsons*, [1923] 2 Ch. 512. *Mentd.* *Re Palace Restaurants*, [1914] 1 Ch. 492.

4977. ———.]—Debentures gave power to the holders to appoint a receiver to take possession of the assets, carry on the business, sell the property, make any arrangements he should think expedient in the interest of the debenture-holders, & apply in a specified way the moneys received; but they did not provide that the receiver was to be the agent of the mtgors.:—*Held*: a receiver appointed under this power was the agent of the debenture-holders.—*ROBINSON PRINTING CO., LTD. v. CHIC, LTD.*, [1905] 2 Ch. 123; 74 L. J. Ch. 399; 93 L. T. 262; 53 W. R. 681; 21 T. L. R. 446; 12 Mans. 314.

Annotations:—Follid. *Deyes v. Wood*, [1911] 1 K. B. 806. *Reid.* *Cully v. Parsons*, [1923] 2 Ch. 512.

4978. ———.]—By debentures issued by a co., its undertaking & all its property were charged with payment of the debenture debts, & by a condition indorsed on & forming part of the debentures it was provided that "at any time after the principal moneys hereby secured become payable, the registered holder of this debenture may, with the consent in writing of the holders of the majority in value of the outstanding debentures of the same issue, appoint by writing any person or persons to be a receiver or receivers of the property charged by the debentures and such appointment shall be as effective as if all the holders of debentures of the same issue had concurred in such appointment. The principal moneys secured by the debentures having become payable, a receiver was appointed by holders of the majority in value of the outstanding debentures under the condition. In an action by the receiver against the debenture-holders by whom he was appointed for remuneration in respect of services rendered by him as such receiver:—*Held*: upon the terms of the condition in the debentures, in rendering those services, the receiver was acting as agent of the debenture-holders by whom he was appointed & not of the co., & he was entitled to remuneration from the debenture-holders.—*DEYES v. WOOD*, [1911] 1 K. B. 806; 80 L. J. K. B. 553; 104 L. T. 404; 18 Mans. 229, C. A.

Annotation:—Distd. *Cully v. Parsons*, [1923] 2 Ch. 512.

4979. ———. Proviso in debenture excluding liability.]—Where a debenture provided that "the holder of this debenture shall not in making or consenting to such appointment, i.e. of a receiver, incur any liability to the receiver for his remuneration or otherwise":—*Held*: this referred, not only to liability for acts of the receiver, but also of third parties, & the receiver was the agent of the co. & not of the person appointing him.—*CULLY v. PARSONS*, [1923] 2 Ch. 512; 67 Sol. Jo. 750.

4980. Receiver appointed under mortgage debenture—Payment into receivership account without

notice of claim—Whether personally liable].—A receiver who has been appointed under the terms of a mtge. debenture issued by a co. is the agent of the co. & not of the debenture-holder, & in the absence of notice of a claim against the co. he is under no personal liability to refund moneys which he has paid into a receivership account.—*BISSELL v. ARIEL MOTORS (1906), LTD. & WALKER (1910), 27 T. L. R. 73.*

Receivers generally, *see* RECEIVERS.

C. Preferential Payments.

4981. Preferential payments in Bankruptcy (Amendment) Act, 1897 (c. 19)—Whether applicable—Though no liquidator appointed.]—*Re BARNBY'S, LTD., FALLOWS v. BARNBY'S, LTD., [1899] W. N. 103.*

Annotation:—Refd. Westminster Corpn. v. Chapman, [1916] 1 Ch. 161.

4982. Payment by receiver after notice of preferential claim—Liability of receiver.]—A receiver & manager appointed by debenture-holders, who, after notice of any claim that is preferential under 1908 Act, s. 107, pays away the co.'s assets to ordinary creditors in the process of carrying on the co.'s business without making or attempting to make any provision for that preferential claim, is guilty of a breach of that sect. & is liable in damages accordingly.—*WOODS v. WINSKILL, [1913] 2 Ch. 303; 82 L. J. Ch. 447; 109 L. T. 399; 57 Sol. Jo. 740; 6 B. W. C. C. 934; 20 Mans. 261.*

D. Position of Receiver.

4983. Liability as trespasser—Carrying on business transferred to company—Transfer set aside as act of bankruptcy.]—Where the transfer of a debtor's business to a co. is subsequently set aside as an act of bkpcy. to which the title of the trustee in bkpcy. relates back, & the business of the co. has in the meantime been carried on by a receiver appointed by the debenture-holders of the co., the receiver is liable as a trespasser to account to the trustee for the assets, if any, of the debtor which may have come to his hands or for the value of them.—*Re GOLDBURG (No. 2), Ex p. PAGE, [1912] 1 K. B. 606; 81 L. J. K. B. 663; 106 L. T. 431; 19 Mans. 138.*

See, generally, RECEIVERS.

SUB-SECT. 6.—ENFORCEMENT OF REMEDIES BY APPLICATION TO COURT.

A. In General.

4984. Nature of debenture-holder's action.]—A debenture-holder's action in the Ch. Div. for the appointment of a receiver & for consequential relief is not a claim for payment of the money secured by the debenture, & therefore does not cover the same ground as, & is no impediment to, the prosecution of an action in the K. B. Div. by another debenture-holder on the covenant contained in his debenture for the payment of arrears of interest.—*CLEARY v. BRAZIL RY. CO. (1915), 85 L. J. K. B. 32; 113 L. T. 96.*

4985. Condition precedent in debenture to taking proceedings—Notice to trustees.]—Certain debentures were issued by defts. by which they acknowledged they were bound to pay the registered holder the sum of £100 & interest, & by which they charged their property with such £100 & interest. These debentures were issued subject to the conditions indorsed on the back, of which one was as follows: "The holder hereof shall not commence any action or take any proceedings to enforce the security hereby created, or to procure the appointment of a receiver, or to procure a sale to be ordered of the property subject thereto or for foreclosure"

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unless he had served a notice on the trustees requiring them to do certain acts, which they had neglected to comply with for six months:—*Held: this condition prevented the registered holder from bringing an action on the covenant to enforce the security, or on the covenant contained in the security, until such notice had been given.—ROGERS & CO. v. BRITISH & COLONIAL COLLIERY SUPPLY ASSOCN. (1898), 68 L. J. Q. B. 14; 6 Mans. 305; sub nom. STEWART, ROGERS & CO. v. BRITISH & COLONIAL COLLIERY SUPPLY ASSOCN., 79 L. T. 494.*

4986. — Consent of majority of holders.]—*PETHYBRIDGE v. UNIBIFOCAL CO., LTD., [1918] W. N. 278.*

B. Appointment of Receiver.

(a) In General.

Receivers generally, *see* RECEIVERS.

4987. Receiver on behalf of creditor already appointed—Appointment annulled & duties transferred to receiver for debenture-holders.]—(1) Where the appointment of a receiver on behalf of a creditor of a limited co. is rendered immediately necessary by exceptional circumstances, the ct. has jurisdiction to make the order upon an *ex p.* application.

(2) The appointment of such receiver may be annulled & his duties transferred to the receiver in a debenture-holders' action subsequently appointed in order to save unnecessary expense provided that the existing rights of the parties are not prejudiced thereby.—*MINTER v. KENT, SUSSEX, & GENERAL LAND SOCIETY (1895), 72 L. T. 186; 59 J. P. 102; 11 T. L. R. 197; 39 Sol. Jo. 230; 14 R. 236, C. A.*

Annotation:—Refd. Tilling v. Blythe (1899), 80 L. T. 44.

Form of order.]—*See* Nos. 5022, 5023, *post.*

When Appointed.

i. In General.

4988. Discretion of court—Interference by Court of Appeal.]—The Ct. of Appeal will not, except in very special circumstances, interfere with the discretion of the ct. in the appointment of a receiver & manager in a debenture-holder's action.—*Re NEW ZEALAND MIDLAND RY. CO., SMITH v. LUBBOCK (1897), 13 T. L. R. 212, C. A.*

ii. Interest in Arrear.

4989. Principal immediately due.]—*BISSILL v. BRADFORD TRAMWAYS CO., LTD., [1891] W. N. 51.*

iii. Security in Jeopardy.

4990. What constitutes jeopardy—Insolvency of company.]—A mtgee. being entitled to have his security protected, the ct. will, on the application of a debenture-holder, appoint a receiver of the property comprised in the security in all cases where the security is in jeopardy through the insolvency of the co., although the principal sum secured is not immediately payable, & default has not been made in payment of interest.—*McMAHON v. NORTH KENT IRONWORKS CO., [1891] 2 Ch. 148; 60 L. J. Ch. 372; 64 L. T. 317; 39 W. R. 349; 7 T. L. R. 303; 35 Sol. Jo. 298.*

Annotations:—Folld. Edwards v. Standing Rolling Syndicate (1892), 37 Sol. Jo. 132. Consd. Thorn v. Nine Reefs (1892), 67 L. T. 93; Re London Pressed Hinge Co., Campbell v. London Pressed Hinge Co., [1905] 1 Ch. 576. Refd. Re Mersey Ry., Gibbs v. Mersey Ry. (1895), 11 T. L. R. 390; Wallace v. Evershed, [1899] 1 Ch. 891.

4991. — — —.]—*BURNAY v. AMBACA RAILWAY CONSTRUCTION CO. (1891), 7 T. L. R. 545.*

4992. — — —.]—*MURRIETTA v. NEVADA LAND CO. (1892), 36 Sol. Jo. 778.*

4993. — — —.]—Upon the principle that a mtgee. is entitled to the protection of his security, the ct. will at the instance of a debenture-holder

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of a limited co., where the debenture creates a floating charge on the property of the co., appoint a receiver of the property so charged, if the security is in jeopardy through the insolvency of the co., even though the principal secured by the debenture is not immediately payable, & default has not yet been made in payment of interest for the period prescribed by the debenture.—*THORN v. NINE REEFS, LTD.* (1892), 67 L. T. 93; 8 T. L. R. 490, C. A. *Annotation*:—*Refd.* *Re* London Pressed Hinge Co., *Campbell v. London Pressed Hinge Co.*, [1905] 1 Ch. 576.

4994. ———. ———.]—There is jeopardy entitling to the appointment of a receiver where at a directors' meeting the auditor's unchallenged statement was that if the amount of the principal secured by the debentures could be realised after clearing off the co.'s liabilities, that was as much as could be hoped for.—*Re* BRAUNSTEIN & MARJORLAINE, LTD. (1914), 112 L. T. 25; *sub nom.* *Re* BRAUNSTEIN & MARJORLAINE, LTD., *PHILIPSON v. BRAUNSTEIN & MARJORLAINE, LTD.*, 58 Sol. Jo. 755.

4995. ———. ———.]—**Impossibility of carrying on business.** —*LATHOM (EARL) v. GREENWICH FERRY CO.* (1892), 36 Sol. Jo. 789.

4996. ———. ———.]—In 1888 a co. under the powers of its memorandum & arts. of assocn. acquired certain mines, & created a debenture issue of £80,000, which was a floating charge in common form protected by the usual trust deed. In 1912 the mines were worked out, the land, plant & machinery at the mines were worthless, the co.'s issued share capital was exhausted, & practically its only asset was a reserve fund of £10,000, representing accumulated profits, which the co. proposed to distribute amongst its shareholders. The debenture interest had been regularly paid, & no event had happened which either under the provisions of the debentures or of the trust deed entitled the debenture-holders to enforce their security:—*Held*: the case came within the principle of jeopardy, & the debenture-holders were entitled to have a receiver appointed.—*Re* TILT COVE COPPER CO., LTD., [1913] 2 Ch. 588; *sub nom.* *Re* TILT COVE COPPER CO., TRUSTEES, EXECUTORS, & SECURITIES INSURANCE CORPN. *v. TILT COVE COPPER CO.*, 82 L. J. Ch. 545; 109 L. T. 138; 57 Sol. Jo. 773; 20 Mans. 288. *Annotation*:—*Folld.* *Re* Braunstein & Marjorlaine (1914), 112 L. T. 25.

4997. ———. ———.]—**Judgment creditor about to levy execution.**—Where judgments have been recovered against a co. & execution is likely to issue, the appointment of a receiver may be made in a debenture holder's action on the ground of jeopardy.—*GRIGSON v. TAPLIN & Co.* (1915), 85 L. J. Ch. 75; 112 L. T. 985; [1915] H. B. R. 226; *sub nom.* *GREGSON v. TAPLIN (GEORGE) & Co., LTD.*, 59 Sol. Jo. 349.

4998. ———. ———.]—**Actions pending against company.**—*Re* NEW PUBLISHING CO., LTD., *BRIGSTOCK v. NEW PUBLISHING CO., LTD.* (1897), 41 Sol. Jo. 839.

4999. ———. ———.]—**Security inadequate.**—(1) Where a co. is not being pressed or threatened by outside creditors, & there is no risk of its assets being seized on their behalf, the mere fact that the security of the debenture-holders is very inadequate is not a sufficient reason for appointing a receiver on the ground of jeopardy.

(2) Debentures were issued under a trust deed providing for their payment *pari passu*. The provisions of the trust deed might be modified by a resolution passed by a three-fourths majority of the debenture-holders in general meeting:—*Held*: it was not competent for such a majority to sanction a sale by the co. of all its assets & a

division of the proceeds not ratably amongst all the debenture-holders, but amongst those willing to accept the lowest price for their debentures.—*Re* NEW YORK TAXICAB CO., LTD., *SEQUIN v. NEW YORK TAXICAB CO., LTD.*, [1913] 1 Ch. 1; 82 L. J. Ch. 41; 107 L. T. 813; 57 Sol. Jo. 98; 19 Mans. 389.

Annotations:—*As to* (1) *Distd.* *Re* Tilt Cove Copper Co., [1913] 2 Ch. 588. *Consd.* *Grigson v. Taplin* (1915), 85 L. J. Ch. 75.

iv. Other Cases.

5000. On sale of undertaking by company—**Company ceasing to be going concern.**—*HUBBUCK v. HELMS*, No. 4750, *ante*.

5001. On improper exercise of power to appoint under security.—*Re* MASKELYNE BRITISH TYPEWRITER, LTD., *STUART v. MASKELYNE BRITISH TYPEWRITER, LTD.*, No. 4971, *ante*.

5002. ———.]—*Re* SLOGGER AUTOMATIC FEEDER CO., LTD., *HOARE v. SLOGGER AUTOMATIC FEEDER CO., LTD.*, No. 4972, *ante*.

5003. On passing resolution to wind up for purpose of reconstruction.—*Re* CROMPTON & CO., LTD., *PLAYER v. CROMPTON & Co., LTD.*, No. 4749, *ante*.

(c) Who may be Appointed.

5004. Liquidator—**General rule.**—A receiver was appointed in a debenture-holders' action after a winding-up petition had been presented, but before a winding-up order was made. Subsequently an official liquidator was appointed. The debentures included all the property of the co. except certain real & leasehold property. At the date of the winding up substantially the whole of the capital had been called up:—*Held*: the official liquidator was not entitled to be substituted as receiver in the action, on the ground that the liquidator had no special duties to perform.

Under ordinary circumstances, where an application is made to the ct. by debenture-holders to appoint a receiver, & an application is also made to appoint a liquidator, the same person ought to be appointed receiver & liquidator.—*Re* JOSHUA STUBBS, LTD., *BARNEY v. JOSHUA STUBBS, LTD.*, [1891] 1 Ch. 475; 60 L. J. Ch. 190; 64 L. T. 306; 39 W. R. 617; 7 T. L. R. 220, C. A.

Annotations:—*Consd.* *British Linen Co. v. South America & Mexican Co.*, [1894] 1 Ch. 108. *Mentd.* *Engel v. South Metropolitan Brewing & Bottling Co.*, [1892] 1 Ch. 442; *Strong v. Carlyle Press*, [1893] 1 Ch. 268.

5005. ———. ———.]—**To save expense.**—An order having been made for continuing under supervision the voluntary winding up of a co. under which a liquidator had been appointed, an equitable mtgee. of property of the co. filed a bill to enforce his security & obtained an order for a receiver. The co. proposed the liquidator as receiver, but the judge in chambers appointed another person who had been proposed by pltf.:—*Held*: the liquidator, inasmuch as no personal objection was alleged against him, ought to have been appointed receiver, since the appointment of another person would cause great & unnecessary expense.—*PERRY v. ORIENTAL HOTELS CO.* (1870), 5 Ch. App. 420; 23 L. T. 525; 18 W. R. 779, L. J.

Annotations:—*Distd.* *Boyle v. Bettws Llantwit Colliery Co.* (1876), 2 Ch. D. 726. *Folld.* *Tottenham v. Swansea Zinc Ore Co.* (1884), 53 L. J. Ch. 776. *Consd.* *British Linen Co. v. South American & Mexican Co.*, [1894] 1 Ch. 108. *Refd.* *Re* Pound & Hutchins (1889), 42 Ch. D. 402; *Re* Joshua Stubbs, *Barney v. Joshua Stubbs*, [1891] 1 Ch. 475.

5006. ———. ———.]—**Though receiver already appointed.**—It is more convenient, & a saving of expense, that the official liquidator appointed in a winding up should be the sole receiver of the co.'s assets. Where, therefore, before a winding-up order is made a receiver is appointed in an action pending against the co., the ct. will, as a general rule, appoint the liquidator sole receiver in the

place of the receiver appointed in the action, even although leave be given to proceed with the action.

—**CAMPBELL v. COMPAGNIE GÉNÉRALE DE BELLE-GARDE, Re COMPAGNIE GÉNÉRALE DE BELLEGARDE** (1876), 2 Ch. D. 181; 45 L. J. Ch. 386; 34 L. T. 54; 24 W. R. 573.

Annotations:—**Foll.** *Tottenham v. Swansea Zinc Ore Co.* (1884), 53 L. J. Ch. 776. **Refd.** *Boyle v. Bettws Llantwit Colliery Co.* (1876), 2 Ch. D. 726; *British Linen Co. v. South American & Mexican Co.*, [1894] 1 Ch. 108.

5007. ————.]—Where a co. is being wound up, the principle of the ct. is, not to sanction the continuance both of a receiver & a liquidator unless it is absolutely necessary, the latter being, except in special cases, the proper & sufficient officer of the ct.

A co. mortgaged property to trustees to secure mtge. debentures. On Sept. 13, the trustees commenced an action against the co. to carry the deed into execution, & for a receiver. On Sept. 19, a receiver was appointed. On Sept. 11, a petition for the compulsory winding up of the co. had been presented, & on Nov. 10, a winding-up order was made, a liquidator being appointed shortly afterwards. It appeared that questions might arise as to the scope of the trust deed. The liquidator moved that the receiver might be discharged, & that he might be appointed in his stead:—**Held**: the application must be granted, on the principle above stated, inasmuch as the questions which might arise as to what was receivable by the receiver & what by the liquidator would cause expense & difficulty.—**TOTTENHAM v. SWANSEA ZINC ORE CO., LTD.** (1884), 53 L. J. Ch. 776; 51 L. T. 61; 32 W. R. 716.

Annotations:—**Refd.** *Re Joshua Stubbs, Barney v. Joshua Stubbs*, [1891] 1 Ch. 475; *British Linen Co. v. South American & Mexican Co.*, [1894] 1 Ch. 108.

5008. ————.]—In an action brought against a co. to enforce a charge on certain calls due from shareholders, pltfs. were, in Aug. 1884, appointed as receivers. In Oct. the co. went into voluntary liquidation, & on Nov. 15, an order was made for carrying on the winding up under the supervision of the ct. The ct., on June 3, 1885, removed pltfs. from being receivers, & appointed the liquidators of the co. to be receivers in their place, on the ground that the liquidators could collect the outstanding calls more expeditiously & less expensively than pltfs. On appeal:—**Held**: the ct., without laying down that a receiver already appointed should be displaced by the liquidator, would not interfere with the exercise of the discretion of the judge.—**BARTLETT v. NORTHUMBERLAND AVENUE HOTEL CO., LTD.** (1885), 53 L. T. 611; 1 T. L. R. 663, C. A.

Annotations:—**Consd.** *British Linen Co. v. South American & Mexican Co.*, [1894] 1 Ch. 108. **Refd.** *Re Joshua Stubbs, Barney v. Joshua Stubbs* (1891), 1 Ch. 187.

5009. ————.]—**BRITISH LINEN CO. v. SOUTH AMERICAN & MEXICAN CO.**, No. 5012, *post*.

5010. ————.]—A motion for a receiver in an action by a debenture-holder came on for hearing on the same day as a creditor's winding-up petition. The ct. made the winding-up order, but declined to appoint a receiver, on the ground that the appointment of a liquidator would be a sufficient protection to the debenture-holders. On appeal:—**Held**: the debenture-holders were entitled to special protection, & the official liquidator was appointed receiver, he not objecting.—**WILLMOTT v. LONDON CELLULOID CO.** (1885), 52 L. T. 642, C. A.

5011. ———— **Not appointed where only few assets to get in.**—**Re JOSHUA STUBBS, LTD., BARNEY v. JOSHUA STUBBS, LTD.**, No. 5004, *ante*.

5012. ———— **Of part of assets—Special receiver to get in special assets.**—An order to wind up a co. was made, & on the same day a receiver was

appointed in an action by debenture-holders. The estimated value of the assets was sufficient to cover the debentures, leaving only a small margin. The Official Receiver applied to have the receiver discharged & to have himself appointed receiver. The ct. below held that when both a receiver's action & a winding up by the ct. were pending, the ct. would, in the absence of special circumstances, appoint the official receiver or liquidator to be receiver in order to avoid unnecessary expense & the possibility of conflict. The receiver was discharged & the official receiver appointed to be receiver, he undertaking to keep a separate account on behalf of the debenture-holders.

The debenture-holders appealed, & adduced fresh evidence which satisfied the ct. that a considerable part of the assets consisted of securities which could not be realised in the ordinary way of business, but could only be advantageously got in by a commercial liquidator:—**Held**: the ct. had proceeded on correct principles, but having regard to the special nature of the above securities, the receiver approved by the debenture-holders ought to be appointed to get them in, the official receiver being appointed receiver of all the other assets.—**BRITISH LINEN CO. v. SOUTH AMERICAN & MEXICAN CO.**, [1894] 1 Ch. 108; 10 T. L. R. 48; *sub nom.* **INDUSTRIAL & GENERAL TRUST, LTD. v. SOUTH AMERICAN & MEXICAN CO., LTD.**, 63 L. J. Ch. 169, C. A.

(d) *Receiver of Property abroad.*

5013. Appointment of attorney to act for receiver.—**MORTON, ROSE & CO. v. BARBADOES WATER SUPPLY CO.** (1893), 37 Sol. Jo. 729.

5014. ————.]—**SMITH v. MORTGAGE CO. OF MEXICO, LTD.** (1895), 39 Sol. Jo. 742.

5015. ————.]—**Re HUINAC COPPER MINES, LTD., MATHESON & CO. v. HUINAC COPPER MINES, LTD.**, [1910] W. N. 218.

See, also, **CONFLICT OF LAWS**, Vol. XI., p. 353, No. 379.

5016. Effect of appointment—Requirements of foreign law must be complied with to perfect title.—A receiver is not put in possession of foreign property by the mere order of an English ct. The requirements of the law of the country where the property is situate must also be complied with. Until this is done, a person not a party to the action taking proceedings in the foreign country is not guilty of contempt of ct. either on the ground of interfering with the receiver's possession or otherwise.—**Re MAUDSLAY, SONS & FIELD, MAUDSLAY v. MAUDSLAY, SONS & FIELD**, [1900] 1 Ch. 602; 69 L. J. Ch. 347; 82 L. T. 378; 48 W. R. 568; 16 T. L. R. 228; 8 Mans. 38.

Annotations:—**Distd.** *Re Derwent Rolling Mills Co., York City & County Banking Co. v. Derwent Rolling Mills Co.* (1904), 21 T. L. R. 81. **Mentd.** *Bank of Africa v. Cohen*, [1909] 2 Ch. 129; *The Kronprinz Olav*, [1921] P. 52; *New York Life Insce. v. Public Trustee* (1923), 39 T. L. R. 720.

5017. ————.]—**Re DERWENT ROLLING MILLS CO., LTD., YORK CITY & COUNTY BANKING CO., LTD. v. DERWENT ROLLING MILLS CO., LTD.** (1905), 21 T. L. R. 701, C. A.

Annotation:—**Mentd.** *Cohen v. Rothfield*, [1919] 1 K. B. 410.

(e) *Security by Receiver.*

5018. Necessity for security—On appointment.—**OPPERT v. LONDON JOINT STOCK ASSOCN.** (1892), 36 Sol. Jo. 789.

Annotation:—**Appld.** *Re Hampshire Land Co.* (1894), 1 Mans. 428.

5019. ———— **When appointment continued after judgment.**—**BRINSLEY v. LYNTON & LYNMOUTH HOTEL & PROPERTY CO.**, No. 5141, *post*.

See, also, No. 5024, *post*.

5020. What security will be accepted—Guarantee

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society.]—The security of a guarantee society may be accepted in the case of a receiver in a cause, as well as in that of an official liquidator in a winding up under 1862 Act.—*COLEMORE v. NORTH, COLEMORE v. RADCLIFFE* (1872), 27 L. T. 405, L. C. & L. JJ.

5021. What security must cover—Where attorney appointed to get in assets abroad.—*MORTON, ROSE, & Co. v. BARBADOES WATER SUPPLY CO.* (1893), 37 Sol. Jo. 729.

5022. Time within which security must be given.—The order appointing a receiver & manager, or receiver or manager, with liberty to act at once, should be drawn up in the Ch. Div. in such form that, if security is not given within 21 days thereafter, the appointment will automatically lapse.—*ROWLEY v. DESBOROUGH* (1916), 60 Sol. Jo. 429.

5023. —.]—In future, wherever a receiver, or receiver & manager, is appointed by any judge of the Ch. Div., & ordered to give security within a specified time, the appointment is to be drawn in such a form that the receivership, or receivership & managership, is to lapse unless the security is given within that time, or unless in the meantime an extension of time is obtained from the judge in chambers.—*Re SIMS & WOODS, LTD., WOODS v. SIMS & WOODS, LTD.* (1916), 60 Sol. Jo. 539.

(f) Effect of Appointment.

5024. Order amounts to entry into possession—No order as to security.—An action was brought by debenture-holders to realise their security. On Jan. 10, 1883, A. was appointed *interim* receiver, with power to take possession of the property of the co. On Jan. 12, 1883, he was continued as receiver. In neither order was there any direction as to his giving security. The receiver entered into possession & remained & was in possession on Mar. 18, 1888, when a judgment creditor of the co. levied execution on the goods & chattels of the co., then in the possession of the receiver. The receiver gave notice of his claim on behalf of the debenture-holders, & an interpleader issue was directed. On Apr. 21, 1888, the ordinary judgment in a debenture-holders' action was taken, & the receiver was continued & was directed to give security:—*Held*: the receiver had been duly appointed with directions to take possession; he was therefore validly in possession, & the judgment creditor was not entitled to the goods.—*MORRISON v. SKERNE IRONWORKS CO., LTD.* (1889), 60 L. T. 588.

5025. Whether company's assets covered by debentures distrainable—Poor rate—General district rate.—Goods belonging to the co., but covered by debentures issued by the co. & in the possession of a receiver appointed by the trustee of the covering deed securing the debentures, under a power contained in such deed, are not distrainable for payment either of a poor rate assessed against the co., or of a general district rate assessed against the co., which rates the co. has left unpaid.—*RICHARDS v. KIDDERMINSTER OVERSEERS, RICHARDS v. KIDDERMINSTER CORPN.*, [1896] 2

Ch. 212; 65 L. J. Ch. 502; 74 L. T. 483; 44 W. R. 505; 12 T. L. R. 340; 4 Mans. 169.

Annotations:—*Distd. Re Marriage, Neave, North of England Trustee, Debenture & Assets Corpn. v. Marriage, Neave*, [1896] 2 Ch. 663; *National Provincial Bank v. United Electric Theatres* (1915), 85 L. J. Ch. 106.

5026. Whether appointment amounts* to new occupation—Electric Lighting Act, 1882 (c. 56).—Under sect. 19 of the above Act, no person within the area supplied with electric current by an electric lighting co. is entitled to a supply of current by the co., unless & until he has entered into a contract with the co. for the purpose. Therefore, upon a change in the occupation of premises to which current is being supplied by an electric co., there being a debt due to the co. from the outgoing occupier in respect of current already supplied to him, the co. are entitled to discontinue the supply until the new occupier has entered into a contract with them for a supply to him.

At the instance of debenture-holders of an hotel co. the ct. appointed a receiver of the undertaking & property of the co. The order directed the co. to deliver to the receiver possession of the hotel "so far as is necessary for the purpose of such receivership," & the receiver at once took possession of the hotel. At this time electric current for lighting the hotel was being supplied by an electric lighting co., & a large sum was due to them from the hotel co. for current already supplied:—*Held*: the electric co. were entitled to discontinue the supply of current until the receiver had entered into a new contract with them for its supply.—*HUSEY v. LONDON ELECTRIC SUPPLY CORPN.*, [1902] 1 Ch. 411; 71 L. J. Ch. 313; 86 L. T. 166; 50 W. R. 420; 18 T. L. R. 296; 46 Sol. Jo. 265, C. A.

Annotation:—*Mentd. Re Newdigate Colliery, Newdegate v. Newdigate Colliery*, [1912] 1 Ch. 468.

Compare No. 4697, ante, No. 5062, post.

(g) Position of Receiver.

5027. Officer of court.—The ct. will not permit its receiver to be interfered with or dispossessed of the property, nor will it allow payment to him to be intercepted although the order appointing him may be perfectly erroneous. An application must first be made to the ct. for leave.—*AMES v. BIRKENHEAD DOCKS TRUSTEES* (1855), 20 Beav. 332; 24 L. J. Ch. 540; 25 L. T. O. S. 121; 1 Jur. N. S. 529; 3 W. R. 381; 52 E. R. 630.

Annotations:—*Reid. Re Manchester & Milford Ry., Ex p. Cambrian Ry.* (1880), 14 Ch. D. 645; *Davies v. Thomas*, [1900] 2 Ch. 462.

5028. —.]—A dispute as to the conduct of a receiver is a dispute as to the conduct of an officer of the ct. in respect of which the ct. is entitled to claim exclusive jurisdiction, & it will not allow its own officer to be sued in another ct. in respect of acts done in discharge of his office.—*Re MAIDSTONE PALACE OF VARIETIES, LTD., BLAIR v. MAIDSTONE PALACE OF VARIETIES, LTD.*, [1909] 2 Ch. 283; 78 L. J. Ch. 739; 101 L. T. 458; 16 Mans. 261.

(h) Rights and Powers of Receiver.

5029. Right to custody of books of company—As against liquidator—When not specifically included in charge.—A co. issued debentures

PART III. SECT. 34, SUB-SECT. 6.—
B. (f).

f. On servants.—Pltf. was engaged as accountant of deft. co. The debenture-holders seized the property & put in charge a receiver & manager, to whom pltf. delivered the books of account, pltf. himself having actually made the seizure. He afterwards continued in the same position as before the seizure, but was paid by the receiver:—*Held*: the appointment of

a receiver & manager operated as a discharge of the servants of the co.—*ROLFE v. CANADIAN TIMBER & SAW MILLS* (1906), 12 B. C. R. 363.—CAN.

g. On position of trustees for debenture-holders.—The mere appointment of a receiver on behalf of the debenture-holders of a co. does not oust the trustee for such debenture-holders.—*BATKILL v. BURRARD SAW MILLS CO., LTD.*, [1921] 3 W. W. R. 831.—CAN.

PART III. SECT. 34, SUB-SECT. 6.—
B. (h).

k. Power to borrow in priority to debentures—Where result would injure debenture securities.—Pltfs. as judgment creditors of deft. co., having obtained a decree for the appointment of a receiver of the railway, & a receiver having been appointed who was in possession of the property, joined with defts. in an application for an order authorising the receiver

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judgment. The judgment was stayed upon terms which were not complied with, & the receiver remained in possession for some time. The lessor applied in the debenture-holders' action for an order that the receiver should pay the rent for the period during which he was in possession, either out of assets in his hands or personally as a trespasser:—*Held*: the effect of the judgment while subsisting was to prevent the lessor from asserting any rights against the persons in possession, & the receiver was not liable for the rent.—*Re WESTMINSTER MOTOR GARAGE CO., BOYERS v. WESTMINSTER MOTOR GARAGE CO.* (1914), 84 L. J. Ch. 753; 112 L. T. 393.

5040. Right to deduct payments made in respect of landlord's property tax.]—By a lease dated in 1907, certain premises were demised to a co., & the co. thereby covenanted to pay the rent & taxes in respect thereof, except land tax & landlord's property tax. The co. never paid any of the rent reserved, but made certain payments in respect of landlord's property tax. In 1911 a debenture-holders' action was commenced & a receiver was appointed. Subsequently the lessor threatened to distrain for the rent in arrear, & in order to avoid distress the receiver signed an undertaking by which he undertook to pay an occupation rent, & also to pay the "arrears of rent" then owing out of a particular fund. The receiver paid one year's landlord's property tax, & subsequently made a payment of occupation rent without deducting anything for property tax:—*Held*: the joint effect of Income Tax Act, 1842 (c. 35) sched. A., No. IV., r. 9, & Income Tax Act, 1853 (c. 34), was to treat the payment by a tenant of landlord's property tax as a *pro tanto* payment of rent; therefore, the receiver was entitled to deduct the payments made by the co. & himself in respect of landlord's property tax from any future payments of rent to be made by him under his undertaking.—*Re STURMEY MOTORS, LTD., RATTRAY v. STURMEY MOTORS, LTD.*, [1913] 1 Ch. 16; 82 L. J. Ch. 68; 107 L. T. 523; 57 Sol. Jo. 44.

Annotations:—**Folld.** *Re Hayman, Christy & Lilly* (No. 2), *Christy v. Hayman, Christy & Lilly* (No. 2), [1917] 1 Ch. 545. **Mentd.** *Re Fife Settlement Trusts*, [1922] 2 Ch. 348.

5041. ———.]—On taking possession of an insolvent co.'s premises a receiver & manager appointed in May, 1916, in a debenture-holders' action agreed with the landlord to pay rent during his occupation at the rate reserved by the leases. Being subsequently required to pay the landlord's property tax for the financial year 1915-6, anterior to his appointment, for which year no rent had been paid, the receiver paid the tax & deducted it from his first payment of rent in the current financial year 1916-7:—*Held*: the deduction was lawful under Income Tax Act, 1842 (c. 35), s. 60, sched. A., No. IV., r. 9, & Income Tax Act, 1853 (c. 34), s. 40, & it was not precluded by the agreement.—*Re HAYMAN, CHRISTY & LILLY, LTD.* (No. 2), *CHRISTY v. THE CO.*, [1917] 1 Ch. 545; 86 L. J. Ch. 389; 116 L. T. 467.

5042. Payment of rates.]—On Nov. 9, 1898, holders of debentures of a co. commenced an action to enforce their security, & a receiver was appointed. The debentures were a charge on the undertaking of the co. & its property present & future. On Dec. 1, 1898, the co. went into liquidation. In Jan., 1899, the receiver paid poor rate & district rate made in Oct., 1898, & water rate, which was payable according to meter. He claimed to be recouped these payments as preferential payments under Preferential Payments in — Act, 1888 (c. 62), & Preferential Payments

in Bkpcy. Amendment Act, 1897 (c. 19):—*Held*: the question being one between mtgor. & mtgee., not between successive occupiers, & the poor rate & district rate being due from the co. at the date of the commencement of the winding up, the liquidators must pay the whole amounts out of the general assets of the co.; but the water rate was not due until the water was supplied, & must be apportioned, the liquidators paying only so much as was due at the date of the commencement of the winding up.—*Re MANNESMANN TUBE CO., LTD., VON SIEMENS v. MANNESMANN TUBE CO., LTD.*, [1901] 2 Ch. 93; 70 L. J. Ch. 565; 84 L. T. 579; 65 J. P. 377; 8 Mans. 300.

C. Appointment of Receiver and Manager.

(a) In General.

See, generally, RECEIVERS.

5043. Jurisdiction of court to make interim order.]—In an action by debenture-holders of a mining co. against the co. for foreclosure the ct. has jurisdiction to make an *interim* order for the appointment of a manager.—*PEEK v. TRINSMARAN IRON CO.* (1876), 2 Ch. D. 115; 45 L. J. Ch. 281; 24 W. R. 361.

Annotations:—**Folld.** *Campbell v. Lloyds Bank* (1889), 58 L. J. Ch. 424. **Dbtd.** *Makins v. Ibotson*, [1891] 1 Ch. 133.

5044. Application for—Whether leave necessary under Courts Emergency Powers Act, 1914 (c. 78), s. 1 (1) b.]—The above sub-sect., which forbids any person to "foreclose" except after application to the ct., does not apply to the commencement of a foreclosure action or a debenture-holders' action; nor does the sub-sect. preclude the ct. from appointing a receiver & manager if no such application has been made.—*Re FARNOL EADES IRVINE & CO., LTD., CARPENTER v. FARNOL EADES IRVINE & CO., LTD.*, [1915] 1 Ch. 22; 84 L. J. Ch. 129; 112 L. T. 151; 21 Mans. 395.

Annotations:—**Folld.** *Behagg v. Palmer*, [1914] W. N. 416. **Apprvd.** *Ness v. O'Neil*, [1916] 1 K. B. 706. **Refd.** *Re A Company*, [1915] 1 Ch. 320; *Hosack v. Robins*, [1917] 1 Ch. 332; *Reversionary Interest Soc. v. Unruh* (1917), 87 L. J. Ch. 235; *Holt v. A. E. G. Electric Co.*, [1918] 1 Ch. 320. **Mentd.** *Braybrooks v. Whaley*, [1919] 1 K. B. 435.

(b) When Appointed.

5045. Where all property present & future charged—With a view to sale as going concern.]—By the arts. of assocn. of a limited co., the management of the business & the control of the co. were vested in the directors. Under a power in the memorandum of assocn. the co. issued debentures purporting to charge all the co.'s property, both present & future, including its uncalled capital. Upon a motion by pltf., who was the only debenture-holder, in an action by him against the co. to enforce his security, the managing director of the co. was appointed receiver of its property & also manager of its business pending realisation, with a view to enabling the co.'s business to be sold as a going concern, pltf. undertaking to provide a sum for wages & current expenses & also to be answerable for the receipts of the receiver & manager, pending his giving security, & to procure the realisation of the property as soon as possible.—*MAKINS v. IBOTSON (PERCY) & SONS.*, [1891] 1 Ch. 133; 60 L. J. Ch. 164; 63 L. T. 515; 39 W. R. 73; 2 Meg. 371.

Annotation:—**Folld.** *Edwards v. Standard Rolling Stock Syndicate*, [1893] 1 Ch. 574.

5046. Where business included in security—By implication.]—COUNTY OF GLOUCESTER BANK v. RUDRY MERTHYR STEAM & HOUSE COAL COLLIERY CO., No. 4625, *ante*.

5047. Where goodwill & business included in security.]—*Re LEAS HOTEL CO., SALTER v. HOTEL CO.*, No. 4648, *ante*.

5048. Where security in jeopardy—Though principal not due—& interest not in arrear.]—A co. issued debentures, by which they charged their undertaking, & all their property, present & future, such charge to be a "floating security." In an action by the debenture-holders to enforce their security, which was in danger of being impaired by the acts of judgment creditors, the ct. appointed a receiver of the property comprised in the debentures, & a manager of the co.'s business, though no principal had yet become due, & there was no interest in arrear.—**EDWARDS v. STANDARD ROLLING STOCK SYNDICATE**, [1893] 1 Ch. 574; 62 L. J. Ch. 605; 68 L. T. 633; 41 W. R. 343; 37 Sol. Jo. 132; 3 R. 226.

*Annotations:—***Consd.** *Taunton v. Warwickshire Sheriff*, [1895] 1 Ch. 734. **Folld.** *Re Victoria Steamboats, Smith v. Wilkinson*, [1897] 1 Ch. 158; *Re London Pressed Hinge Co., Campbell v. London Pressed Hinge Co.*, [1905] 1 Ch. 576. **Refd.** *Re Mersey Ry., Gibbs v. Mersey Ry.* (1895), 11 T. L. R. 390; *Wallace v. Evershed*, [1899] 1 Ch. 891.

5049. Company consenting.]

Re LONDON PRESSED HINGE CO., LTD., CAMPBELL v. LONDON PRESSED HINGE CO., LTD., No. 4763, *ante*.

5050. ——— Interest in arrear—Several actions pending against company.]—*Re NEW PUBLISHING CO., LTD., BRIGSTOCK v. NEW PUBLISHING CO., LTD.* (1897), 41 Sol. Jo. 839.

5051. ——— Company practically insolvent—Winding-up petition pending.]—In an action by debenture-holders of a limited co. to enforce their security, the ct. has jurisdiction to appoint, not only a receiver of the co.'s property but also a manager of its undertaking & business where the security is in jeopardy, as, for instance, where the co. is practically insolvent & there is pending a winding-up petition, notwithstanding that the security has not yet "crystallised" by the debenture-debt having become actually due; but as the appointment of a manager is made only with a view to the probable necessity of realisation it should extend for a limited period only.—*Re VICTORIA STEAMBOATS, LTD., SMITH v. WILKINSON*, [1897] 1 Ch. 158; 66 L. J. Ch. 21; 75 L. T. 374; 45 W. R. 134.

*Annotations:—***Distd.** *Re New York Taxicab Co., Sequin v. New York Taxicab Co.*, [1913] 1 Ch. 1. **Folld.** *Re Braunstein & Marjorlaine* (1914), 112 L. T. 25.

5052. Where security not in jeopardy—Principal due—But interest not in arrear.]—The ct. has jurisdiction to appoint a receiver & manager of the undertaking & assets of a co. on the application of the holder of a debenture issued by the co., secured by a floating charge, if the principal money thereby secured has become due before the time when the application is made, although at the date of the issue of the writ no default had been made in payment of interest, the money was not payable, & the security was not in jeopardy.

The holder of a debenture secured by a floating charge on the assets of the co. issued a writ in an action claiming an account, execution of the trusts of the debenture trust deed, realisation of the security, & the appointment of a receiver & manager. At the date of the issue of the writ the principal money secured was not due & no default had been made in payment of interest. Pltf. moved for the appointment of a receiver & manager, but the motion was refused on the ground that the money was not due, no default had been made, & the security was not in jeopardy. After the money became due pltf. served another notice of motion for the appointment of a receiver & manager. This was opposed on the ground that pltf. had no cause of action when he issued his writ & that the action could not be maintained :

—*Held*: pltf. as the holder of a floating security had a right to issue his writ before the money became payable & the ct. had jurisdiction, inasmuch as the money was now payable, to appoint a receiver & manager.—*Re CARSHALTON PARK ESTATE, LTD., GRAHAM v. CARSHALTON PARK ESTATE, LTD., TURNELL v. CARSHALTON PARK ESTATE, LTD.*, [1908] 2 Ch. 62; 77 L. J. Ch. 550; 99 L. T. 12; 24 T. L. R. 547 15 Mans. 228.

5053. On application by mortgagee in possession.]—*COUNTY OF GLOUCESTER BANK v. RUDRY MERTHYR STEAM & HOUSE COAL COLLIERY CO.*, No. 4625, *ante*.

5054. With a view to preservation of business.—To avoid disturbance of trade as whole.]—*Re BECKER & CO., NATIONAL PROVINCIAL & UNION BANK OF ENGLAND, LTD. v. BECKER & CO.* (1923), 58 L. Jo. 540.

(c) *Who may be Appointed.*

5055. Plaintiff or his nominee—Mortgagee.]—After resolutions for the voluntary winding up of a colliery co. had been duly passed & registered & a liquidator had been appointed, an action was commenced against the co. by their mtgees. to enforce their mtge. security. The mtgees. then applied for the appointment of a receiver & manager, & the ct., on evidence showing that the liquidator had no funds to carry on the colliery, & that unless it were carried on the property would be ruined, appointed the mtgees. receivers & managers without security & without salary.—*BOYLE v. BETTWS LLANTWIT COLLIERY CO.* (1876), 2 Ch. D. 726; 45 L. J. Ch. 748; 34 L. T. 844.

*Annotation:—***Refd.** *Re Pound & Hutchins* (1889), 42 Ch. D. 402.

5056. ——— Managing director.]—*MAKINS v. IBOTSON (PERCY) & SONS*, No. 5045, *ante*.

5057. ——— Director.]—This was an action by a debenture-holder, on behalf of himself & all other the debenture-holders of the co. claiming an account, foreclosure or sale, & the appointment of a receiver & manager. Pltf., who was a director of the co., now moved that he might be appointed receiver of the property comprised in, & subject to, the debentures, & manager of the business of the co. The co. had been served, but did not appear. The ct. made the order subject to an affidavit being produced to the registrar that all the other debenture-holders consented to the appointment of pltf. as receiver & manager.—*BUDGETT v. IMPROVED PATENT FORCED DRAUGHT FURNACE SYNDICATE, LTD.*, [1901] W. N. 23.

5058. ———.]—*STUBBER v. DANIEL & CO., LTD.* (1892), 36 Sol. Jo. 744.

5059. Liquidator—Though receiver & manager already appointed—If more convenient.]—There is nothing whatever against W. [the liquidator]. It is purely a question of convenience. The county ct. judge having appointed the liquidator in the winding up, it is more convenient that he should also act as receiver & manager. Having regard to the circumstances of the case & to the small amount due to the debenture-holders, there will be an order in terms of the notice of motion (BYRNE, J.).—*SAVORY v. VICTORY CYCLE MANUFACTURING SYNDICATE, LTD.* (1897), 41 Sol. Jo. 765.

(d) *Effect of Appointment.*

5060. As regards servants of company—Operation as discharge.]—The appointment of a manager & receiver of a co. by the ct. at the suit of debenture-holders, has the effect of discharging the officers & servants of such co. so as to entitle them to bring an action against the co. for wrongful dismissal.—*REID v. EXPLOSIVES CO.* (1887), 19

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Q. B. D. 264; 56 L. J. Q. B. 388; 57 L. T. 439; 35 W. R. 509; 3 T. L. R. 588, C. A.

Annotations:—*Reid*. De Grolle v. Bull & Ward (1894), 10 T. L. R. 198; Midland Counties District Bank v. Attwood, [1905] 1 Ch. 357; Measures v. Measures, [1910] 2 Ch. 248; Whinney v. Moss S.S. Co., [1910] 2 K. B. 813; Parsons v. Sovereign Bank of Canada, [1913] A. C. 160; *Re* Vulcan Coal Co., Harrison v. Harbottle, [1922] 2 Ch. 60. **Mentd.** Turner v. Goldsmith (1891), 60 L. J. Q. B. 247; Robinson Printing Co. v. Chic, [1905] 2 Ch. 123.

5061. — Power of receiver & manager to annul contract of service.]—*Re* MARRIAGE, NEAVE & Co., NORTH OF ENGLAND TRUSTEE, DEBENTURE & ASSETS CORPN. v. MARRIAGE, NEAVE & Co., No. 5062, *post*.

5062. — Whether made servants of receiver & manager.]—(1) In an action by debenture-holders against a co. to enforce their security, the appointment of receivers & managers of the co.'s property, by an order which does not direct the co. to give up possession, does not cause a change of occupation of the co.'s property within Poor Rate Assessment & Collection Act, 1869 (c. 41) s. 16; & the co.'s goods & chattels can therefore be distrained on for rates, notwithstanding any equitable charge of the debenture-holders.

(2) A receiver & manager of a co. cannot annul the contracts of the co.; & the servants of the co. do not *ipso facto* become his servants on his appointment.—*Re* MARRIAGE, NEAVE & Co., NORTH OF ENGLAND TRUSTEE, DEBENTURE & ASSETS CORPN. v. MARRIAGE, NEAVE & Co., [1896] 2 Ch. 663; 65 L. J. Ch. 839; 75 L. T. 169; 60 J. P. 805; 45 W. R. 42; 12 T. L. R. 603; 40 Sol. Jo. 701, C. A.

Annotations:—*As to* (1) **Appld.** *Re* Crosbie, Johnson & Hughes v. Crosbie (1909), 74 J. P. 25. **Consd.** National Provincial Bank v. United Electric Theatres (1915), 85 L. J. Ch. 106. *As to* (2) **Consd.** Whinney v. Moss S.S. Co., [1910] 2 K. B. 813.

5063. Whether operates as change of occupation—Poor Rate Assessment & Collections Act, 1869 (c. 41), s. 16.]—*Re* MARRIAGE, NEAVE & Co., NORTH OF ENGLAND TRUSTEE, DEBENTURE & ASSETS CORPN. v. MARRIAGE, NEAVE & Co., No. 5062, *ante*.

5064. — Or Public Health Act, 1875 (c. 55), s. 211 (3).]—NATIONAL PROVINCIAL BANK OF ENGLAND, LTD. v. UNITED ELECTRIC THEATRES, LTD., No. 4697, *ante*.

Compare No. 5026, *ante*.

(e) Position.

5065. Officer of the court.]—(1) Receivers & managers, appointed by the ct. at the instance of the debenture-holders of a limited co., to receive & manage the assets & business of the co., are officers of the ct., & (2) are not, by virtue of their appointment, the agents of the co. to make contracts on the co.'s behalf.

Semble: they are not the agents of the debenture-holders.

(3) They may be personally liable on their contracts made as receivers & managers. (4) If they purport to contract on the co.'s behalf, they may be liable for breach of warranty of authority.—*DE GRELLÉ & Co. v. BULL & WARD* (1894), 10 T. L. R. 198; 1 Mans. 118; 10 R. 97.

5066. —.]—The receiver & manager of a co. appointed by the ct. in a debenture-holder's action is an officer of the ct. put in to discharge certain duties, & is not the agent either of the debenture-holders or of the co., which still remains in existence.—*PARSONS v. SOVEREIGN BANK OF CANADA*, [1913] A. C. 160; 82 L. J. P. C. 60; 107 L. T. 572; 29 T. L. R. 38; 20 Mans. 94, P. C.

5067. As agent—Of company.]—*DE GRELLÉ & Co. v. BULL & WARD*, No. 5065, *ante*.

5068. — Of debenture-holders.]—*DE GRELLÉ & Co. v. BULL & WARD*, No. 5065, *ante*.

5069. —.]—*PARSONS v. SOVEREIGN BANK OF CANADA*, No. 5066, *ante*.

5070. — Of court.]—(1) Where advances for the preservation of a limited co.'s assets are made to a receiver & manager by a party to a debenture-holders' action under an order of ct. which directs that the sum advanced shall be a first charge on the assets in priority to the debenture-holders, the receiver & manager is nevertheless entitled to take his costs & expenses properly incurred out of the assets in priority to the sums advanced, if it appears that the true bargain was that the assets should be realised by the receiver & manager for the benefit of all concerned.

Qu.: whether the same rule applies where the person making the advance is a stranger to the action.

An order was made in a debenture-holders' action against a mining co. appointing a receiver & manager. Successive orders were then made on the application of pl'tfs. giving the receiver & manager liberty to borrow on the security of first charges to be created by him, certain sums of money for the purpose of preserving the co.'s property & carrying on the business. The receiver & manager borrowed the money from pl'tfs. themselves on the security of deeds executed by him & creating first charges in their favour on the property of the co. comprised in the debentures. By each of those charges the receiver & manager expressly stipulated that he should not be personally liable to repay the sums advanced out of his own moneys; but he made no express reservation of his right to be indemnified out of the assets in respect of his costs & expenses properly incurred. He then continued to carry on the co.'s business, but it proved a failure, & he eventually realised the assets, but the proceeds were insufficient to satisfy both his costs & expenses, including his remuneration allowed by the ct., & also pl'tfs.' charges:—*Held*: inasmuch as, in the circumstances, the receiver & manager had acted in the preservation & realisation of the assets for the benefit of every one concerned, he was entitled to indemnity out of the assets in priority to pl'tfs. & all other persons for whose benefit he had so acted.

(2) A receiver & manager, although appointed by the ct. & for the benefit of the debenture-holders, is not the agent to contract, either of the ct. or of anybody else, but is a principal.—*Re GLASDIR COPPER MINES, LTD., ENGLISH ELECTRO-METALLURGICAL CO., LTD. v. GLASDIR COPPER MINES, LTD.*, [1906] 1 Ch. 365; 75 L. J. Ch. 109; 94 L. T. 8; 22 T. L. R. 100; 13 Mans. 41, C. A.

Annotations:—*As to* (1) **Consd.** *Re* Boynton, Hoffman v. Boynton, [1910] 1 Ch. 519. **Refd.** *Re* British Power Traction & Lighting Co., Halifax Joint Stock Banking Co. v. British Power Traction & Lighting Co., [1906] 1 Ch. 497; *Re* Hawkins, Briebe v. Hawkins (1915), 31 T. L. R. 247; *Re* Kastner, Auto-Piano Co. v. Kastner, [1917] 1 Ch. 390.

(f) Power to Borrow.

5071. Power to borrow—When authorised by court—When necessary for preservation of business.]—*MASSON v. OTTOMAN PAPER MANUFACTURING Co., LTD.* (1892), 36 Sol. Jo. 801.

5072. — Proposed expenditure beneficial to company.]—In a debenture-holder's action, in which, with a view to the sale of a theatrical co.'s business as a going concern, a receiver & manager had been appointed, the ct. refused to direct the receiver & manager to borrow money as a first charge upon the co.'s assets in priority to the

debentures for the purpose of carrying on a pantomime which was being performed in the co.'s theatre, being of opinion that the proposed expenditure was not likely to be beneficial to any one concerned, & was not justifiable on the footing of salvage.—**SECURITIES & PROPERTIES CORPN., LTD. v. BRIGHTON ALHAMBRA, LTD.** (1893), 62 L. J. Ch. 566; 68 L. T. 249; 3 R. 302.

5073. ———.—The ct. will not sanction a borrowing by the receiver & manager of a co. by means of a mtge. or charge on the undertaking & assets of the co. to be put in front of the debenture-holders' security for the purpose of completing a contract where there is no evidence that any direct or indirect profit will enure to the co. by the completion of such contract. *Re THAMES IRONWORKS, SHIPBUILDING & ENGINEERING CO., LTD., FARRER v. THAMES IRONWORKS, SHIPBUILDING & ENGINEERING CO., LTD.* (1912), 106 L. T. 674; 28 T. L. R. 273; 56 Sol. Jo. 413.

5074. ———. **Limit of borrowing imposed—Advance subsequently repaid—Borrowing power not exhausted.**—When a receiver & manager in a debenture-holder's action is authorised to borrow to a fixed amount, *e.g.* £700, & borrows a part, *e.g.* £500, from a bank which he afterwards repays, such repayment does not exhaust *pro tanto* the borrowing power, *i.e.* reduce it to £200.—*MILWARD v. AVILL & SMART, LTD.* (1897), 4 Mans. 403.

5075. ———. **Limit exceeded without leave of court—Personal liability of receiver & manager.**—Orders were made in a debenture-holders' action appointing a receiver & manager, & authorising him to borrow £3,000 for the general purposes of the business, the sum to be a first charge on the assets. The co. was ordered to be wound up. The manager carried on the business & incurred debts beyond the £3,000, but made no further application for leave to raise money. He retired from his office, & pl'ts. in the action applied for a declaration that he was not entitled to any indemnity in respect of liabilities incurred beyond the £3,000, or that if he was so entitled, he had by his conduct forfeited his rights:—*Held*: (1) the order authorising him to borrow for the general purposes of the business had not deprived the manager of his right to be indemnified out of the assets; (2) if without any application to the ct. he had incurred further liabilities, he would only be entitled to be indemnified in respect of them so far as he could show that having regard to all the circumstances he was justified in incurring them without leave; (3) this must be separately determined in each particular case; & (4) it would not be enough for him to show that the further liabilities had been incurred *bonâ fide* & in the ordinary course of business.—*Re BRITISH POWER TRACTION & LIGHTING CO., LTD., HALIFAX JOINT STOCK BANKING CO., LTD. v. BRITISH POWER TRACTION & LIGHTING CO., LTD.*, [1906] 1 Ch. 497; 75 L. J. Ch. 248; 94 L. T. 479; 54 W. R. 387; 22 T. L. R. 268; 50 Sol. Jo. 257; 13 Mans. 74; *subsequent proceedings*, [1907] 1 Ch. 528; *subsequent proceedings*, [1910] 2 Ch. 470.

Annotation:—As to (1) *Refd.* *Re Hawkins, Briebe v. Hawkins* (1915), 31 T. L. R. 247.

5076. ———.—The matter (*see* No. 5075, *ante*) then went back to chambers on inquiries which had been directed by a previous order, & questions now came before the ct. whether the receiver was entitled to be indemnified (a) in respect of bodies supplied for motor-cars which had been ordered by customers either before or after his appointment; (b) bodies supplied to him for cars which had been prepared for a motor show; (c) rent of business premises; & £1,500 overdrawn with the bank:—*Held*:

(1) inasmuch as the receiver had reasonable ground for believing that he would be able to discharge the liabilities out of the purchase-money of the cars, & it would not have been practicable to apply to the ct., he ought to be indemnified in respect of (a) & (c); (2) the motor bodies supplied for the show were ordered as a speculation, so there should be no indemnity in respect of (b); (3) although the £1,500 overdraft had all been spent on payments which were necessarily made to keep the business going, there was no reason why the receiver should not have applied to the ct. for leave to make these payments, & he was therefore not entitled to an indemnity in respect of (d).—*Re BRITISH POWER TRACTION & LIGHTING CO., LTD., HALIFAX JOINT STOCK BANKING CO., LTD. v. BRITISH POWER TRACTION & LIGHTING CO., LTD.*, [1907] 1 Ch. 528; 76 L. J. Ch. 423; 97 L. T. 198; 14 Mans. 149; *subsequent proceedings*, [1910] 2 Ch. 470.

5077. ———. **Limit exceeded to knowledge of creditor.**—In a debenture-holders' action against a co. a receiver & manager was appointed, & he was empowered by an order made in the action to borrow not more than £300 to carry on the business. He gave an order for goods on the understanding that he was not to be personally liable. In giving this order he was contracting in excess of the sum of £300. During the proceedings in the action a summons was taken out by the creditor for an order that the receiver & manager should pay him out of the assets or out of his own moneys. The creditor knew that it was doubtful whether his & similar debts could be paid in full out of the assets:—*Held*: the creditor was not entitled to an order for payment on the summons.—*Re HAWKINS (ERNEST) & CO., LTD., BRIEBA v. HAWKINS (ERNEST) & CO., LTD.* (1915), 31 T. L. R. 247.

Power to repudiate contracts.—*See* Nos. 5088, 5089, *post*.

5078. Duty to preserve assets & goodwill.—*Re NEWDIGATE COLLIERY, LTD., NEWDEGATE v. NEWDIGATE COLLIERY, LTD.*, No. 5088, *post*.

(g) *Right of Indemnity.*

5079. Advances made by party to action—Priority of costs & expenses of receiver & manager.—A joint-stock co. for building operations, which had some uncompleted contracts, got into difficulties. An action against the co. was brought by a debenture-holder, & a petition for winding up was presented by an unsecured creditor. By a consent-order in the winding-up petition it was ordered that £5,000 should be raised by pl'tf. in the action & the unsecured creditors in order to complete the contracts, which sum was to be a first charge on the assets of the co. in priority to all the debentures, that all the unsecured creditors should have second debentures given them, that two receivers & managers should be appointed, one of whom was nominated by the unsecured creditors, to carry on the business, but the co. was to incur no fresh debts or liabilities. £4,250 was accordingly raised; but the receivers & managers in completing the contracts incurred considerable further expenses, for which they claimed to be indemnified:—*Held*: the receivers & managers were entitled to be indemnified out of the assets of the co. in priority to the persons who advanced the £4,250, as well as to the holders of debentures.—*STRAPP v. BULL, SONS & CO., SHAW v. LONDON SCHOOL BOARD*, [1895] 2 Ch. 1; 64 L. J. Ch. 658; 72 L. T. 514; 43 W. R. 641; 2 Mans. 441; 12 R. 387, C. A.

Annotations:—**Consd.** *Re British Power Traction & Lighting Co., Halifax Joint Stock Banking Co. v. British Power*

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Traction & Lighting Co., [1906] 1 Ch. 497. **Expld.** *Re Glasdir Copper Mines, English Electro-Metallurgical Co. v. Glasdir Copper Mines*, [1906] 1 Ch. 365. **Refd.** *Lathom v. Greenwich Ferry Co.* (1895), 72 L. T. 790; *Re Boynton, Hoffman v. Boynton*, [1910] 1 Ch. 519; *Re Hawkins, Briebe v. Hawkins* (1915), 31 T. L. R. 247; *Re Kastner, Auto-Piano Co. v. Kastner*, [1917] 1 Ch. 390.

5080. ————.]—*Re GLASDIR COPPER MINES, LTD., ENGLISH ELECTRO-METALLURGICAL CO., LTD. v. GLASDIR COPPER MINES, LTD.*, No. 5070, *ante*.

5081. ———— **Priority of costs of realisation.**]—A ferry co., which was in occupation of works in the bed of the Thames, under a licence from the conservators, which reserved an annual payment, were unable to meet their liabilities. An action was commenced against it by the debenture-holders to enforce their security, which comprised all the assets of the co., & a receiver & manager was appointed. The receiver, who continued to maintain & use the works with a view to the realisation of the assets, under an order of the ct. giving him leave to raise money to carry on the co.'s business, borrowed £1,000 from a corpn., who were debenture-holders of the co., giving them therefor a charge on the assets in priority to the existing debentures. Certain other debenture-holders also advanced £196 to the receiver for the same purpose. Under an order of the ct. the receiver sold the assets & paid the proceeds into ct. Claims being made by summons against the fund:—**Held:** (1) the co., having continued in beneficial occupation, the conservators, although only licensors, & having no power of distress, were entitled in priority to the sums due under their licence as costs of realisation; (2) the receiver was next entitled to his costs of realisation, but such costs only included costs of actual sale, & not the costs of preserving the property; (3) the corpn., although debenture-holders, having advanced their £1,000 under an entirely separate contract, were entitled next in priority to the existing debentures; (4) those who advanced the £196, having done so in their character of debenture-holders, could only come in with the other debenture-holders after payment of the expenses of the litigation.—*LATHOM v. GREENWICH FERRY CO.* (1895), 72 L. T. 790; 2 Mans. 408; 13 R. 503.

5082. **Priority of costs of realisation.**]—(1) Where a receiver & manager appointed by the ct. properly incurs debts in carrying on the business, the ct. will see that such debts are satisfied either by the receiver, or if the receiver becomes bkpt. or there is any other reason which makes it advisable, by payment direct to the creditors of the business out of the funds in ct. available for that purpose.

(2) In a debenture-holders' action a receiver & manager was appointed. In carrying on the business of the co. he incurred considerable debts without the leave of the ct. or the consent of the debenture-holders & subsequently became bkpt. The funds in ct. were the only assets of the co., & were insufficient to discharge pltf's. costs of realisation & the receiver's costs of carrying on the business. The trustee in bkpcy. of the receiver claimed that the funds in ct. less the costs of realisation ought to be paid out to him for distribution amongst the receivership creditors, whilst pltf's. contended that the receiver, having acted improperly, was not entitled to be indemnified out of the assets & that the funds less costs of realisation ought to be paid to the debenture-holders:—**Held:** the funds in ct. must be applied first in payment of the costs of realisation; & then in payment of the receiver's costs.—*Re LONDON UNITED BREWERIES, LTD., SMITH v.*

LONDON UNITED BREWERIES, LTD., [1907] 2 Ch. 511; 76 L. J. Ch. 612; 97 L. T. 541; 14 Mans. 250. *Compare* No. 5170, *post*.

5083. **Balance due on receivership accounts—How far trade creditors entitled to benefit of indemnity.**]—A receiver & manager in a debenture-holders' action gave the usual security by a bond with sureties. He properly incurred, & was entitled to be indemnified by the estate against, trade liabilities to the extent of £900 for goods supplied to him on credit, of which the estate had the benefit, & his cash account was deficient by £400, which he was unable to pay:—**Held:** the trade creditors could only claim against the estate to the net amount of the receiver's indemnity, i.e. £500, & they & not the sureties must bear the loss of the £400.—*Re BRITISH POWER TRACTION & LIGHTING CO., LTD., HALIFAX JOINT STOCK BANKING CO., LTD. v. BRITISH POWER TRACTION & LIGHTING CO., LTD.*, [1910] 2 Ch. 470; 79 L. J. Ch. 666; 103 L. T. 451; 54 Sol. Jo. 749.

5084. **Extent of indemnity—Whether receiver & manager entitled to retain assets against possible future claims.**]—The receiver appointed by debenture-holders, who was also liquidator of a colliery co. & had become possessed of the proceeds of sale of the colliery plant for which he was accountable to the debenture-holders, claimed the right to retain the moneys as an indemnity fund against any future claims which might be made against him for damages to the surface arising out of his working of the coal:—**Held:** he had no such lien at law, & no equitable lien either upon principle or authority.—*DYSON v. PEAT*, [1917] 1 Ch. 99; 86 L. J. Ch. 204; 115 L. T. 700; 61 Sol. Jo. 131; [1917] H. B. R. 97.

(h) Liabilities.

5085. **Liability on contract—Contract entered into by company—For hire of chattels—Possession taken by manager.**]—*HAY v. SWEDISH & NORWEGIAN RY. CO., LTD.* (1892), 8 T. L. R. 775; 36 Sol. Jo. 712.

Annotation:—**Refd.** *Re Abbott, Abbott v. Abbott* (1913), 30 T. L. R. 13.

5086. ———— **Contract adopted.**]—*Re RYLAND'S GLASS CO., YORK, ETC., BANK v. RYLAND'S GLASS CO.* (1904), 49 Sol. Jo. 67.

5087. ———— **Subsequent repudiation—Right of set-off.**]—A limited co. entered into a contract with defts. to supply them with pit props to be delivered during the twelve months ending June 30, 1905. The co. became in arrears with the deliveries, & it was agreed that the time should be extended to June 30, 1906. In Nov. 1905, pltf. was appointed by the ct. receiver & manager of the co. on behalf of the debenture-holders, & notice thereof was given to defts. Pltf. delivered a quantity of props at various times in pursuance of the contract, & then gave defts. notice that he could not undertake to carry out their contract with the co. In an action by pltf. to recover the price of the props supplied by him:—**Held:** as pltf. delivered the props under the contract between the co. & defts., & not under a new contract with him, he did so as assignee of the co., & he could only recover subject to the right of defts. to set off any claim which they might have arising out of the same matter; & defts. were, therefore, entitled to set off as against pltf.'s claim, the difference between the contract price & the market price of the props not delivered.—*FORSTER v. NIXON'S NAVIGATION CO., LTD.* (1906), 23 T. L. R. 138.

5088. ———— **Whether manager bound—Power to repudiate.**]—It is the duty of the re-

ceiver & manager of the property & undertaking of a co. to preserve the goodwill as well as the assets of the business, & it would be inconsistent with that duty for him to disregard contracts entered into by the co. before his appointment.

Where therefore a receiver & manager of the undertaking & property of a colliery co. had been appointed in a debenture-holders' action against the co., the ct. declined to authorise him to repudiate the co.'s forward contracts for the supply of coal notwithstanding that, since those contracts were made, the price of coal had risen, & if the contracts were disregarded, a much larger sum would be obtained for the coal.—*Re NEWDIGATE COLLIERY, LTD., NEWDEGATE v. NEWDIGATE COLLIERY, LTD.*, [1912] 1 Ch. 468; 81 L. J. Ch. 235; 106 L. T. 133; 28 T. L. R. 207; 19 Mans. 155, C. A.

Annotations:—*Distd. Re Great Cobar, Beeson v. Great Cobar*, [1915] 1 Ch. 682. *Reid. Re Thames Ironworks, Shipbuilding & Engineering Co., Farrer v. Thames Ironworks, Shipbuilding & Engineering Co.* (1912), 106 L. T. 674.

5089. ————*Contract entered into as receiver & manager.*—A contract by a co. to employ another co. as its sole agent for the sale of the products of its business does not bind a receiver & manager of the business appointed in a debenture-holders' action on behalf of the debenture-holders, & he will be allowed to disregard it, as his doing so will not affect the value of the goodwill of the business.—*Re GREAT COBAR, LTD., BEESON v. GREAT COBAR, LTD.*, [1915] 1 Ch. 682; 84 L. J. Ch. 468; 113 L. T. 226; [1915] H. B. R. 79.

Effect of repudiation, after assignment of rights under contract, *see* CHOSES IN ACTION, Vol. VIII., p. 494, No. 606.

5090. ———— *Personal liability.*—*DE GRELLE & Co. v. BULL & WARD*, No. 5065, *ante*.

5091. ———— *Contract entered into as receiver & manager.*—A person who is appointed by the ct. receiver & manager to carry on a business is *prima facie* personally liable on contracts entered into by him as receiver & manager, & must look to the assets for an indemnity.

Therefore, where, in an action in the Ch. Div. by debenture-holders of a co., the ct. appointed defts. receivers & managers to carry on the business of the co., & defts. ordered goods of pltf., for the purposes of the business, the order being expressed to be for the co., & defts. signing it as receivers & managers:—*Held*: defts. were personally liable for the price of the goods so ordered.—*BURT, BOULTON & HAYWARD v. BULL*, [1895] 1 Q. B. 276; 64 L. J. Q. B. 232; 71 L. T. 810; 43 W. R. 180; 11 T. L. R. 90; 39 Sol. Jo. 95; 2 Mans. 94; 14 R. 65, C. A.

Annotations:—*Consd. Re Glasdir Copper Mines, English Electro-Metallurgical Co. v. Glasdir Copper Mines*, [1906] 1 Ch. 365. *Reid. Re Flowers*, [1897] 1 Q. B. 14; *Justice v. James* (1899), 15 T. L. R. 181; *Re British Power Traction & Lighting Co., Halifax Joint Stock Banking Co. v. British Power Traction & Lighting Co.*, [1906] 1 Ch. 497; *Forster v. Nixon's Navigation Co.* (1906), 23 T. L. R. 138; *Plumpton v. Burkinshaw*, [1908] 2 K. B. 572; *Nicholls v. Knapman* (1909), 101 L. T. 746; *Boehm v. Goodall*, [1911] 1 Ch. 155; *Moss S.S. Co. v. Whinney*, [1912] A. C. 254; *Re Hawkins, Briebe v. Hawkins* (1915), 31 T. L. R. 247. *Mentd. The Achilles*, [1919] P. 340.

5092. ———— *Contract on behalf of company—Warranty of authority.*—*DE GRELLE & Co. v. BULL & WARD*, No. 5065, *ante*.

5093. ———— *Bill of exchange accepted.*—*Re RYLAND'S GLASS CO., YORK, ETC., BANK v. RYLAND'S GLASS CO.* (1904), 49 Sol. Jo. 67.

5094. *Liability for rates—Property subject to debentures sold.*—A receiver & manager, appointed in a debenture-holders' action, of all the property comprised in the debentures of a co., sold the property under an order of the ct. The overseers of a parish, in which the property was

situate, applied for an order that, in default of recovery by distress of the amount of a rate, the receiver might be ordered to pay them the amount out of any money in his hands:—*Held*: the overseers were not entitled to the order asked for.—*Re BRITISH FULLERS' EARTH CO., LTD., GIBBS v. BRITISH FULLERS' EARTH CO., LTD.* (1901), 17 T. L. R. 232.

(i) *Remuneration.*

5095. *Priority—Over money borrowed as first charge on assets.*—In an action by a debenture-holder on behalf of himself & all the other debenture-holders of a co. to realise his security, the usual judgment in a debenture-holders' action was pronounced & a receiver & manager was appointed. On the same day an order was made on the application of pltf. in the action authorising the receiver to borrow £500, to be secured by a first charge on the assets of the co. in priority to the debenture-holders. The receiver borrowed the money from a bank, & the deed containing the charge did not in express terms exempt the receiver from personal liability to repay the loan. The receiver realised the whole of the assets comprised in the debentures, & there was in ct. a fund insufficient to satisfy all the claims upon it. The bank claimed that, subject to the costs of realisation in the strict sense, they were entitled to be first paid out of the fund their charge, on the ground that the receiver, having borrowed the money from them, was their debtor, & that they were entitled to be subrogated to him in respect of his indemnity against the fund:—*Held*: (1) the proper inference to be drawn from the transaction was that the receiver did not intend to pledge his credit & the bank did not rely upon it, & therefore there was no right of indemnity to which the principle of subrogation could apply; (2) the fund must be applied, first, in payment of the pltf.'s costs of the action as between solr. & client; then in payment of the receiver's remuneration; & lastly, in repayment of the loan to the bank, so far as the balance of the fund would extend.—*Re BOYNTON (A.), LTD., HOFFMAN v. BOYNTON (A.), LTD.*, [1910] 1 Ch. 519; 79 L. J. Ch. 247; 102 L. T. 273; 26 T. L. R. 294; 54 Sol. Jo. 308; 17 Mans. 36.

5096. *Appointment for fixed period—Manager continuing to act after fixed date—No remuneration allowed after fixed date.*—A person appointed in a debenture-holder's action to be receiver & manager of the co.'s business with a direction that he should not act as manager beyond a fixed date, continued without obtaining an extension of time to act as manager after that date with a view to selling the business. The negotiations having failed, the ct. made an order that the co.'s business should be closed down forthwith:—*Held*: on the passing of the accounts of the receiver & manager, he should be allowed no remuneration for acting as manager after the fixed date, & all items of expenditure by way of management incurred by him after the date of the order closing down the business ought also to be disallowed.—*Re WOOD GREEN & HORNSEY STEAM LAUNDRY, TRENCHARD v. WOOD GREEN & HORNSEY STEAM LAUNDRY*, [1918] 1 Ch. 423; 87 L. J. Ch. 171; 118 L. T. 501; 62 Sol. Jo. 349.

(j) *Discharge.*

5097. *Leave given to discontinue business—Assets insufficient to pay debentures.*—After the presentation of a winding-up petition & the appointment of a provisional liquidator, debenture-holders commenced an action to enforce their

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security, which extended over all the assets of the co. In this action a receiver was appointed, with power to manage the business until the petition was disposed of. A winding-up order was made on the petition, & plffs. obtained leave to go on with their action, the receiver being continued with powers of management. Subsequently leave was given to discontinue the business; & the liquidator thereupon applied for the discharge of the receiver. The assets of the co. being insufficient to pay the debentures:—*Held*: there was no ground for discharging the receiver.—**STRONG v. CARLYLE PRESS**, [1893] 1 Ch. 268; 62 L. J. Ch. 541; 68 L. T. 396; 41 W. R. 404; 9 T. L. R. 135; 37 Sol. Jo. 116; 2 R. 283, C. A.

Annotation:—**Expld.** *British Linen Co. v. South American & Mexican Co.*, [1894] 1 Ch. 108.

5098. Receivers & managers appointed in two actions—No notice given of application in second action.—**RICHARDSON v. BRINSMEAD (T. E.) & SONS, LTD., FRESY v. BRINSMEAD (T. E.) & SONS, LTD.** (1896), 40 Sol. Jo. 800.

5099. Appointment secured on misleading affidavit.—In a debenture-holders' action by plffs., S. had been, by order, appointed receiver & manager of the property & assets of defts. In an affidavit, C., described as a "director of public cos.," stated that for five years past he had known S., of No. 1, R.-street, A., "accountant," the proposed receiver & manager, that the accountant had carried on business as such for upwards of five years at No. 1, R.-street, & elsewhere in the City of London, & that S. was a person of respectability & a fit & proper person to be appointed receiver & manager of defts.' property & assets. S. was, according to the evidence, secretary to a political league, & had had an office at No. 1, R.-street for two months past, & there was no evidence that he had carried on business as an accountant. On motion to discharge S. from the receivership:—*Held*: the appointment had been procured by means of a misleading affidavit, & the receiver must be discharged. There was no reflection upon S. personally.—**Re CHURCH PRESS, LTD., VICTORIA HOUSE PRINTING CO., LTD. v. CHURCH PRESS, LTD.** (1917), 116 L. T. 247.

D. Foreclosure and Sale.

(a) Foreclosure.

5100. Application — By originating summons.—A foreclosure order can be made at the instance of debenture-holders on an originating summons, & a writ is not necessary in order to enable the ct. to make such an order.—**OLDREY v. UNION WORKS, LTD.** (1895), 72 L. T. 627.

5101. — Whether leave necessary under Courts Emergency Powers Act, 1914 (c. 78), s. 1 (1) (b).—**Re FARNOL EADES IRVINE & CO., LTD., CARPENTER v. FARNOL EADES IRVINE & CO., LTD.**, No. 5044, *ante*.

5102. What may be foreclosed—Uncalled capital.—The remedy by foreclosure is applicable to the uncalled capital of a limited co.

Therefore, when debentures were a floating security in the usual form charging all the property of the co., both present & future, including uncalled capital, with a condition that on default in payment of interest or on a winding up the principal should immediately become payable & the condition was fulfilled, an order was made directing the co. at the debenture-holders' request to assign the several items comprised in the debentures.

Form of foreclosure judgment on a mtge. debenture.—**SADLER v. WORLEY**, [1894] 2 Ch. 170;

63 L. J. Ch. 551; 70 L. T. 494; 42 W. R. 476; 10 T. L. R. 364; 8 R. 194.

Annotations:—**Fold.** *Halifax & Huddersfield Union Banking Co. v. Radcliffe*, [1895] W. N. 63. **Consd.** *Re Continental Oxygen Co., Elias v. Continental Oxygen Co.*, [1897] 1 Ch. 511. **Mentd.** *Oldrey v. Union Works* (1895), 72 L. T. 627.

5103. Whether period for redemption will be extended—Creditor who has obtained equitable execution applying to be added as defendant.—Where in a foreclosure action a debenture-holder mtgee. had obtained a foreclosure order *nisi*, & subsequently a judgment creditor in another action, who had obtained the appointment of a receiver by way of equitable execution of the property of the mtgor., applied to be added as a deft. to the foreclosure action, & that the period for redemption might be extended, the ct. made an order adding appct. as deft. but refused to extend the period for redemption.—**Re PARBOLA, LTD., BLACKBURN v. PARBOLA, LTD.**, [1909] 2 Ch. 437; 78 L. J. Ch. 782; 101 L. T. 382; 53 Sol. Jo. 697.

Who are necessary parties.—*See* Sub-sect. 6, E. (c), *post*.

(b) Sale.

5104. Application of Conveyancing Act, 1881 (c. 41), s. 19.—The above sect. conferring on a mtgee., where the mtge. is by deed, a power of sale, does not apply to the debentures of a joint-stock co.

By a provisional order under Gas & Water Works Facilities Act, 1870 (c. 70), authorising a waterworks undertaking, two individuals, & "the survivor of them & the exors. or administrators of such survivor, their or his assigns" were declared to be "undertakers" for the purposes of the order, & power was conferred on the undertakers to acquire lands by agreement, but not compulsorily, to construct waterworks, & to supply water to the inhabitants of a district, & charge rates for such supply; the amount of the capital of the undertaking was specified, & the amount of all moneys borrowed by the undertakers & "secured by mtge. of the undertaking" was not at any time to exceed a specified sum. The undertaking was assigned to a limited co. formed for that purpose, & the co. issued debentures whereby they charged their undertaking lands, works, property, & effects both present & future, with repayment of the money borrowed, the charge being expressed to be a floating security not hindering any sale, exchange, or lease of the lands, or the receipt or payment of any moneys, or any other dealings in the course of the business of the co., but attaching to all the property for the time being, whether real or personal, of the co. By a subsequent provisional order further powers were conferred on the co., & it only was recognised as undertaker for the purposes of that order. The co. afterwards made default in payment of the principal moneys secured by the debentures on the day named therein for payment. In an action by the debenture-holders claiming a sale of the undertaking & property comprised in the debentures as a going concern, & the appointment of a manager until sale:—*Held*: (1) the debentures did not confer upon the holders a power to sell the undertaking; (2) the ct. ought not to direct a sale of the undertaking or the appointment of a manager.—**BLAKER v. HERTS. & ESSEX WATERWORKS CO.** (1889), 41 Ch. D. 399; 58 L. J. Ch. 497; 60 L. T. 776; 37 W. R. 601; 5 T. L. R. 421; 1 Meg. 217.

Annotations:—*As to* (1) **Consd.** *Re Barton-upon-Humber & District Water Co.* (1889), 42 Ch. D. 585. **Refd.** *Deyes v. Wood*, [1911] 1 K. B. 806. *As to* (2) **Consd.** *Re Barton-upon-Humber & District Water Co.* (1889), 42 Ch. D. 585; *Marshall v. South Staffordshire Tram. Co.*, [1895] 2 Ch. 36. **Refd.** *Sadler v. Worley*, [1894] 2 Ch. 170,

5105. When sale ordered—Jeopardy—Principal not due & interest not in arrear.]—(1) The ct., on motion for judgment on admissions in the pleadings in a debenture-holders' action, in which pltf. sued on behalf of himself & all other debenture-holders, & the debenture-holders were entitled to a charge on the property of the co., directed a sale of the property of the co. under R. S. C. Ord. 51, r. 18, upon proof of the insolvency of the co. & the jeopardy of the property comprising the debenture-holders' security, although the principal moneys secured by the debentures were not due, no interest thereon being in arrear for six months, & no resolution having been passed, or order made, for the winding up of the co.

(2) In such a case the admitted allegations of the statement of claim should be verified by affidavit.—*Re DAY & NIGHT ADVERTISING CO., UPWARD v. DAY & NIGHT ADVERTISING CO.* (1900), 48 W. R. 362.

5106. Confirmation by court—Contract unfairly entered into.]—*Re TUNISIAN RY. CO.* (1880), cited in 16 Ch. D. at p. 569, C. A.

Annotation:—Consd. Re Bartlett, Newman v. Hook (1880), 16 Ch. D. 561.

5107. — Sale at less than reserve price by mistake of clerk in chambers.]—In a debenture-holders' action an order was made for the sale of the assets included in the debentures, & two valuations were made for the purpose of fixing the reserves. The judge accepted the higher valuation & ordered a sale of the land by auction at reserves amounting to the higher figure. Through the mistake of a clerk in chambers the lower figure was given to the auctioneer as the amount of the reserves, & the properties were knocked down to the highest bidder for a sum intermediate between the higher figure & the lower. When the facts were brought before the master he declined to grant the usual certificate allowing the purchaser. The debenture-holders took out a summons asking that proceedings might be taken to certify the result of the sale, or alternatively that directions might be given how to proceed in the matter:—*Held*: notwithstanding Sale of Land by Auction Act, 1867 (c. 48), s. 7, as the reserve price was that in fact fixed by the judge & as the purchaser did not bid up to the reserve price there was nothing to compel the ct. to certify the highest bidder to be the purchaser, & he ought not to be so declared.—*Re CLAYTON (JOSEPH), LTD., SMITH v. CLAYTON (JOSEPH), LTD.*, [1920] 1 Ch. 257; 89 L. J. Ch. 188; 122 L. T. 517; 36 T. L. R. 109; 64 Sol. Jo. 176.

5108. — Dissentient minority.]—(1) Pltfs., on behalf of holders of debenture-stock & mtge. bonds of the co. secured respectively by deeds of 1905, 1910, & by supplemental deeds, had, on June 18, 1915, obtained the appointment of a receiver & manager, who had since made reports to the ct. & to the trustees. By clause 15 (2) of the third schedule to the deed of 1905 a general meeting of the stockholders was empowered to agree that the stock should be exchanged for the shares or obligations or debenture-stock of any co. taking over the co.'s business. On Nov. 18, 1917, an order was made for sale of the co.'s undertaking, with the approval of the ct. In his report of Mar. 31, 1920, the receiver proposed a scheme for realisation & reorganisation by which the trustees should offer the co.'s assets for sale in the Argentine by public auction for £480,000 in cash, but if such offer was not forthcoming, the property was to be purchased by a new co. for £511,000, under an agreement with the receiver payable in cash & fully-paid shares of the new co. which would take over the assets & contracts & discharge the liabilities of the vendor co. The

holders of debenture-stock were to receive shares equal in nominal value to 100 per cent. of their present holding; bondholders to receive in shares 66½ per cent. of their holding. In Apr. 1920, a majority of the holders of both classes of securities attended meetings at which the scheme & an agreement for carrying it out were approved, only three holders of £866 of the stock voting against the resolution. Deft. was the holder of £600 debenture-stock, who had obtained liberty to attend the proceedings. Pltfs. now applied that the scheme might be authorised to be carried out & the co. directed to concur. Deft. objected that there was no authority for the sanction of a scheme after the ct. has ordered a sale, & that alienation by trustees pending suit is void:—*Held*: there were no grounds shown for realising the stockholders' & bondholders' securities separately, & for not selling the whole undertaking in one lot. Their interests had been considered by the receiver whose views had been adopted by the stockholders. The trustees' powers under the trust deed of 1905 were not abrogated by the decree of the ct., but their exercise was rendered subject to the ct.'s sanction & approval. Clause 15 remained operative & in force. The proposed transaction was *intra vires*. The wishes of the committee, adopted by the majority of the shareholders, & fortified by the receiver's conclusion, deft. putting forward no alternative proposal, ought to be carried out & the scheme sanctioned, subject to verification of the receiver's report.

(2) When an action is brought by the holders of debenture-stock & mtge. bonds against a co. for the realisation of their security, it is the duty of all who are concerned in the conduct of the proceedings to see that realisation is brought about at the earliest possible opportunity. The ct. will not, therefore, refuse to sanction a sale merely because a minority of the creditors allege that the price to be paid is unsatisfactory if the only alternative is to continue the working of the undertaking indefinitely.—*Re BUENOS AIRES PORT & CITY TRAMWAYS, UNITED STATES DEBENTURE CORPN. v. BUENOS AIRES PORT & CITY TRAMWAYS* (1920), 89 L. J. Ch. 597; 123 L. T. 748; 64 Sol. Jo. 667.

5109. Restraint of sale—Mortgage to secretary authorised by directors after ceasing to hold office.]—A mtge. to the secretary of a co. was authorised by a resolution passed at a meeting of the directors, who had ceased to be directors by being concerned in previous contracts with the co.:—*Held*: a sale by the mtgee. ought to be restrained until the hearing of the cause.—*SOUTHAMPTON BOAT CO., LTD. v. RAWLINGS* (No. 3) (1864), 9 L. T. 749; 12 W. R. 331.

5110. Jurisdiction of court to review order—After order perfected—Allegation of misrepresentation.]—When an order has been perfected there is no jurisdiction to rehear the matter, & make a new order or alter the former one, although the order is wrong by reason of some misrepresentation or mistake of fact.

An order was made in a debenture-holders' action that the property comprised in the debentures should be sold out of ct., & L., one of the debenture-holders, afterwards applied that the sale & other proceedings under that order should be carried out under the direction of the ct. The application was granted subject to L. paying £250 into ct., as security for the costs, in default of which the application was ordered to be dismissed with costs. L. did not pay in the money. On the sale of the property a sum was available for distribution among the debenture-holders, & L. then applied that, notwithstanding that order,

Sect. 34.—Borrowing and securing money: Sub-sect. 6, D. (b) & E. (a), (b), (c) i., ii., (d) & (e).]

the costs directed to be paid by him should be costs in the action, & that all further proceedings under the order should be stayed on the ground that when the order was made there had been misrepresentation as to the value of the assets:—*Held*: there was no jurisdiction to alter the former order & to make the order asked.—*PRESTON BANKING CO. v. ALLSUP (WILLIAM) & SONS*, [1895] 1 Ch. 141; 64 L. J. Ch. 196; 71 L. T. 708 43 W. R. 231; 39 Sol. Jo. 113; 12 R. 51, C. A.

Annotations:—*Expld.* *Re Scowby*, *Scowby v. Scowby*, [1897] 1 Ch. 741. *Consd.* *Chessum v. Gordon*, [1901] 1 K. B. 694. *Refd.* *Re Calgary & Medicine Hat Land Co.*, *Pigeon v. The Co.*, [1908] 2 Ch. 652; *Re Pilling*, [1909] 2 K. B. 788. *Mentd.* *Sweetland v. Turkish Cigarette Co.* (1899), 80 L. T. 472; *Rackham v. Tabrum* (1923), 129 L. T. 24.

Property of company incorporated for public purposes.]—See Part IX., Sect. 14, sub-sect. 4, C. (d), post.

E. Practice in Debenture-Holders' Action.

(a) In General.

5111. Jurisdiction of court—Summons by strangers to action—Claims against receiver for working expenses.]—A summons in a debenture-holder's action for an order directing the receiver in the action to pay claims by strangers to the action for working expenses was dismissed for want of jurisdiction.—*BROCKLEBANK v. EAST LONDON RY. CO.* (1879), 12 Ch. D. 839; 48 L. J. Ch. 729; 41 L. T. 205; 28 W. R. 30.

Annotations:—*Mentd.* *G. E. Ry. v. East London Ry.* (1881), 44 L. T. 903; *Hand v. Blow*, [1901] 2 Ch. 721.

(b) Form of Proceedings.

5112. Summons empowering receiver to make calls in name of liquidator—Entitled in action & in winding up.]—*FOWLER v. BROAD'S PATENT NIGHT LIGHT CO.*, No. 4597, ante.

5113. Motion for receiver & manager—Notice of motion before one judge—Motion heard before linked judge.]—A notice of motion [for a receiver & manager, in a debenture-holders' action] which states that the ct. will be moved before a named judge is sufficient although the ct. is in fact moved before another judge, the judge before whom, owing to the system of linked judges adopted in the Ch. Div. the motions in actions assigned to the named judge, are made, notwithstanding that resp. to the motion does not appear; & an order can properly be made on such a motion by the judge before whom the motion is heard, in accord-

PART III. SECT. 34, SUB-SECT. 6.—E. (a).

n. Jurisdiction of court—To order repayment by overpaid debenture holder—Mistake in allocation schedule.]—In a debenture-holder's action brought by trustees for debenture-holders against an insolvent co., the realised assets were insufficient to pay debenture-holders in full. The allocation schedule was, by mistake, framed on the basis that certain banking cos., who held debentures as security for advances made by them to the co. should receive dividends on the amounts of the debts due to them instead of on the face value of their debentures. As a result, the amount allocated to the banking cos. was less than it should have been, & certain debenture-holders, directors of the co. & parties to the action, were consequently overpaid. Upon motion by pltf., who had carriage of the suit, the directors were ordered to bring back into ct. the amounts by which they had been overpaid.—*PLATT v. CASEY'S DROGHEDA BREWERY CO.*, [1912] 1 I. R. 279.—IR.

PART III. SECT. 34, SUB-SECT. 6.—E. (c) i.

o. Action to restrain exercise of powers under trust-deed—All debenture-holders must be before court.]—The prospectus of the N. S. Co. stated that its debentures would be issued on the security of the property of the co., real & personal, including its uncalled capital, revenues & income, & a trust-deed executed, of which the P. Co. would be trustee, for the debenture-holders. Pltf. subscribed for debentures, of which the whole issue was taken up. The trust-deed, which was thereafter executed, provided that money arising from calls, should, in certain events, be paid to the P. Co. to be applied in satisfaction of interest due on the debentures. Pltf. brought an action for an injunction restraining such application of the proceeds of a call, by the P. Co., & alleged that the debenture-holders were not consulted as to the form in which the trust-deed was executed. Upon interlocutory application:—*Held*: until all the debenture-holders were before the ct., the ct. would not interfere.—*v. NORTH SYDNEY INVESTMENT*

ance with its terms.—Re ROMNEY, LTD., STUART v. ROMNEY, LTD. (1915), 60 Sol. Jo. 141.

Form of order.]—See Sub-sect. 5, E. (f), post.

(c) Parties.

i. In General.

5114. Foreclosure action—All incumbrancers must be parties.]—*WELCH v. NATIONAL CYCLE CO.* (1886), as reported in, [1897] 1 Ch. at p. 514.

Annotation:—*Consd.* *Re Continental Oxygen Co.*, *Elias v. Continental Oxygen Co.*, [1897] 1 Ch. 511.

—Where the equity of redemption in a mtge. had been purchased by limited co., & the co. had issued debentures to a large amount which were a charge on the mortgaged property:—Held: all the debenture-holders having an interest in the equity of redemption, must be made parties to a foreclosure action, & not merely some as representatives of the whole, under R. S. C., Ord. 16, r. 9.—*GRIFFITH v. POUND* (1890), 45 Ch. D. 553; 59 L. J. Ch. 522.

Annotation:—*Refd.* *Wavell v. Mitchell* (1891), 64 L. T. 560.

5116. ———.]—A foreclosure order will not be made in an ordinary debenture-holder's action without the concurrence of the holders of all the debentures.—*Re CONTINENTAL OXYGEN CO.*, *ELIAS v. CONTINENTAL OXYGEN CO.*, [1897] 1 Ch. 511; 66 L. J. Ch. 273; 76 L. T. 229; 45 W. R. 313; 13 T. L. R. 224; 41 Sol. Jo. 296.

5117. ———.]—*WALLACE v. EVERSLED*, No. 4720, ante.

5118. Order for sale—Subsequent incumbrancer not a party.]—Pltf. held the only first mtge. debenture in deft. co., & second debentures were held by deft. W. & C., who was not a party to the action. Pltf. moved for judgment as on a short cause, claiming an immediate sale with a preliminary declaration that pltf. was entitled to a charge on all the assets of the co.:—*Held*: (1) a declaration of charge was the proper & usual preface to the order according to the practice in the Ch. Div.; (2) pltf. could not be treated as suing on behalf of the other debenture-holders in the absence of C., who must either be made a deft. or consent to the order.—*PARKINSON v. WAINWRIGHT & CO. & WAINWRIGHT* (1895), 64 L. J. Ch. 493; 72 L. T. 485; 43 W. R. 420; 2 Mans. 420; 13 R. 467.

5119. Trustees for debenture-holders.]—*MORTGAGE INSURANCE CORPN., LTD. v. CANADIAN AGRICULTURAL COAL & COLONISATION CO., LTD.*, No. 4687, ante.

5120. Who may intervene—Debenture-holders claiming rescission on ground of misrepresentation.]

& TRAMWAY CO. & PERPETUAL TRUSTEE CO. (1892), 13 N. S. W. Eq. 1.—AUS.

p. Action to enforce payment—Person to whom debenture originally issued need not be party.]—A bill being filed by the holder of debentures, issued by defts. & payable to bearer, to enforce payment of the debentures, the co. by answer objected that the person to whom the debentures were issued was a necessary party to the suit, but did not name the person:—*Held*: the co. must be presumed to know who the person was; there was no presumption that pltf. knew him; & the person not being named in the answer, the objection could not be insisted on at the hearing.—*WOODSIDE v. TORONTO STREET RY. CO.* (1868), 14 Gr. 409.—CAN.

q. Action to enforce terms of debenture-deed—Trustees of deed as defendants.]—A suit to enforce a trust mtge. to secure debentures may be brought in the name of the debenture-holders, the trustees being made defts.—*SHAUGHNESSY v. IMPERIAL TRUSTS CO.* (1904), 3 N. B. Eq. Rep. 5; 25 C. L. T. 67.—CAN.

—In ascertaining whether pl'tfs. in an action to rescind an executed contract for the purchase of £70,000 debentures on the ground of misrepresentation are barred by laches, consideration is to be paid to the magnitude & difficulty of the interests & questions involved, & to the time that must necessarily elapse after an inquiry is commenced before the truth of the facts can be sufficiently established to justify them in bringing forward serious charges.

Pending such an action pl'tfs. have a lien on the debentures for the purchase-money, & are entitled to intervene in an action instituted by other debenture-holders for the protection of all the debentures, in order to do all that is reasonable to protect & prevent the purchased debentures from being injured, so long as they do not thereby injure them, & they are entitled to oppose the vendors in such proceedings, provided they do so in good faith, & in the interests of those entitled to the purchased debentures.—*IMPERIAL OTTOMAN BANK v. TRUSTEES, EXECUTORS, & SECURITIES INSURANCE CORPN.* (1895), 13 R. 287.

5121. Representative action—Subsequent incumbrancers must be represented.]—*Re WILCOX & Co. (late W. H. Fox & Co.), LTD., HILDER v. WILCOX & Co. (LATE W. H. FOX & Co.), LTD.,* [1903] W. N. 64.

—.]—See Sub-sect. 6, E. (c) ii., *post*.

ii. *Representative Action.*

5122. Who may sue—Whether holder of sole first mortgage debenture—As representing holders of second mortgage debentures.]—*PARKINSON v. WAINWRIGHT & Co. & WAINWRIGHT*, No. 5118, *ante*.

5123. Plaintiff suing as representative—Dissentient debenture-holder—Application to be made defendant.]—*DEBENTURE CORPN. v. DE MURRIETA & Co., LTD.* (1892), 8 T. L. R. 496.

5124. ——— Added as defendant in representative capacity.]—Pl'tf., a bondholder of a railway co., sued on behalf of himself & all the other bondholders of the co. except B., who dissented from the course taken by pl'tf. in commencing the action. B., afterwards, upon his own application, was added as a def't. in order that his interests & the interests of other dissenting bondholders might be represented:—*Held*: since B. was not added as a def't. in a representative capacity, & his consent to act in such capacity had not been obtained by pl'tf., T. was entitled to be added as a def't. for the purpose representing the dissenting bondholders.—*FRASER v. COOPER, HALL & Co.* (1882), 21 Ch. D. 718; 51 L. J. Ch. 575; 46 L. T. 371; 30 W. R. 654.

Annotation:—*Reff.* May v. Newton (1887), 34 Ch. D. 347.

5125. ——— Cannot elect to take less than entitled to under trust deed.]—*Re CALGARY & MEDICINE HAT LAND CO., LTD., PIGEON v. CALGARY & MEDICINE HAT LAND CO., LTD.*, No. 5193, *post*.

5126. ——— Right of debenture-holders to attend proceedings.]—*Re MATE (W.) & SONS, LTD., WILKES v. MATE (W.) & SONS, LTD.*, No. 5171, *post*.

5127. ——— Application of two of several plaintiffs to be struck out—& joined as defendants—Jurisdiction of court.]—*Re KENT COAL CONCESSIONS, LTD., BURN v. KENT COAL CONCESSIONS, LTD.*, [1923] W. N. 328, C. A.

5128. Defendant sued as representative—Necessity for order—Amendment of writ.]—*FAIRFIELD SHIPBUILDING & ENGINEERING CO., LTD. v. LONDON & EAST COAST EXPRESS S.S. CO., LTD.*, [1895] W. N. 64.

(d) *Practice on Application for Receiver.*

5129. Undertaking by plaintiff where receiver appointed to act at once—Includes all liabilities

covered by security when completed.]—*DEBENTURE-HOLDERS' ACTIONS* (1900), 16 T. L. R. 256.

Annotation:—*Mentd.* Woods v. Winskill, [1913] 2 Ch. 303.

5130. Ex parte application—Inquiry whether Board of Trade has intervened.]—Before an *ex p.* application is made by counsel for the appointment of a receiver of a co. he must inquire whether the Board of Trade has intervened, under its emergency powers, to appoint an inspector or other officer to supervise & control the business of the co.—*Re DENTON (WILLIAM), LTD., SMITH v. DENTON (WILLIAM), LTD.* (1916), 33 T. L. R. 88; 61 Sol. Jo. 131.

(e) *The Hearing.*

5131. Hearing as short cause—Order for—Form—Provision for notice of trial.]—A debenture-holder's action was set down by the master, for trial without pleadings to be heard as a short cause; judgment to be applied for on minutes; the evidence to be taken by affidavit. Two days' notice of motion was served on defts., & an objection was taken at the hearing that this was not in compliance with the master's order, & that ten days' notice of trial ought to have been given under R. S. C. Ord. 36, r. 14:—*Held*: the order was defective in that it did not give pl'tf. leave to serve notice of trial, but, assuming that leave to serve such notice was implied in the order, it remained that the order was to set down the action for trial, & ten days' notice must be given.

Two days' notice has been given instead of ten days. That is not a good notice to bring an action on for trial, & the notice itself is not a notice that the action has been set down for trial. Therefore I cannot hear this action as a short cause. One of defts. is not here. If he had been here & had consented to its being heard as a short cause, I should not have felt any difficulty in making the order (*BUCKLEY, J.*).—*Re PRINGLE & Co., LTD., PAWNALL v. PRINGLE & Co., LTD.* (1903), 89 L. T. 743; 48 Sol. Jo. 101.

Annotation:—*Consd.* *Re Cadogan & Hans Place Estate* (No. 2), *Graham v. The Co.* (1906), 50 Sol. Jo. 499.

5132. ——— Order defective—Jurisdiction of judge to hear—Where all parties appear.]—*Re PRINGLE & Co., LTD., PAWNALL v. PRINGLE & Co., LTD.*, No. 5131, *ante*.

5133. ——— Made in company's absence.]—*Re KITSON EMPIRE LIGHTING CO., LTD., HIGGS v. KITSON EMPIRE LIGHTING CO., LTD.*, [1910] W. N. 154.

5134. ——— Whether statement of claim necessary.]—As a matter of general convenience, I think there should be a statement of claim on these applications. Where judgment is given on a motion [for judgment in a debenture-holders' action] without pleadings, the judge has all the affidavits before him & the facts are fresh in his mind, but where, as in the present case, the action comes on as a short cause so that there are no affidavits before the ct. it is more convenient to have a statement of claim. The case must stand over till a statement of claim is delivered (*SWINFEN EADY, J.*).—*Re DUPORE, LTD., DUPORE v. DUPORE, LTD.* (1906), 50 Sol. Jo. 206; as reported in, [1906] W. N. 14.

5135. ———.]—*Re CADOGAN & HANS PLACE ESTATE* (No. 2), *LTD., GRAHAM v. CADOGAN & HANS PLACE ESTATE* (No. 2), *LTD.* (1906), 50 Sol. Jo. 499.

See, generally, PRACTICE & PROCEDURE.

5136. Evidence—Allegations in statement of claim admitted—Verification by affidavit.]—*Re DAY & NIGHT ADVERTISING CO., UPWARD v. DAY & NIGHT ADVERTISING CO.*, No. 5105, *ante*.

5137. ——— Sufficiency.]—*Re KITSON EMPIRE*

Sect. 34.—Borrowing and securing money: Sub-sect. 6, E. (e) & (f) i., ii., & (g), (h) & (i) i.]

LIGHTING CO., LTD., HIGGS v. KITSON EMPIRE LIGHTING CO., LTD., [1910] W. N. 154.

5138. Judgment—In default of defence—Counsel's minutes to be left with judge.]—Counsel's minutes must always be left with the judge on these applications, even if the common form judgment is all that is asked for. The motion [for judgment in default of defence in a debenture-holder's action] must stand over for this to be done (SWINFEN EADY, J.).—*Re AUTOMATIC MACHINES (HAYDON & URRY'S PATENTS), LTD., GRAAFE v. AUTOMATIC MACHINES (HAYDON & URRY'S PATENTS), LTD., [1902] W. N. 236.*

5139. — Declaring debentures a charge on assets—Consent by liquidator.]—*Re LOVE (GREGORY) & Co., FRANCIS v. LOVE (GREGORY) & Co., No. 4695, ante.*

(f) Form of Order.

i. Declaration of Charge.

5140. Whether inserted—Plaintiff suing as representative—Form of declaration.]—PERRY v. CLUTTON COAL CO., LTD. (1876), Seton's Judgments & Orders, 5th ed. p. 1685; Palmer's Company Precedents, 5th ed., p. 618.

Annotation:—Distd. Parkinson v. Wainwright & Wainwright (1895), 43 W. R. 420.

5141. — Court will not declare as to priorities.]—In an action by a debenture-holder, suing on behalf of himself & all other debenture-holders, & which is brought on as a short cause, the ct. can preface the judgment with a declaration "that pltf. & the other holders of debentures issued by deft. co. are entitled to a charge" on the property designated in the debentures as security for the moneys thereby secured, although it cannot declare priorities.

A continuance of a receiver appointed until judgment or other order amounts practically to a new appointment, & security must be given.—BRINSLEY v. LYNTON & LYNMOUTH HOTEL & PROPERTY CO. (1895), 2 Mans. 244; 13 R. 369.

5142. — Re EHRMANN BROTHERS, LTD., ALBERT v. EHRMANN BROTHERS, LTD. (1904), 48 Sol. Jo. 298.

5143. — Plaintiff suing on own behalf.]—PARKINSON v. WAINWRIGHT & CO. & WAINWRIGHT, No. 5118, *ante*.

5144. — Company in liquidation.]—In an action by debenture-holders of a co. to enforce their security, when the statement of claim asks for a declaration of charge, it is the practice of the Ch. Div. upon a judgment in default or by consent, to make such a declaration. Where, however, the co. is in liquidation at the time when the order is asked for, the ct. will not make the declaration, or any order interfering with the property of the co., until it has ascertained from the liquidator that he is satisfied as to the validity of the debentures.—MARWICK v. THURLOW (LORD), [1895] 1 Ch. 776; 64 L. J. Ch. 555; 72 L. T. 463; 43 W. R. 493; 11 T. L. R. 334; 39 Sol. Jo. 381; 2 Mans. 310; 13 R. 480.

5145. — CHARLWOOD v. LEASEHOLD INVESTMENT CO. (1895), 39 Sol. Jo. 316.

5146. — Holders of other series of debentures not parties.]—*Re PRINCE & BAUGH, LTD., BEDELL v. PRINCE & BAUGH, LTD., [1902] W. N. 96.*

ii. Form of Judgment.

5147. Form of judgment—Where no pleadings.]—*Re BRITISH RAILWAY CARRIAGE METAL FITTINGS ETC. & Co., LTD. (1898), 43 Sol. Jo. 140.*

5148. — SADLER v. WORLEY, No. 5102, ante.

5149. — Re WOLVERHAMPTON DISTRICT BREWERY, LTD., DOWNES v. WOLVERHAMPTON DISTRICT BREWERY, LTD. (1899), 44 Sol. Jo. 74; 7 Mans. 50.

5150. — Inquiry as to preferential creditors—Floating charge.]—A judgment in a debenture-holder's action, where the debentures constitute a floating charge on the assets of the co., ought to contain an inquiry as to preferential creditors.—*Re MEABY & Co., LTD., CLARKE v. MEABY & Co., LTD. (1899), 6 Mans. 303.*

5151. — Re BIRMINGHAM BREWERIES, LTD., WARD v. BIRMINGHAM BREWERIES, LTD. (1899), 43 Sol. Jo. 604.

5152. — DEBENTURE - HOLDERS' ACTIONS (1900), 16 T. L. R. 256.

5153. — Accounts or inquiries.]—*Re LEVISON & STEINER, LTD., WISSNER v. LEVISON & STEINER, Ltd. (1900), 44 Sol. Jo. 573.*

5154. — ADDRESSOGRAPH, LTD., BACKHOUSE v. ADDRESSOGRAPH, LTD., [1909] W. N. 260.

5155. — Direction for manager to be continued for limited period.]—Upon default being made by a co. in the payment of interest on the debentures issued by it, a debenture-holder commenced an action on behalf of himself & all other debenture-holders against the co. for the enforcement of their security, & for the appointment of a receiver & manager. A receiver & manager was duly appointed, & on the co. subsequently going into voluntary liquidation, he was continued as liquidator. The action came on as a short cause upon motion for judgment. The minutes provided for an account to be taken of what was due under & by virtue of pltf's. security, & for a sale, & for the continuation of the receiver & manager until further order:—*Held*: the minutes ought to contain a provision, not only for the continuation of the receiver & manager but also for his discharge, & therefore a direction should be inserted in the minutes that the business of the co. was not to be carried on by the receiver & manager for a longer period than six months without the leave of the judge in chambers; & if any further time should be required, an application for further time must be made before the expiration of the six months.—DAY v. SYKES, WALKER & Co., LTD. (1886), 55 L. T. 763.

5156. — Where, on an interlocutory order, a receiver & manager has been appointed as receiver generally & as manager until a fixed date, upon the motion for judgment in the action, the minutes of judgment should not continue the receiver, but merely extend the time during which the receiver may act as manager, as he is still in office as receiver, by reason of the former order.—DAVIES v. VALE OF EVESHAM PRESERVES, LTD (1895), 73 L. T. 150; 43 W. R. 646.

5157. Judgment in foreclosure action—Declaration not made in chambers.]—HALIFAX & HUDDERSFIELD UNION BANKING CO. v. RADCLIFFE, LTD., [1895] W. N. 63.

5158. — Direction for liberty to apply for payment out of moneys in court.]—A judgment in a foreclosure action should contain a direction that moneys in ct., or in the hands of a receiver, shall on defts'. application be applied towards payment of the amount due.

The following additional direction was ordered to be inserted in the minutes: "Let defts. be at liberty at any time before foreclosure to apply to the judge in chambers for payment & transfer to pltf. on account of the moneys due to him of any money or securities in ct. to the credit of this action, or in the hands of the receiver."—CUMMING

v. METCALFE'S LONDON HYDRO, LTD. (1895), 2 Mans. 418; 13 R. 501.

5159. — Must be made by judge in person.]—BEHAGG *v.* PALMER, [1914] W. N. 416.

See, also, No. 5102, *ante*.

5160. Declaration that debenture-holders judgment creditors—Power for receiver to take all property not comprised in charge.]—In an action by a debenture-holder on behalf of himself & all other debenture-holders of the same series, the ct. will make a declaration that the debenture-holders are entitled to rank as judgment creditors of the co. for the amounts due on their debentures, & will extend the powers of a receiver of all the property comprised in the debentures, appointed in the action, so as to include all property of the co. not comprised in the debentures which could be taken in execution.—HOPE *v.* CROYDON & NORWOOD TRAMWAYS CO. (1887), 34 Ch. D. 730; 56 L. J. Ch. 760; 56 L. T. 822; 35 W. R. 594.

*Annotations:—*Consd. Cleary *v.* Brazil Ry. (1915), 85 L. J. K. B. 32. Refd. Bartlett *v.* West Metropolitan Tram. Co., [1894] 2 Ch. 286; Marshall *v.* South Staffordshire Tram. Co., [1895] 2 Ch. 36.

(g) *Certificate in answer to Inquiries.*

5161. Inquiry as to property charged—Finding what uncalled capital due from shareholders.]—In an action against a limited co. by one debenture-holder on behalf of himself & all other debenture-holders, the chief clerk may, under an inquiry directed by the judgment as to the property charged by the debentures, find what uncalled capital is due from the several shareholders, where uncalled capital is part of the security, notwithstanding that no calls can actually be made in such an action; & where pltf. is himself a shareholder & is found indebted in a sum of uncalled capital, he, being a party to the action, is bound by that finding, unless varied by the judge, the ct. having jurisdiction to decide in that action the question of pltf.'s liability without leaving it to be decided by other proceedings.—MADELEY *v.* ROSS, SLEEMAN & CO., [1897] 1 Ch. 505; 66 L. J. Ch. 233; 76 L. T. 321.

(h) *Stay of Proceedings.*

5162. Stay by plaintiff in representative capacity—After judgment.]—A pltf., expressed to be suing on behalf of himself & all other debenture-holders of a co., who has had his claims satisfied after the decree in the action has been pronounced, is *dominus litis* & may discontinue further proceedings, although this cannot be done by a pltf. suing in a similar manner in a creditor's administration action.—*Re* ALPHA CO., LTD., WARD *v.* ALPHA CO., [1903] 1 Ch. 203; 72 L. J. Ch. 91; 87 L. T. 646; 51 W. R. 201; 47 Sol. Jo. 146; 10 Mans. 237.

5163. Stay by court—Delay in proceeding with action by plaintiff—R.S.C. Ord. 33, r. 9.]—Where a trustee of a debenture trust deed commenced the usual debenture-holders' action, & on motion a receiver was appointed, & a summons to proceed taken out but was ordered to stand over generally & pltf. did not proceed with the action for three years:—*Held*: on the application of the official solr. under the above rule, the action must be stayed, & pltf. must pay the costs of the application to stay.—*Re* CORNISH TIN LANDS, LTD., BASTARD *v.* THE CO. (1918), 63 Sol. Jo. 166.

(i) *Costs.*

i. *Plaintiff.*

5164. Scale of costs—Representative action.]—INDUSTRIAL & GENERAL TRUST, LTD. *v.* SOUTH J.—VOL. X.

AMERICAN & MEXICAN CO. (1895), cited, [1900] 1 Ch. 792.

*Annotation:—*Folld. *Re* Queen's Hotel Co., Cardiff, *Re* Vernon Tin Plate Co., [1900] 1 Ch. 792.

5165. — — — — —.]—Pltf. in an action, brought to realise the security by one debenture-holder on behalf of all other debenture-holders of the same class against the co., is not entitled to costs as between solr. & client out of the property realised, whether it is or is not sufficient to pay all the charges upon it.—*Re* QUEEN'S HOTEL CO., CARDIFF, LTD., *Re* VERNON TIN PLATE CO., LTD., [1900] 1 Ch. 792; 48 W. R. 567; *sub nom.* *Re* QUEEN'S HOTEL (CARDIFF) CO., LONDON & PROVINCIAL BANK *v.* QUEEN'S HOTEL (CARDIFF) CO., *Re* VERNON TIN-PLATE CO., LONDON & PROVINCIAL BANK *v.* VERNON TIN-PLATE CO., 69 L. J. Ch. 414; 82 L. T. 675; 7 Mans. 238.

*Annotations:—*Distd. *Re* New Zealand Midland Ry., Smith *v.* Lubbock, [1901] 2 Ch. 357. Refd. *Re* Horne, Horne *v.* Horne, [1906] 1 Ch. 271.

5166. — — — — — Assets insufficient to pay debentures in full.]—In an action by a debenture-holder on behalf of himself & all other debenture-holders of a co. to enforce their security, where the assets are insufficient for the payment of the debentures in full, pltf. is entitled to be allowed costs as between solr. & client, & not as between party & party only.—*Re* NEW ZEALAND MIDLAND RY. CO., SMITH *v.* LUBBOCK, [1901] 2 Ch. 357; 70 L. J. Ch. 595; 84 L. T. 852; 49 W. R. 529; 45 Sol. Jo. 519; 8 Mans. 363, C. A.

*Annotations:—*Consd. *Re* Horne, Horne *v.* Horne, [1906] 1 Ch. 271. Apld. *Re* Boynton, Hoffmann *v.* Boynton, [1910] 1 Ch. 519. Refd. *Re* Glasdir Copper Mines, English Electro-Metallurgical Co. *v.* Glasdir Copper Mines, [1906] 1 Ch. 365.

5167. — — — — —.]—*Re* BRISTOL COLLIERIES CO., LTD., WILLIAMS *v.* BRISTOL COLLIERIES CO., LTD. (1909), 54 Sol. Jo. 376.

5168. — — — — —.]—*Re* BOYNTON (A.), LTD., HOFFMAN *v.* BOYNTON (A.), LTD., No. 5095, *ante*.

5169. Representative action — Payment into court accepted by plaintiff.]—In an action by one debenture-holder, on behalf of herself & others, for administration of the trusts of a deed securing the debentures, defts. paid money into ct. which was accepted by pltf. in satisfaction of her claim:—*Held*: she was not entitled of right to her costs.—NICHOLS *v.* EVENS (1883), 22 Ch. D. 611; 52 L. J. Ch. 383; 48 L. T. 66; 31 W. R. 412.

5170. — — — — — Bankruptcy of plaintiff—Second debenture-holder substituted as plaintiff—Two plaintiffs entitled to costs *pari passu.*]—(1) In a suit instituted by a debenture-holder of a co., on behalf of himself & the other debenture-holders, against the co. & the trustees of a deed, by which leasehold collieries & plant of the co. were assigned to trustees to secure the payment of the debentures, to enforce the security, a receiver & manager was appointed. He worked the collieries for some years at a loss. Ultimately the property was sold, pltf. having the conduct of the sale, & the purchase-money was paid into ct. The fund was insufficient. The original pltf. became bkpt. in the course of the proceedings, & another debenture-holder was substituted for him as pltf. On the further consideration of the suit:—*Held*: the costs & other expenses must be paid out of the fund in the following order: (a) pltf.'s costs of the realisation of the property, including the costs of an abortive attempt to sell; (b) the balance due to the receiver & manager, including his remuneration, & his costs of the suit; (c) the costs, charges, & expenses of the trustees of the deed; (d) the two pltf.'s costs of the suit, *pari passu*.

(2) Two summonses taken out by pltf. were heard with the further consideration of the suit,

Sect. 34.—Borrowing and securing money: Sub-sect. ; sub-sects. 7 & 8.]

& were dismissed with costs:—*Held*: these costs must be set off against the costs which pltf. was entitled to receive out of the fund.—*BATTEN v. WEDGWOOD COAL & IRON CO.* (1884), 28 Ch. D. 317; 54 L. J. Ch. 686; 52 L. T. 212; 33 W. R. 303.

Annotations:—As to (1) *Consd.* *Lathom v. Greenwich Ferry Co.* (1895), 72 L. T. 790. *Foll.* *London United Breweries, Smith v. London United Breweries*, [1907] 2 Ch. 511. *Refd.* *Strapp v. Bull, Shaw v. London School Board*, [1895] 2 Ch. 1; *Re Boynton, Hoffman v. Boynton* (1910), 79 L. J. Ch. 247. *Generally, Mntd.* *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96.

5171. — What is included in plaintiff's costs—Costs of sending out notices of judgment—Acknowledging & returning debentures sent.]—(1) Where the judgment in a representative debenture-holder's action directs usual accounts & inquiries, & pltf.'s solr. sends to every debenture-holder not a party to the action the usual notice of the judgment, "pltf.'s costs of action" properly include not only his solr.'s charges for sending out the notices but also his charges for acknowledging, giving a receipt for & returning debentures sent him by debenture-holders for production in chambers in pursuance of the notice. This rule applies whether the assets of the co. are sufficient or insufficient to pay the debentures in full, & it also applies where there is a trust deed to secure the debentures, & the judgment directs execution of the trusts thereof.

(2) It is not permissible for any debenture-holder served with the above notice to enter an appearance. A debenture-holder so served who desires to attend the proceedings must apply by summons for leave to do so.—*Re MATE (W.) & SONS, LTD., WILKES v. MATE (W.) & SONS, LTD.*, [1920] 1 Ch. 551; 89 L. J. Ch. 184; 123 L. T. 91.

5172. Assets insufficient to redeem plaintiff's security.]—*CARRICK v. WIGAN TRAMWAYS CO.*, [1893] W. N. 98.

5173. Charging order in favour of plaintiff's solicitor—If plaintiff unable to pay solicitor & client costs.]—*Re HORNE (W. C.) & SONS, LTD., HORNE v. HORNE (W. C.) & SONS, LTD.*, No. 5175, *post*.

5174. Costs of notices of judgment—May be assessed at gross sums—R. S. C. Ord. 65, r. 27 (38a).]—R. S. C., 1883, as to the costs of preparing & sending out notices, do not, expressly or by analogy, apply to notices of judgment in a debenture-holders' action, or notices of meetings of creditors & members of a co. to agree to an arrangement under 1908 Act, s. 120. In the case of the notices of judgment & of meetings aforesaid the taxing master may, under the above sub-rule, assess the costs thereof at gross sums, & in that sub-rule the words "other cause" are not to be read as *ejusdem generis* with those matters which are expressly mentioned in it, but the taxing master may act on the sub-rule in cases where no misconduct or negligence on the part of the solrs. whose costs are being taxed is imputed.—*Re COMMONWEALTH OIL CORPN., LTD., PEARSON v. COMMONWEALTH OIL CORPN., LTD.*, [1917] 1 Ch. 404; 86 L. J. Ch. 348; 116 L. T. 402; 61 Sol. Jo 315. *Annotation*:—*Refd.* *Re Wyatt's Appln.*, [1918] 2 Ch. 293.

—*See, also*, No. 5171, *ante*.

PART III. SECT. 34, SUB-SECT. 6.—
E. (i) iv.

*r. Costs of winding up—Whether payable out of assets belonging to debenture-holders.]—*In the winding up of a co. the ct. will refuse to order the payment of the general costs of the liquidation out of proceeds in the hands of the liquidator belonging to debenture holders, even although the costs were incurred in an examination of the officers of the co. by the express leave of the ct., & although the co. was wound up on the petition of the debenture holders, & the liquidator was appointed at their request.—*Re J. G. WARD FARMERS' ASSOCN., LTD., Ex p. COOK* (1897), 16 N. Z. L. R. 322.—N.Z.

holders, even although the costs were incurred in an examination of the officers of the co. by the express leave of the ct., & although the co. was wound up on the petition of the debenture holders, & the liquidator was appointed at their request.—*Re J. G. WARD FARMERS' ASSOCN., LTD., Ex p. COOK* (1897), 16 N. Z. L. R. 322.—N.Z.

ii. *Receiver.*

5175. Solicitor employed by receiver—Recovering & preserving assets—Charging order on balance of funds in hands of receiver.]—In a debenture-holder's action a receiver was appointed, & the same solr. acted for the pltf. & for the receiver. In the course of realising the estate proceedings were taken at home & abroad with the sanction of the ct., & the solr. was employed by the receiver for these purposes. In the result property was recovered or preserved, & the funds paid into ct. were sufficient to pay all the debenture-holders in full & to leave a large surplus for the liquidator of the co. The pltf. being unable to pay the difference between party & party & solicitor & client costs of the action:—*Held*: the solr. was entitled to a charging order for such difference upon so much of the funds as belonged to the debenture-holders; (2) the solr. was also entitled to a charging order upon the balance of the funds that would be payable to the liquidator for his costs of recovering & preserving assets at home & abroad, which really were part of the receiver's costs of administration & might have been included in his accounts.—*Re HORNE (W. C.) & SONS, LTD., HORNE v. HORNE (W. C.) & SONS, LTD.*, [1906] 1 Ch. 271; 75 L. J. Ch. 206; 54 W. R. 278; 13 Mans. 165.

Annotation:—As to (1) *Refd.* *Re Cockrell's Estate*, [1911] 2 Ch. 318.

iii. *Trustees.*

5176. Trustees & company appearing by same solicitors—Costs incurred, except company's separate costs, to be treated as trustees' costs.]—*MORTGAGE INSURANCE CORPN., LTD. v. CANADIAN AGRICULTURAL COAL & COLONISATION CO., LTD.*, No. 4687, *ante*.

iv. *Debenture-Holders.*

5177. Action by first mortgage debenture-holders—Costs of subsequent debenture-holders made defendants not allowed—Assets insufficient to satisfy first series.]—In an action by first mtge. debenture-holders of a limited co., in which the co. & the second mtge. debenture-holders were made defts., the assets proved insufficient to satisfy the claims of the first mtge. debenture-holders. On the further consideration of the action the question was raised whether the second mtge. debenture-holders made defts. ought to be allowed their costs:—*Held*: the second mtge. debenture-holders made defts. were not entitled to costs.—*Re CLAYTON ENGINEERING & ELECTRICAL CONSTRUCTION CO., LTD.* (1904), 90 L. T. 283.

5178. Costs of proof of debenture-holders' title—Added to security.]—*Re TICEHURST & DISTRICT WATER & GAS CO., LOCKE v. TICEHURST & DISTRICT WATER & GAS CO.* (1915), 139 L. T. Jo. 295.

Annotation:—*Distd.* *Re Mate, Wilkes v. Mate*, [1920] 1 Ch. 551.

SUB-SECT. 7.—EFFECT OF WINDING UP.

See, now, 1908 Act, s. 142.

5179. Whether right to realise security affected.]—Liberty was refused to a mtgee. pending a winding up to institute a suit for foreclosure, there being no special difficulty & it being competent to him to obtain the proper order in

PART III. SECT. 34, SUB-SECT. 7.

*s. On appointment of receiver—In action to enforce debenture security—Where validity of mortgage questioned.]—*In a suit to enforce a mtge. to secure debentures issued by deft. co., a receiver was appointed. Subsequently a winding-up order was made against the co., & official liquidators were appointed.

chambers without the necessity of a suit.—*Re* ST. CUTHBERT LEAD SMELTING CO. (1866), 35 Beav. 384; 55 E. R. 944.

5180. —.]—The shareholders of a co. resolved that it should be wound up voluntarily. Subsequently an equitable mtgee. commenced an action for foreclosure, & for the appointment of a receiver, & some months later an order was made upon the petition of a creditor that the winding up of the co. should be continued under the supervision of the ct. On an application by the equitable mtgee. for leave to proceed with the action, notwithstanding the winding up proceedings:—*Held*: the equitable mtgee. ought not to be restrained from proceeding with the foreclosure action.

As a general rule a mtgee. of a co. which is being wound up has a right to realise his security & to obtain leave from the ct. under 1862 Act, s. 87, to bring or proceed with an action for foreclosure unless special grounds are shown to induce the ct. to withhold such leave.—*Re* LLOYD (DAVID) & CO., *LLOYD v. LLOYD (DAVID) & Co.* (1877), 6 Ch. D. 339; 37 L. T. 83; 25 W. R. 872, C. A.

Annotations:—**Foll.** *Re* Longdendale Cotton Spinning Co. (1878), 8 Ch. D. 150; *Re* Hamilton's Windsor Iron Works Co. (1879), 40 L. T. 569. **Dist.** *Re* Cambrian Mining Co. (1881), 45 L. T. 298. **Consd.** *Re* Pound & Hutchins (1889), 42 Ch. D. 402; *Re* Stubbs, Barney v. Stubbs, [1891] 1 Ch. 475. **Refd.** *Andrew v. Swansea Cambrian Benefit Bldg. Soc.* (1880), 50 L. J. Q. B. 428; *Re* Brown, Bailey & Dixon, *Ex p. Roberts & Wright* (1881), 50 L. J. Ch. 738; *Strong v. Carlyle Press*, [1893] 1 Ch. 268; *British Linen Co. v. South American & Mexican Co.*, [1894] 1 Ch. 108.

5181. —.]—The mere fact that an order has been made for winding up a co. does not prevent a debenture-holder or mtgee. of the co. from bringing an action to realise his security.—*Re* LONGDENDALE COTTON SPINNING CO. (1878), 8 Ch. D. 150; 48 L. J. Ch. 54; 38 L. T. 776; 26 W. R. 491.

Annotation:—**Refd.** *Andrew v. Swansea Cambrian Benefit Bldg. Soc.* (1880), 50 L. J. Q. B. 428.

5182. —.]—In the winding up of a co. an order was made directing an inquiry what securities had from time to time been given by the co., & what were the priorities of the incumbrancers. A mtgee., in whose presence this order had been made, & who had not appealed from it, but had subsequently obtained an order giving him leave to attend all proceedings in the winding up, & directing that his costs of attending the proceedings should be costs in the winding up, applied to the ct., under 1862 Act, s. 87, for leave to institute a foreclosure action, notwithstanding the winding up order:—*Held*: leave should be given to the mtgee. to bring such action as he might be advised to enforce his security, on his undertaking that, notwithstanding the order obtained by him in the winding up, his costs of attending the proceedings in the winding up should be in the discretion of the judge.—*Re* HAMILTON'S WINDSOR IRONWORKS CO., LTD. (1879), 40 L. T. 569; 27 W. R. 827, C. A.

Annotation:—**Refd.** *Re* Brown, Bayley & Dixon, *Ex p. Roberts & Wright* (1881), 30 W. R. 5.

5183. Proof of debt—Against general assets—When property charged insufficient.—*Re* COLONIAL TRUSTS CORPN., *Ex p. BRADSHAW*, No. 4665, *ante*.

5184. On right to appoint receiver under

The liquidators disputed the validity of the mtgo. & the extent of the property covered by it:—*Held*: the receiver should not be discharged; but the order appointing a receiver on behalf of debenture-holders secured by the mtgo. should be varied so as to limit it to property described in the mtgo.—*BANK OF MONTREAL v. MARITIME SULPHITE FIBRE CO.* (1901), 22 C. L. T. 37; 2 N. B. Eq. Rep. 328.—CAN.

PART III. SECT. 34, SUB-SECT. 8.

t. Payment of interest out of certain fund—Resulting in breach of trust to plaintiff's knowledge—Whether defence to action for interest.—In an action for the recovery of interest upon certain debentures issued by defts. & held by the Crown, defts. set up that they had no authority to issue the debentures; that the application by them of moneys received from the sale of debentures to the payment of

security.]—After the co. was ordered to be wound up compulsorily, debenture-holders, under an express power in their debentures appointed a receiver of all the co.'s property, & applied to the ct. that such receiver might take possession of the property notwithstanding the appointment of an official liquidator. The debentures conferred on the receiver, when appointed, very varied powers:—*Held*: the debenture-holders had a right to the order, & the ct. did not possess the discretion as to the person to be appointed receiver which it would have had if the debenture-holders were in an action asking the ct. to appoint a receiver.—*Re* POUND (HENRY), SON, & HUTCHINS (1889), 42 Ch. D. 402; 58 L. J. Ch. 792; 62 L. T. 137; 38 W. R. 18; 5 T. L. R. 720; 1 Meg. 363, C. A.

Annotations:—**Dist.** *Re* Stubbs, Barney v. Stubbs, [1891] 1 Ch. 475. **Foll.** *Strong v. Carlyle Press*, [1893] 1 Ch. 268. **Consd.** *British Linen Co. v. South American & Mexican Co.*, [1894] 1 Ch. 108. **Mentd.** *Davies v. Thomas*, [1900] 2 Ch. 462.

5185. Irredeemable debentures—Become redeemable.—*Re* SOUTHERN BRAZILIAN RIO GRANDE DO SUL RY. CO., LTD., No. 4582, *ante*.

5186. Assets subject to floating charge—Liable for preferential debts—If general assets insufficient.—

The effect of 1908 Act, s. 209, (1) (a), (2) (b), & (3), is that the costs & expenses of the winding up of a co. are payable out of the assets of the co. not comprised in a debenture security, before any payment is made by the liquidator of preferential debts; but if the general assets of the co., after discharge of the costs & expenses of winding up, are insufficient to make payment of the preferential debts, then, to the extent to which they are insufficient, the amount must be made up by debenture-holders holding a security creating a floating charge upon the property of the co., out of the property of the co. comprised in or subject to the charge.—*WESTMINSTER CORPN. v. CHAPMAN*, [1916] 1 Ch. 161; 85 L. J. Ch. 334; 114 L. T. 63, 80 J. P. 74; [1916] II. B. R. 12.

Fixing floating charge.—*See* Sub-sect. 2, C. (e) i., *ante*.

On transfer of debentures.—*See* Sub-sect. 2, I., *ante*.

Right to interest.—*See* Sect. 36, sub-sect. 11 E. (d), *post*.

Debenture payable by instalments.—*See* No. 4787, *ante*.

SUB-SECT. 8.—INTEREST ON SECURITIES.

5187. Accrues de die in diem—Though payable half-yearly.—Interest payable on coupons to debentures, though payable half-yearly, accrues *de die in diem*, & is therefore subject to apportionment.—*Re* ROGERS' TRUSTS (1860), 1 Drew. & Sm. 338; 30 L. J. Ch. 153; 3 L. T. 397; 6 Jur. N. S. 1363; 9 W. R. 64; 62 E. R. 408.

5188. What may be proved for in winding up—To date of confirmatory resolution to wind up.—Where a voluntary winding up had been ordered to be continued under supervision debenture-holders were held entitled to prove for interest only up to the date of the confirmatory resolution to wind up the co. voluntarily, without prejudice to their right to prove for further interest, if there

interest on other debentures, was a misapplication of the trust fund & a breach of trust; & that the Crown's advisers knew, when the debentures were acquired by it, that the proceeds were to be so misapplied:—*Held*: inasmuch as defts. had authority to issue & dispose of the debentures, their acts in so doing were *intra vires*, & complicity by the Crown in a breach of trust committed by them could not be relied on as a defence to the action.—

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should be found to be surplus assets. Payments of interest made since the above date to be brought into account by the debenture-holders.—*Re IMPERIAL LAND CO. OF MARSEILLES, Ex p. COLBORNE & STRAWBRIDGE* (1870), L. R. 11 Eq. 478; 23 L. T. 515; 24 L. T. 255; 19 W. R. 223; *sub nom. Re IMPERIAL LAND CO. OF MARSEILLES, Ex p. DEBENTURE HOLDERS*, 40 L. J. Ch. 93.

Annotations:—Mentd. *Re South Essex Estuary & Reclamation Co., Ex p. Chorley* (1870), 19 W. R. 430; *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374; *Re Hercules Insee., Brunton's Claim* (1874), L. R. 19 Eq. 302; *Re Imperial Land Co. of Marseilles, Ex p. Larking* (1877), 4 Ch. D. 566; *British India Steam Navigation Co. v. L. R. Comrs.* (1881), 7 Q. B. D. 165; *Re Western Counties Steam Bakeries & Milling Co.* (1897), 45 W. R. 418.

5189. — Judgment recovered for principal—Interest at 4 per cent.]—A railway co., in 1864, issued debentures by which it bound itself to pay a principal sum one year after the date of issue, with interest at 6 per cent., & charged the railway & undertaking with the payment of the principal sum & interest. Soon after the expiration of the year a debenture-holder brought an action against the co., & recovered judgment for the principal debt, interest, & costs. The co. was ordered to be wound up in 1868, & the debenture-holder was admitted to prove for the judgment debt, & interest at 4 per cent. He claimed to prove for an additional 2 per cent. on the original amount of the debenture from the date of the judgment:—*Held*: the original debt was merged in the judgment, & claimant was only entitled to interest on the judgment at 4 per cent.—*Re EUROPEAN CENTRAL RY. CO., Ex p. ORIENTAL FINANCIAL CORPN.* (1876), 4 Ch. D. 33; 46 L. J. Ch. 57; 35 L. T. 583; 25 W. R. 92, C. A.

Annotations:—Distd. *Popple v. Sylvester* (1882), 22 Ch. D. 98. **Foll.** *Arbuthnot v. Bunsill* (1890), 62 L. T. 234.

Expld. *Economic Life Assce. Soc. v. Osborne*, [1902] A. C. 117. **Refd.** *Re Sneyd, Ex p. Fewings* (1883), 25 Ch. D. 338.

See, further, JUDGMENTS & ORDERS.

—*See, generally, Sect. 36, sub-sect. 11, A. (h); Sect. 37, sub-sect. 8; Sect. 38, sub-sect. 6, post.*

5190. When debenture ceases to carry interest—Bonds drawn for repayment but not paid.]—By a deed for declaring the trusts of remittances to be sent from time to time to this country from Peru for the purposes of a railway undertaking, after reciting that arrangements had been made for the issue of a public loan of £1,000,000 in mtge. bonds, redeemable by half-yearly drawings in ten years, it was provided that the sums to be remitted from time to time should be applied on the next following Dec. 1 & June 1, as the case might be, in payment of the principal sums secured by such of the said mtge. bonds as should have been drawn on the preceding Nov. 1 & May 1, as the case might be, & of the half-yearly interest on such of the said mtge. bonds as should be outstanding & bearing interest, but no interest should be payable on any drawn bond after the day fixed for its redemption; that the mtgors. might in any year redeem any larger amount than 10 per cent. of the bonds, & for that purpose might cause any larger number of bonds than before provided, to be drawn for redemption in any year. Clause 3 provided for the advertisement of drawn bonds on the assumption that the funds for payment were duly remitted, & clause 8 charged all bonds on the undertaking; & by clause 15, after giving power to the trustees to take possession of the mortgaged property if default were made in

payment of principal & interest, it was provided that the trustees should, out of any money which should come into their hands, after certain necessary payments, apply the residue of the said moneys in or towards payment of the principal moneys & interest secured by the said mtge. bonds in the following order: first, in payment of all arrears of interest actually due on such of the said bonds as should be outstanding & bearing interest; secondly, in redemption of such an amount of the said mtge. bonds as ought to have been redeemed on any previous June 1 or Dec. 1, but might not have been redeemed in consequence of default in providing the necessary funds; & lastly in the payment of the future interest on the bonds & the redemption of the same in any future half-year. The bonds issued in pursuance of this deed were for payment to the bearer of each bond of the principal sum secured on June 1 or Dec. 1, as the case might be, next following the day on which the bond should be drawn, & interest thereon at 7 per cent, half-yearly on every June 1 & Dec. 1, up to & including the day on which the principal sum should become payable; & to each bond were attached coupons for the half-yearly interest extending over ten years. Default having been made in the remittances, the trustees took possession of the property, & from time to time received various sums of money on account of the profits, but not enough to pay in full the half-yearly interest & also the principal due upon the bonds, which were from time to time drawn for repayment. In an action for determining the rights of the holders of the drawn & undrawn bonds respectively, it was held that, after the day fixed for redemption, interest on the principal sums secured by the drawn bonds was only recoverable as damages, & was not, upon the construction of the deed, payable out of the moneys in the hands of the trustees on drawn bonds after the day when they ought to have been paid. But upon appeal:—*Held*: (1) interest at 7 per cent. was payable *pari passu* upon the drawn bonds until actual payment; (2) as well the drawn bonds, in payment of which default had been made, as the undrawn bonds, were outstanding & bearing interest within the meaning of the deed, & interest upon them was payable *pari passu* with the undrawn bonds.—*GORDILLO v. WEGUELIN* (1877), 5 Ch. D. 287; 46 L. J. Ch. 691; 36 L. T. 206; 25 W. R. 620, C. A.

5191. Interest guaranteed—Guarantee subsisting after winding up of company.]—A. guaranteed B. the regular payment of the interest payable under the debenture of a limited co. until the principal sum secured by the debenture was repaid by the co. Some time afterwards the co. went into liquidation & was dissolved by virtue of 1862 Act, s. 143. Subsequently A. became bkpt.:—*Held*: notwithstanding the dissolution of the co., B. was entitled to prove in A.'s bkpey. for the estimated value of the future interest payable under the guarantee.—*Re FRITZGEORGE, Ex p. ROBSON*, [1905] 1 K. B. 462; 74 L. J. K. B. 322; 92 L. T. 206; 53 W. R. 384; 49 Sol. Jo. 204; 12 Mans. 14.

Annotations:—Expld. & Distd. *Re Moss, Ex p. Hallet*, [1905] 2 K. B. 307. **Refd.** *Re Pyke, Davis v. Jeffreys* (1910), 55 Sol. Jo. 109.

5192. Appropriation of payments to principal or income.]—A debenture trust deed executed by a co. provided that the trustees should appropriate the proceeds of the realisation of the securities first towards payment of all arrears of interest on the debentures, & then towards payment of the

R. v. QUEBEC NORTH SHORE TURNPIKE TRUSTEES (1904), 8 Exch. C. R. 390; 38 S. C. R. 62.—CAN.

a. Debentures issued to bank securing overdraft—Interest charged on overdraft—Whether interest payable on

debentures as well.]—A co. issued to a bank, as security for advances, 6 debentures of the co. for £1,000 each,

principal. The co. made default, & an action was brought on behalf of the debenture-holders to enforce their security. The judgment in the action ordered that the trusts of the deed should be carried into execution, & directed that the usual accounts & inquiries should be taken & made. The securities were gradually realised, & orders were from time to time made under which certain sums were paid to the debenture-holders on account of interest, after deducting income tax. When the order on further consideration was made there was evidence that the securities would prove insufficient, & that order directed that pl'ts.' taxed costs as between solr. & client should be paid by the trustees out of the moneys in their hands. The subsequent orders for payment to the debenture-holders directed that the payments should be made on account generally of what was due for principal & interest. The securities having been practically all realised, the trustees had in their hands a sum of money which they proposed to pay to the debenture-holders. It was admitted that if the whole of the payments to the debenture-holders were attributed to principal they would be insufficient to discharge the full amount due. The Commrs. of Inland Revenue claimed that all the payments made on account generally ought to be attributed to interest in the first place, & that income tax should be deducted from them. Upon a summons taken out by the trustees of the deed to determine this question:—*Held*: upon the construction of the orders which directed payments on account generally, & having regard to the circumstances of the case the ct. when making those orders had purposely left open for future determination the question how the payments were to be ultimately appropriated as between principal & interest, & it being now clearly for the benefit of the debenture-holders that those payments should be appropriated to principal, they ought to be so appropriated, without putting the debenture-holders to an election how the appropriation should be made, & consequently income tax ought not to be deducted.

But the order was made without prejudice to the question whether the payments, or any part or parts thereof, ought, in the hands of the persons to whom payments had been made, to be treated as principal or interest.—*SMITH v. LAW GUARANTEE & TRUST SOCIETY, LTD.*, [1904] 2 Ch. 569; 73 L. J. Ch. 733; 94 L. T. 545; 20 T. L. R. 789; 12 Mans. 66, C. A.

Annotation:—*Mentd. Re Calgary & Medicine Hat Land Co., Pigeon v. The Co.*, [1908] 2 Ch. 652.

5193. —.—.]—A debenture trust deed provided that the trustees should, in case of default by the co., apply the net proceeds of any realisation of the securities, first in payment of interest, secondly of the principal, due on the debentures. The co. made default, & a representative action was brought on behalf of the debenture-holders to enforce their security, in which the trusts of the deed were ordered to be carried into execution & the usual accounts were directed. The master certified the amounts due to the various debenture-holders for principal, but, as the security was believed to be insufficient, he forbore to compute interest. The securities were gradually realised, & orders were made in chambers from time to time whereby dividends of 5s. in the pound, 10s. in the pound, & 5s. in the pound were directed to be paid "on the principal sums by the master's certificate certified to be due to" the debenture-

holders; the last of the dividends being further described as "the balance of the principal sum" so certified. A further sum was subsequently received sufficient to pay all arrears of interest & leave a small surplus for the co. The question now raised was whether by the terms of these orders the debenture-holders had lost their rights under the trust deed:—*Held*: (1) there had been no final & complete appropriation by these orders as between principal & interest, & the debenture-holders were entitled to receive the whole of their arrears of interest in accordance with the provisions of the trust deed, before any surplus was payable to the co. From the first the ct. had professed to be carrying into effect the trusts of this deed & not to be varying those trusts: (2) pl'tf. suing in his representative capacity could not elect on behalf of the persons whom he represented, to take less than they were entitled to according to the trust deed, but each individual member of the class had a separate right to elect when the facts were known; (3) the ct. had no jurisdiction to vary the trusts of the deed without the consent of all parties, & did not profess to do so; (4) the earlier payments were therefore subject to final adjustment so as to give effect to the trusts of the trust deed, & must be treated as having been made first in discharge of interest, & only after all liability on account of interest had been discharged in payment of principal, & the moneys now available for division must be applied on the footing that the earlier payments had not completely paid off the principal.—*Re CALGARY & MEDICINE HAT LAND CO., LTD., PIGEON v. CALGARY & MEDICINE HAT LAND CO., LTD.*, [1908] 2 Ch. 652; 78 L. J. Ch. 97; 99 L. T. 706; 16 Mans. 36, C. A.

Annotations:—*As to* (1) *Refd. Keates v. Lewis Merthyr Consolidated Collieries*, [1910] 2 K. B. 445; *Cloutte v. Storey*, [1911] 1 Ch. 18.

5194. Payment by cheque—Failure by holder to cash cheques.—[Cheques for interest on mtge. debentures of a co. from time to time were given, three to the registered holder, who, being a trustee, indorsed them over to a beneficiary, & three direct, with the registered holder's consent to the beneficiary. The co. went into liquidation & the beneficiary had not cashed the cheques:—*Held*: in the absence of circumstances from which an intention to the contrary could be inferred, the security for the interest had not been released.—*Re DEFRIES (J.) & SONS, LTD., EICHHOLZ v. DEFRIES (J.) & SONS, LTD.*, [1909] 2 Ch. 423; 78 L. J. Ch. 720; 101 L. T. 486; 25 T. L. R. 752; 53 Sol. Jo. 697; 16 Mans. 308.

5195. Interest payable out of net earnings.—A co. issued debenture-stock, the interest on which was to be paid out of the net earnings of the co. The co. proposed to set aside a sum representing profits:—*Held*: the co. was only entitled to set aside so much of the sum as was required for the maintenance of the security, & the balance ought to be distributed among the debenture-stockholders.—*HESLOP v. PARAGUAY CENTRAL RY. CO., LTD.* (1910), 54 Sol. Jo. 234.

5196. Interest paid on some debentures to later date than others—Whether assets applied in equalising interest.—[Where debentures are charged by way of floating security to rank *pari passu* as a first charge on the property of the co. "without any preference or priority over one another," & when the security comes to be enforced in a debenture-holder's action, & it appears that some

bearing interest at 5 per cent, accompanied by a letter of charge. The bank charged interest on the overdraft of the co. The co. was afterwards

wound up. At the date of the winding up the co. was indebted to the bank in a sum larger than the amount of the debentures, exclusive of interest

thereon, which had not been paid:—*Held*: the bank was entitled to interest on the debentures.—*Re VINT & SONS*, [1905] 1 L. R. 112.—*IR.*

Sect. 34.—Borrowing and securing money: Sub-sect. 8. Sects. 35 & 36: Sub-sect. 1, A. & B. (a).]

debenture-holders have been paid interest by the co. while a going concern, down to a later date than other debenture-holders, the latter, in the absence of some express provision to that effect, are not entitled to have the assets applied in equalising the amount of interest before any further distribution is made, but the amount found due to each debenture-holder for principal & interest ought to be calculated down to the date of the master's certificate, & the assets distributed ratably according to the amounts so found due.—*Re MIDLAND EXPRESS, LTD., PEARSON v. MIDLAND EXPRESS, LTD.*, [1914] 1 Ch. 41; 83 L. J. Ch. 153; 109 L. T. 697; 30 T. L. R. 38; 58 Sol. Jo. 47; 21 Mans. 34, C. A.

SECT. 35.—WINDING UP GENERALLY.

5301. How company can be extinguished—Only by winding up.]—REUSS (PRINCESS) *v.* BOS, No. 5331, *post*.

5302. Whether winding up by court or voluntarily—Provisions in deed of settlement.]—A proviso for the dissolution of a co., in a particular manner does not exclude the jurisdiction of the ct. to decree a dissolution in case of misconduct.—*KINDER v. TAYLOR* (1825), 3 L. J. O. S. Ch. 68, L. C.

5303. .]—The provisions of 1862 Act, as to winding-up orders under the Ct. of Ch., are not intended to apply to cases where there is a very small body of shareholders, & no difficulties in the way of voluntary winding up exist.—*Re NATAL, ETC. Co., LTD.* (1863), 1 Hem. & M. 639; 71 E. R. 280.

Annotations:—Folld. *Re Sea & River Marine Insee.* (1866), L. R. 2 Eq. 545. Consd. *Re General Co. for Promotion of Land Credit* (1869), 5 Ch. App. 367, n.; *Re Sanderson's Patents Assocn.* (1871), L. R. 12 Eq. 188; *Re Second Commercial Benefit Bldg. Soc.* (1879), 48 L. J. Ch. 753.

— **Winding up by court—Where voluntary winding up begun.]—**See Sect. 37, sub-sect. 15, A., *post*.

— .]—See, generally, Sect. 36, *post*.

— **Voluntary winding up.]—**See, generally, Sect. 37, *post*.

PART III. SECT. 35.

a. Object of winding up—Payment of creditors—Order only made where possibility that creditors will derive some benefit.]—An order for the winding up of a co. will not be granted unless there is a reasonable possibility that the creditors will derive some benefit therefrom which they could not otherwise obtain, *e.g.*, where there is unpaid capital which can only be made available for creditors by winding up the co.—*Re SOUTH EAST CORPN., LTD.* (1915), 31 W. L. R. 145; 8 W. W. R. 297.—CAN.

b. —.]—The object of Joint-Stock Cos. Act, 1858 (c. 60), is not only to provide for the payment of the debts of a co., but also to equalise the losses of the contributories.—*GRAHAM v. M'CLELLAND WESTERN BANK* (1866), 4 Macph. (Ct. of Sess.) 484.—SCOT.

PART III. SECT. 36, SUB-SECT. 1.—A.

c. Extent of jurisdiction—Not to exercise discretion of directors.]—The ct. has no jurisdiction after the co. has gone into liquidation to exercise discretion which rested with the directors.—*Re CHATSWORTH ESTATE Co., LTD., Re CLARKE, Ex p. HARTNELL* (1892), 18 V. L. R. 442.—AUS.

d. — Over all matter arising in winding up—To exclusion of other courts.]—It is the intention of Dominion Winding-up Act that one ct. should control all the estate of an insolvent co.; to settle all claims of debt, privilege, mtge., lien or right of property upon, in or to any effects or property of such co. in the simplest & least expensive way & to distribute its assets among its creditors in the most expeditious manner, & not to have proceedings delayed or impeded by or dependent upon outside or expensive litigation in other cts.—*Re TORONTO WOOD & SHINGLE Co.* (1894), 30 C. L. T. 353.—CAN.

e. — To refuse winding-up order—Petition of creditor with substantial interest.]—Where the insolvency of a co. is admitted, the ct. has no discretion under Winding-up Act, R. S. C., c. 129, s. 9, to refuse to grant a winding-up order on the petition of a creditor who has a substantial interest in the estate, although the co. has made a voluntary assignment for the benefit of its creditors, & most of them are willing that the winding up should be under such assignment.—*Re WILLIAM LAMB MANUFACTURING Co. OF OTTAWA* (1900), 32 O. R. 243.—CAN.

SECT. 36.—WINDING UP BY COURT.

SUB-SECT. 1.—JURISDICTION.

A. In General.

5304. Extent of jurisdiction—To deal with matters of practice—Though no bill or petition before court.]—The ct. has jurisdiction under 1862 Act to deal with all matters relating to practice touching the winding up of cos., etc., although no bill filed or petition presented.—*Re CASHAR Co.* (1866), 15 L. T. 274.

5305. —.]—A ct. of appeal will generally refuse to interfere with the discretion of the judge in the ct. below as to the amount or time of a call. It is the imperative duty of the ct. to exercise the powers which are given by 1862 Act, for the benefit of the creditors, having regard to the position in which the legislature has placed them. Persons on the list of shareholders of a co. in process of being wound up, having thereby incurred a *prima facie* legal liability, are not entitled to resist the making of a call on the ground that they assert a right to have their names removed from the list; but their remedy is to apply for the suspension of the operation of the call as against themselves.—*Re BARNED'S BANKING Co., LTD.* (1867), 36 L. J. Ch. 215; 15 W. R. 372; *sub nom. Re BARNED'S BANKING Co., LTD., Ex p. OFFICIAL LIQUIDATORS*, 15 L. T. 597, L. J.J.

Annotation:—Refd. *Re Law Guarantee Trust & Accident Soc.* (1910), 26 T. L. R. 565.

5306. — Court of Appeal—Cannot hear original petition.]—The Ct. of Appeal has no jurisdiction to hear an original petition.—*Re DUNRAVEN ADARE COAL & IRON Co., SHEFFIELD WAGON Co.'S ORIGINAL PETITION* (1875), 33 L. T. 371; 24 W. R. 37; 1 Char. Pr. Cas. 2, C. A.

5307. — Chancery Division of High Court.]—The jurisdiction of the Ct. of Ch. in winding up matters not being taken away by the Jud. Acts, the Ch. Div. is the proper Div. in which all matters relating to winding up business should be brought; & this applies to the stay of actions in any other Div. of the Ct.—The same principle applies where a co. is being wound up voluntarily.—*NEEDHAM v. RIVERS PROTECTION & MANURE Co.* (1875), 1 Ch. D. 253; 33 L. T. 403; 24 W. R. 317; 20 Sol. Jo. 92; 2 Char. Pr. Cas. 64; *sub nom. Re RIVERS PROTECTION & MANURE Co., LTD., NEEDHAM v. RIVERS PROTECTION & MANURE Co., LTD.*, 45 L. J. Ch. 132.

Annotation:—Refd. *Re Stapleford Colliery Co.* (1875), 24 W. R. 173.

f. —.]—The ct. has a discretion to grant or withhold a winding-up order under R. S. C., c. 129, s. 9.—*Re MAPLE LEAF DAIRY Co.* (1901), 2 O. L. R. 590; 21 C. L. T. 596.—CAN.

g. — When winding-up petition opposed by the company.]—An order for the compulsory winding up of a co. may be made under Cos. Winding-up Act (S. B. C., 1898, c. 14), notwithstanding that the winding up is opposed by the co.—*Re FLORIDA MINING Co., LTD.* (1902), 9 B. C. R. 108.—CAN.

h. — Emergency legislation—War Relief Act, 1916 (c. 74).]—On objection that no leave to proceed under sect. 10 of the above Act had been granted & as a matter of procedure the provincial legislation was effective notwithstanding the Act under which the application was made was a Dominion statute:—*Held*: as all proceedings were taken under a Dominion statute & all procedure under it was governed by the Act & by the winding-up of rules passed in pursuance of sect. 92, the above Act has no bearing or effect, & its provisions need not be recognised in dealing with matters under the Wind-

To commit for contempt.]—See Sub-sect. 19, F., post.

5308. To make order after petition dismissed.]—The ct. has no jurisdiction to make an order on a petition to wind up a co. which had been dismissed with costs, otherwise than on an appeal or rehearing.—*Re NORTH WALES SLATE SUPPLY CO.* (1870), 21 L. T. 818; 18 W. R. 403.

At hearing of petition.]—See Sub-sect. 3, E. (h), post.

5309. To order taxation of costs—Incurred before winding up.]—This co. was ordered to be wound up compulsorily in Sept. 1909. At that date the co.'s solrs. had in their hands large sums of money belonging to the co. They repaid a considerable amount to the co. or liquidator, but retained £471, against which they claimed to set off their costs incurred before the winding up. The official receiver, who was liquidator, took out a summons for delivery of a bill of costs & cash account, taxation, & payment. The registrar made an order, which the solrs. did not oppose, for delivery of a bill of costs & cash account only. The solrs. delivered them, showing a balance due from them to the co. of £13. The official receiver then brought the summons on again for an order for taxation in the winding up & payment. The solrs. resisted the application, claiming to have their costs taxed under the Solrs. Act, 1843

(c. 73):—*Held*: the solrs. in this case by submitting to the order to deliver a bill of costs had submitted to the jurisdiction for a proper consequential order for taxation & payment in the winding up. A judge sitting in winding-up matters has jurisdiction to make an order for taxation of costs incurred before the winding up either under the Solrs. Act, 1843 (c. 73), or in the winding up.—*Re PALACE RESTAURANTS, LTD.*, [1914] 1 Ch. 492; 83 L. J. Ch. 427; 110 L. T. 534; 30 T. L. R. 248; 58 Sol. Jo. 268; 21 Mans. 109, C. A.

B. Courts exercising Jurisdiction.

(a) County Courts.

See 1908 Act, sect. 131.

5310. Effect of Companies (Winding up) Act, 1890 (c. 63)—Petition presented before Act in force—Jurisdiction of High Court.]—*Re LONDON & YORKSHIRE MUTUAL MONEY CLUB CO.* (1891), 7 T. L. R. 182.

Annotation:—Folld. Re Newspaper Co-op. Assocn. (1891), 7 T. L. R. 202.

5311. — — —.]—*Re NEWSPAPER CO-OPERATIVE ASSOCN., LTD.* (1891), 7 T. L. R. 202.

5312. — What county courts have jurisdiction—Metropolitan county courts—Jurisdiction attached to High Court.]—*Re COURT BUREAU, LTD.* (1891), 7 T. L. R. 223.

ing-up Act.—*Re ROBSON INVESTMENT CO., LTD.*, [1918] 1 W. W. R. 779.—CAN.

k. — Courts of Southern Ireland—Articles of Agreement constituting Irish Free State.]—Under Provisional Govt. (Transfer of Functions) Order, 1922, the functions of certain departments, including the Board of Trade, were transferred to the Provisional Govt. of Southern Ireland, set up in accordance with the Articles of Agreement of Dec. 1921. On petition by a shareholder for the compulsory winding up of the co. as an unregistered co.:—*Held*: notwithstanding the Articles of Agreement of Dec. 1921, the Irish Free State (Agreement) Act, 1922 (c. 4), & of the orders thereunder, the Cos. Acts remain in full force until revoked or altered by a competent legislature, & the cts. of Southern Ireland had no jurisdiction to make the order sought for in the petition.—*Re PORTARLINGTON ELECTRIC LIGHT & POWER CO., LTD.*, [1922] 1 L. R. 109.—IR.

l. Jurisdiction of "insolvent court"—Not interfered with by other courts.]—The ct. will not, unless in a very exceptional case, interfere with the jurisdiction of the insolvent ct. by winding up the affairs of an insolvent co. Where a bill was filed for the purpose of winding up the affairs of an insolvent insurance co., a demurrer for want of equity was allowed, although the bill prayed, amongst other things, for the appointment of a receiver to get in the assets, & wind up the affairs of the co.—*MCNEIL v. RELIANCE MUTUAL FIRE INSURANCE CO.* (1879), 26 Gr. 567.—CAN.

m. Jurisdiction of master—To try claims arising out of breach of contract.]—In proceeding under a judgment for the winding up of a co., the master has the same jurisdiction to try claims for unliquidated damages arising out of breach of contract as he would have in an administration proceeding.—*CLARKE v. UNION FIRE INSURANCE CO.*, *CASTON'S CASE* (1884), 10 P. R. 339.—CAN.

n. — Delegation to master in ordinary—Local master.]—It is not competent for the master in chambers to make an order under 45 Vict. c. 23, s. 77 (D), as amended by 47 Vict. c. 39, s. 5 (D), referring the winding up to

the master in ordinary. That may be done by a judge, as in conformity with the usual course of proceedings in other causes & matters, but it is not the practice, save in one or two exceptional cases, to have references ordered by the master in chambers to the master in ordinary. The intention of the Act is that the master in chambers, or local master, or master in ordinary, may grant a winding-up order, & conduct all the proceedings necessary therefor in his own office & before himself as a judicial officer.—*Re JOSEPH HALL MANUFACTURING CO.* (1884), 10 P. R. 485.—CAN.

o. — — —.]—*Re QUEEN CITY REFINING CO.* (1884), 10 P. R. 415.—CAN.

ordinary—To decide questions arising in winding up.]—The master in ordinary or other officer of the ct., to whom its powers may be delegated, is not a competent tribunal to decide questions of fraudulent transfer arising in the course of a reference in winding-up proceedings.—*HARTE v. ONTARIO EXPRESS & TRANSPORTATION CO.*, *MOILSON'S BANK CLAIM* (1894), 25 O. R. 247.—CAN.

q. — In chambers—Validity of instruments held by strangers.]—Under the Winding-up Act the ct. has no power to determine, upon a chamber application, as to the validity of instruments held by parties not connected with the co.—*Re MARITIME TRUST CO., LTD.*, & *BURNS & CO.* (1915), 32 W. L. R. 442; 9 W. W. R. 167; 22 B. C. R. 177.—CAN.

r. — To settle list of creditors—To decide right to prove.]—The Ontario legislature has power to confer upon the master the powers given by the Insurance Corporations Act, 1892. The master has power under that Act to settle schedules of creditors, which implies power to adjudicate upon the claims of officials of a co. for services to ascertain whether they shall appear as creditors in the schedules; but he cannot adjudicate upon the question whether they have been guilty of such conduct as deprives them of their right to claim as creditors. He has also power to settle schedules of contributories, but cannot adjudicate upon the question whether officials of the co. have been guilty of such a breach of duty as to make them liable for any loss by reason thereof. Such

matters can only be determined by action.—*Re DOMINION PROVIDENT, BENEVOLENT & ENDOWMENT ASSOCN.* (1894), 25 O. R. 619.—CAN.

s. — Powers may be delegated to.]—The powers conferred upon the Supreme Ct. by the Winding-up Act may be delegated to the master, whether according to the usual practice & procedure of the ct. such officer is in the habit of exercising similar jurisdiction or not.—*Re WINDING-UP ACT, Re ALBERTA LOAN & INVESTMENT CO.*, [1917] 1 W. W. R. 744; 11 Alta. L. R. 744.—CAN.

t. Retrospective effect of 47 Vict. c. 39, s. 2 (D)—Companies "in liquidation."—The above sect. is not limited in its application to cos. being wound up at the date of 45 Vict. c. 23 (D); it applies also to cos. in liquidation, i.e., insolvent, though not technically being wound up, & against which proceedings are being taken to realise their assets & pay their debts.—*Re UNION FIRE INSURANCE CO.* (1886), 13 A. R. 268.—CAN.

a. Jurisdiction of judge in chambers—To make winding-up order.]—An order for the winding up of a co., upon petition may be made by a judge in chambers.—*Re TORONTO BRASS CO., LTD.* (1898), 18 P. R. 248.—CAN.

b. Jurisdiction of local judge of Supreme Court—Cannot make winding-up order.]—A local judge of the Supreme Court has no jurisdiction to make a winding-up order.—*Re KOOTENAY BREWING CO.* (1898), 7 B. C. R. 131.—CAN.

c. Jurisdiction of Court of Sessions—"In vacation."—Sect. 135 of 1908 enacts "The ct. having jurisdiction to wind up cos. registered in Scotland shall be the Ct. of Session in either division thereof, or in the event of a remit to a permanent Lord Ordinary, that Lord Ordinary during the session, & in time of vacation the Lord Ordinary on the Bills":—*Held*: the jurisdiction given by this sect. to the Lord Ordinary on the Bills in vacation was not limited to cases in which there had been a remit to a permanent Lord Ordinary; & the words "in time of vacation" applied to a temporary adjournment of the ct. during session.—*LONDON COUNTY & WESTMINSTER BANK, LTD., PETITIONERS*, [1911] S. C. 1073.—SCOT.

Sect. 36.—Winding up by court: Sub-sect. 1, B. (a) & (b), & C. (a), (b), (c), (d), (e), (f), (g), (h) &

5313. Registered office not within district—For greater part of six months before presentation of petition—Assets within district.]—At the date of the presentation of a petition in the S. county ct. for the winding up of a co., & for the greater part of the six months preceding that date, the co.'s registered office was in London. All its assets were in Portsmouth, & the office of the co. had been there for a considerable time during the six months preceding the petition for winding up:—*Held*: by 1908 Act, s. 131 (7), the judge of the county ct. had jurisdiction to hear the petition.—*Re SOUTHSEA GARAGE, LTD.* (1911), 27 T. L. R. 295; 55 Sol. Jo. 314, D. C.

Transfer to & from county court.]—See Sub-sect. 14, A., *post*.

5314. Extent of jurisdiction—Cannot decide title to property between liquidator & stranger—Arising before winding up.]—Where a petition to wind up a co. is presented to a county ct. under 1890 (Winding up) Act, sect. 1, sub-sect. 3, the judge of the county ct. has no jurisdiction to make an order deciding a question as to title to property, which arose before the commencement of the winding up, between the co. & a stranger.—*Re ILKLEY HOTEL Co.*, [1893] 1 Q. B. 248; 62 L. J. Q. B. 333; 68 L. T. 164; 57 J. P. 281; 41 W. R. 639; 5 R. 154, D. C.

5315. — “All the powers of High Court” — Cannot issue writ of fieri facias—To enforce payment of moneys received on behalf of company.]—Although 1890 (Winding up) Act, s. 1 (6) gives to a county ct. having jurisdiction to wind up a co. “all the powers of the High Ct.” in respect of such winding up, the county ct. has no power to issue a writ of *fi. fa.* addressed to the sheriff of the county, for the purpose of enforcing, by execution, an order of that ct. directing a person to pay moneys received by him on behalf of the co. to the liquidator.—*Re BASSETT'S PLASTER Co., LTD.*, [1894] 2 Q. B. 96; 63 L. J. Q. B. 518; 70 L. T. 658; 42 W. R. 410; 10 R. 191; *sub nom. Re BASSETT'S PLASTER Co., LTD., Ex p. BASSETT*, 1 Mans. 297, D. C.

5316. — — May commit for contempt of court—For disobedience of previous order.]—In the course of winding up a co. a county ct. judge made an order committing a person who had been a director of the co. to prison for disobedience to a previous order of the ct.:—*Held*: on appeal from an order for prohibition, inasmuch as a county

ct. has for the purposes of its jurisdiction to wind up a co. under 1890 (Winding-up) Act, all the powers of the High Ct., prohibition would not lie.—*Re NEW PAR CONSOLS, LTD.* (No. 2), [1898] 1 Q. B. 669; 67 L. J. Q. B. 598; 78 L. T. 312; 46 W. R. 369; 14 T. L. R. 287; 42 Sol. Jo. 343; 5 Mans. 277, C. A.

Annotation:—*Apld. R. v. North Allerton County Court Judge*, [1898] 2 Q. B. 680.

Power to state special case.]—See BUILDING SOCIETIES, Vol. VII., p. 503, No. 303.

Jurisdiction of county courts generally.]—See COUNTY COURTS, Vol. XIII., pp. 456 *et seq.*

(b) *Stannaries Court.*

See 1908 Act, s. 131 (4). Part VIII., Sect. 2, sub-sect. 4, A., *post*.

C. *Companies which may be wound up by Court.*

(a) *In General.*

5317. Company with only few shareholders—Voluntary winding up available.]—*Re NATAL, ETC. Co., LTD.*, No. 5303, *ante*.

The machinery of the Winding-up Acts is only applicable to cos. where there are numerous shareholders. Therefore in a co. where there were only seven shareholders, & no debts, the ct. dismissed a winding-up petition with costs.—*Re SEA & RIVER MARINE INSURANCE Co.* (1866), L. R. 2 Eq. 545; 35 L. J. Ch. 820; 12 Jur. N. S. 779.

Annotations:—*Consd. Re Sanderson's Patents Asscn.* (1871), L. R. 12 Eq. 188; *Re Second Commercial Benefit Bldg. Soc.* (1879), 48 L. J. Ch. 753.

5319. — No debts.]—The ct. has jurisdiction to make an order to wind up a co. where there are only a few shareholders & no debts.—*Re SANDERSON'S PATENTS ASSOCN.* (1871), L. R. 12 Eq. 188; 40 L. J. Ch. 519; 19 W. R. 966.

Annotation:—*Refd. Re Second Commercial Benefit Bldg. Soc.* (1879), 48 L. J. Ch. 753.

5320. — Less than seven members.]—It is a condition precedent to the incorporation of a co. that it shall consist of seven members; & the provision in 1862 Act, s. 18, that the certificate of incorporation shall be conclusive evidence that all the requisitions of the Act in respect of registration have been complied with, does not preclude the ct. from inquiring into the question whether such condition has been fulfilled; & unless the co. consists of seven members the ct. has no jurisdiction to make a winding-up order.—*Re NATIONAL DEBENTURE & ASSETS CORPN.*, [1891]

PART III. SECT. 36, SUB-SECT. 1.— C. (a).

d. *Under Dominion Winding-up Acts—Company provincially incorporated.]—*A co. incorporated under the Cos. Act, 1890, may be put into compulsory liquidation & wound up under Dominion Winding-up Amendment Act, 1889.—*Re BRITISH COLUMBIA IRON WORKS Co., LTD., LIABILITY* (1899), 6 B. C. R. 536.—CAN.

e. — — — — —.]—A co. having for its objects, amongst others, the borrowing of money & the carrying on generally the business of a loan & investment co., though incorporated under the authority of a provincial legislature, is subject to Dominion Winding-up Act, 1906, c. 144; & under sect. 11 of the Act, a winding-up order may be made on the application of a shareholder, if the co., at a special meeting of the shareholders called for the purpose, has passed a resolution requiring the co. to be wound up.—*Re COLONIAL INVESTMENT Co. OF*

WINNIPEG (1913), 25 W. L. R. 843.—CAN.

f. “*Trading company*”—*Boom company.]—**Re FREDERICTON BOOM Co.* (1907), 2 E. L. R. 451.—CAN.

g. *Company not actually exercising corporate powers.]—*If the charter or letters patent of incorporation of a co. confer upon it powers within Winding-up Act, R. S. C., 1906, c. 144, s. 2 (d), a winding-up order may be made against it under that Act, although it does not actually carry on business in exercise of such powers.—*Re CANADIAN GENERAL SERVICE CORPN.* (No. 1) (1914), 27 W. L. R. 102.—CAN.

h. *Company already in bankruptcy—By assignment to trustee.]—*An incorporated co. made an assignment to a trustee under the Bkpcy. Act but subsequently an order was made by the registrar in bkpcy. upon the *ex parte* application of the authorised trustee directing that all further proceedings in the winding up be continued under Dominion Winding-up

Act, R. S. C. 1906, c. 144, delegating to an official referee the powers of the ct. for the winding up of the co.:—*Held*: the registrar in bkpcy. had no jurisdiction to make the order & it was nugatory. After a co. has been put in bkpcy., resort cannot be had to the Winding-up Act, unless in pending cases. After the bkpcy. there is nothing upon which the winding-up proceedings can take effect, the assets being vested in the trustee in bkpcy.—*Re CANADIAN WESTERN STEEL CORPN., LTD.* (1922), 69 D. L. R. 689; 51 O. L. R. 615.—CAN.

k. *Company incorporated under special Act—Registered under 1908 Act with view only to winding up.]—*Although a co. incorporated under a special Act has voluntarily got itself registered under the above Act with a view only to being wound up, it may be wound up by the ct. under that Act.—*Re ENNIS & WEST CLARE RY. Co.* (1879), 3 L. R. Ir. 94.—IR.

**2 Ch. 505 ; 60 L. J. Ch. 533 ; 64 L. T. 512 ; 39
W. R. 707 ; 7 T. L. R. 485, C. A.**

Annotations :—**Consd.** *Re Laxon* (2), [1892] 3 Ch. 555. *Moosa Goolam Ariff v. Ebrahim Goolam Ariff* (1912), 28 T. L. R. 505. **Distd.** *Ladies Dress Assocn. v. Pulbrook*, [1900] 2 Q. B. 376; *Re Walker & Smith* (1903), 72 L. J. Ch. 572. **Refd.** *Re British Asahan Plantations Co.* (1892), 36 Sol. Jo. 363; *Salomon v. Salomon*, *Salomon v. Salomon* (1896), 66 L. J. Ch. 35; *Young v. South African & Australian Exploration & Development Syndicate*, [1896] 2 Ch. 268; *Bowman v. Secular Soc.*, [1917] A. C. 406; *Hammond v. Prentice*, [1920] 1 Ch. 201.

(b) Companies having no Share Capital.

5321. Unlimited company.]—The High Ct. has jurisdiction to wind up a registered unlimited co. which has no shares & no capital.—*Re NORTH OF ENGLAND IRON STEAMSHIP INSURANCE ASSOCN.*, [1900] 1 Ch. 481 ; 69 L. J. Ch. 211 ; 82 L. T. 598 ; 48 W. R. 604 ; 16 T. L. R. 172 ; 44 Sol. Jo. 230 ; 7 Mans. 364.

5322. Guarantee company.]—*Re* MONMOUTH-SHIRE & SOUTH WALES EMPLOYERS MUTUAL INDEMNITY SOCIETY, LTD., [1909] W. N. 6.

(c) *Dissolved Companies.*

5323. Voluntary winding up completed—No fraud or misconduct proved.]—After voluntary winding up has proceeded properly, & the liquidators have laid their final account before a general meeting under 1862 Act, s. 142, & have made a return to the Registrar of Joint Stock Companies, & three months have elapsed, & the co. is accordingly under sect. 143 to be deemed to be dissolved, a petition for a winding up by the ct. will only be entertained when fraud or misconduct is proved such as to make the guilty persons personally liable to the petitioner.—*Re PINTO SILVER MINING Co.* (1878), 8 Ch. D. 273 ; 47 L. J. Ch. 591 ; 38 L. T. 336 ; 26 W. R. 622, C. A.

Annotations:—*Folld. Re London & Caledonian Marine Insee.* (1879), 11 Ch. D. 140; *Re Schooner Pond Coal Co.* (1888), 4 T. L. R. 411; *Coxon v. Gorst*, [1891] 2 Ch. 73. **Consd.** *Whiteley Exerciser v. Gamago* (1898), 79 L. T. 20.

5324. ———.]—The ct. has no jurisdiction to make an order for winding up a co. which has been voluntarily wound up & dissolved under 1862 Act, ss. 142, 143, unless the dissolution can be impeached on the ground of fraud.—*Re LONDON & CALEDONIAN MARINE INSURANCE Co.* (1879), 11 Ch. D. 140 ; 40 L. T. 666 ; 27 W. R. 713, C. A.

Annotations.—**Folld.** *Re Schooner Pond Coal Co.* (1888), 4 T. L. R. 411. **Apld.** *Coxon v. Gorst*, [1891] 2 Ch. 73. **Consd.** *Knowles v. Scott*, [1891] 1 Ch. 717. **Apld.** *Pulsford v. Devenish*, [1903] 2 Ch. 625. **Refd.** *Whiteley Exerciser v. Gamage* (1898), 67 L. J. Ch. 560; *Argylls v. Coxeter* (1913), 29 T. L. R. 355.

See also, No. 7160, post.

PART III. SECT. 38, SUB-SECT. 1.—
C. (b).

5321 i. Unlimited company.]— For the purpose of giving the ct. jurisdiction to make a winding-up order against an unlimited co., it is not necessary that the arts. of assocn. should be signed by all the subscribers to the memorandum of assocn.; it is sufficient if they are signed by seven of them.—*Re AUSTRALIAN BANKING Co. of SYDNEY* (1891), 12 N. S. W. L. R. 237.—**AUS.**

PART III. SECT. 36, SUB-SECT. 1.—
C. (c).

1. *Company struck off register—Procedure necessary to restore.*—A. Co. a creditor of H. Co., presented a petition for the winding up of the latter, stating that it had suspended business for more than one year & that it was unable to pay its debts. Three days after, the registrar of joint-stock cos. struck H. Co. off the register & notice of this was published in the Gazette
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(d) *Unregistered Companies.*

See Part VII., Sect. 2, sub-sect. 2, post.

(e) *Mining Companies.*

See Part VIII., Sect. 1, sub-sect. 6; Sect. 2, sub-sect. 4, A., *post*.

(f) Companies Incorporated by Statute.

Statutory company for public purposes.]— See Part IX., Sect. 15, sub-sect. 1, *post*.

(g) Chartered Companies.

See Part X., Sect. 7, post.

(h) *Foreign Companies.*

See Part XII., Sect. 8, sub-sect. 2, post.

(i) *Illegal Companies.*

See Part XIII., Sect. 2, sub-sect. 2, post.

SUB-SECT. 2.—GROUNDS FOR WINDING UP.

A. Default in Filing Statutory Report or in Holding Statutory Meeting.

See 1908 Act, s. 129 (ii).

5325. Compulsory winding up order made—No opposition.]—*Re* KENT OUTCROP COAL CO., [1912] W. N. 26.

B. Non-Commencement or Suspension of Business.

See 1908 Act, s. 129 (iii).

5326. Non-commencement of business within year of incorporation—No business carried on for several years—Winding-up order with view to sale under direction of court.]—A. co. had been in existence for four years without carrying on any business; all its shares were registered as fully paid-up, & there were no creditors. An agreement having been entered into for the sale of its property, a shareholder presented a petition for winding up the co. with a view to the property being sold under the direction of the ct., other shareholders, however, opposing the petition on the ground that the sale could be better effected without the intervention of the ct., & that there being no creditors or contributories a winding-up order would be useless:—*Held*: (1) the co., being registered under 1862 Act, the liability to a winding-up order existed, independently of the question whether any advantage might result from

for the delay, admitting that they had hardly begun business, denied generally petitioners' averments. The question of winding up had never been considered at a meeting of shareholders :—*Held* : it would not be just & equitable that the co. should be wound up.—*SCOBIE v. ATLAS STEEL WORKS, LTD.* (1906), 8 F. (Ct. of Sess.) 1052.—*SCOT.*

n. ——— ——— ———.] — A shareholder applied for a co. to be wound up on the ground that it had not commenced operations within a year from its incorporation, & that it was just & equitable that it should be liquidated. It was proved that the co. was solvent, the delay was satisfactorily explained, the directors *bona fide* intended, & were able to carry out within the near future the purpose for which the co. had been formed, & the majority of the shareholders were opposed to the liquidation:—*Held*: this application should be refused.—**HULL v. TURF MINES, LTD.**, [1906] T. S. 68.—S. AF.

the effect of which was to dissolve the co. from that date, unless a winding-up order could be made to date back. The co. could only be restored to the register on an application to the ct. by the co. or one of its members:—*Held*: the petition should be granted & a liquidator was appointed.—**ALLIANCE HERITABLE SECURITY Co., LTD., PETITIONERS (1886), 14 R. (Ct. of Sess.) 34.—SCOT.**

PART III. SECT. 36, SUB-SECT. 2.—B.

*m. Non-commencement of business within year of incorporation—No intention to abandon business—Delay accounted for.]—*Within six months from incorporation of a steel foundry co. which had acquired a patent for making steel horse shoes three preference shareholders presented an order for winding up by the ct. under 1862 Act, s. 79 (5), on ground (*inter alia*) that hardly any horse shoes had been manufactured, & that the plant was insufficient. The co. gave reasons

Sect. 36.—Winding up by court: Sub-sect. 2, B. & C. (a) & (b).]

such an order; (2) as the property appeared to be of some value, & the shareholders were unable to agree as to the mode of sale, the sale could be more advantageously effected under the direction of the ct. Winding-up order granted.

(3) The ct. will not direct meetings of creditors or contributories to be called under 1862 Act, s. 91, except where the co. is a going concern.—*Re TUMACACORI MINING Co.* (1874), L. R. 17 Eq. 534; 43 L. J. Ch. 417; 22 W. R. 510.

Annotation:—As to (1) Re New Gas Generator Co. (1877), 4 Ch. D. 874.

5327. — Circulation by opposing shareholders of false reports as to condition of company.]—*Re SOUTH LUIPAARDS VLEI GOLD MINES, LTD.* (1897), 13 T. L. R. 504, C. A.

5328. — English company formed to protect name of foreign company—Nominal capital & no business.]—*Re CAEMENTIUM (PARENT) Co., LTD.*, [1908] W. N. 257.

5329. — No intention to abandon business—Delay accounted for.]—The ct. will not exercise the discretionary power conferred on it by 1862 Act, s. 79, of winding up a co. which has not commenced its business within a year from its incorporation, where the past delay has been sufficiently accounted for, & there is no evidence of any improbability of its commencing its business within a reasonable time.

The ct. is averse to suspending or adjourning a winding-up petition.

The discretion to be exercised by the ct. is, however, a judicial discretion, & therefore the exercise of this discretion by the judge of a ct. of first instance is subject to the review of the Ct. of Appeal.

It is always inadvisable, if it can be avoided, to order a winding-up petition to stand over, because, if a winding-up order should be ultimately made, it will date back to the date of the presentation of the petition, & the result may be to invalidate or imperil all acts done by the co. in the meantime.—*Re METROPOLITAN RAILWAY WAREHOUSING Co., LTD.* (1867), 36 L. J. Ch. 827; 17 L. T. 108; 15 W. R. 1121, L. J.

5330. — Preparations to commence business well forward.]—*Re PETERSBURGH & VIBORG GAS Co.*, [1874] W. N. 196.

5331. — Business commenced abroad but not in England—Shares dealt with so as to defeat rights of public.]—A co. having many of its shares transferable by delivery, but having also many "nominative shares," i.e., shares which are the same as the ordinary joint-stock shares in cos. in this country, applied for registration. The seven shareholders who made the application were all resident abroad, & the first directors nominated were foreigners, & only one of them appeared to have even a temporary residence in England. The

arts. of assocn. referred in several places to the English law, & especially to 1862 Act. There was an office of the co. in Westminster, but it was doubtful whether any general meeting was intended to be held in England:—*Held*: if the circumstances occurred which, by 1862 Act, s. 79, were such as, in the opinion of the ct., made it "just & equitable" that the co. should be wound up, the ct. might lawfully & properly issue the order for winding it up.

It is exactly one of those cases where it would be just & equitable that the co. should be wound up, because it is a co. not trading in this country, & because it is a co. dealing with its shares in a manner calculated to mislead the public & defeat the just rights of creditors (LORD CAIRNS).

There are no means by which such a co. can be got rid of, except by a winding up under the Act, & the ct. has jurisdiction to order it to be wound up under 1862 Act, s. 79.—*REUSS (PRINCESS) v. Bos* (1871), L. R. 5 H. L. 176; 40 L. J. Ch. 655; 24 L. T. 641, H. L.; *affg.* S. C. *sub nom.* *Re GENERAL CO. FOR THE PROMOTION OF LAND CREDIT* (1870), 5 Ch. App. 363, L. J.

Annotations:—Distd. Re Capital Fire Insce. Assocn. (1882), 21 Ch. D. 209. *Re Matthei v. Galitzin* (1874), 22 W. R. 700; *Re Tumacacori Mining Co.* (1874), L. R. 17 Eq. 534; *Re Nassau Phosphate Co.* (1876), 2 Ch. D. 610.

5332. — —.]—When a co. is incorporated to carry on business in the United Kingdom & in other parts of the world, & it has commenced to carry on its business in a foreign country, & there appears a *bona fide* intention to commence business in this country, the mere fact that it has not actually commenced in this country the objects for which it was incorporated within a year from its incorporation is not a sufficient ground for ordering the co. to be wound up under 1862 Act, s. 79 (2).—*Re CAPITAL FIRE INSURANCE ASSOCN.* (1882), 21 Ch. D. 209; 52 L. J. Ch. 20; 47 L. T. 123; 30 W. R. 941.

5333. Suspension of business for whole year—Intention to abandon business necessary—Or inability to carry it on.]—Although there may be a suspension of the business of a co. for the space of a whole year, the ct. will not make an order, under 1862 Act, s. 79 (2), to wind up the co., unless it is satisfied that there has been an intention on the part of the co. to abandon its business, or inability to carry it on; & upon the question of such intention the ct. will have regard to the opinion & wishes of the majority of the shareholders whose names are on the register.—*Re TOMLIN PATENT HORSE SHOE Co., LTD.* (1886), 55 L. T. 314.

5334. — —.]—A co. which was formed for building & using & letting assembly rooms bought the site & carried the building up to the level of the street by the end of 1875. Shortly afterwards trade in the neighbourhood became depressed, & the directors, with the sanction of the great body of the shareholders, resolved to proceed no further till times improved. In July, 1879, a shareholder

5333 i. Suspension of business for whole year—Intention to abandon business necessary—Or inability to carry it on.]—Where there has been a suspension of a co. incorporated under the Indian Cos. Act, the power of the ct. to wind up the co. will be exercised only when there is a fair indication that there is no intention to carry on the business; if the suspension is satisfactorily accounted for & appears to be due to temporary causes the order may be refused.—*MURALIDAR ROY v. BENGAL S.S. Co.* (1920), 1 L. R. 47 Calc. 654.—**IND.**

o. — All assets sold.]—A Co. was formed in 1895 with the following

objects (*inter alia*): to acquire a certain block of claims; to search for minerals; to purchase & acquire movable & immovable property; to acquire, purchase, sell, hold or deal in the shares of any other co. or cos. In Jan. 1902, the co. sold its assets to E. Co., receiving in return £97,000 in cash & 250,000 shares. The directors then invested the cash in further shares of E. Co. The largest portion of these shares were locked up, but some 47,000 were, together with shares belonging to the directors & other persons, made the subject of a pooling arrangement which continued till June, 1903, large profits accruing thereby. In the meanwhile no meet-

ings of directors or of shareholders of A. Co. were held:—*Held*: on the application of a shareholder the co. might be compulsorily liquidated under Law 1 of 1894, s. 2 (c), as it had suspended its operations for more than a year.—*EAST RAND DEEP, LTD. v. JOEL* (1903), T. S. 616.—**S. AF.**

p. —.]—A co., creditor of a H. Co., presented a petition for the winding up of the latter, stating that it had suspended business for more than one year & that it was unable to pay its debts:—*Held*: the petition should be granted.—*ALLIANCE HERITABLE SECURITY Co., LTD., PETITIONERS* 14 R. (Ct. of Sess.) 34.—**SCOT.**

presented a petition for winding up on the ground that the co. had suspended business for more than a year. It was not alleged that the co. could carry on the proposed business at a profit. Fully four-fifths in value of the shareholders opposed the winding up, which was supported by about one-eighth in value:—*Held*: a winding-up order ought not to be made.—*Re MIDDLESBOROUGH ASSEMBLY ROOMS Co.* (1880), 14 Ch. D. 104; 49 L. J. Ch. 413; 42 L. T. 609; 28 W. R. 868, C. A.

Annotation:—*Refd.* *Re Tomlin Patent Horse Shoe Co.* (1886), 55 L. T. 314.

C. Inability to pay Debts.

(a) In General.

See 1908 Act, s. 130.

5335. "Debts"—Meaning.—In 1862 Act, s. 80 (4), the word "debts" means debts absolutely due—that is, debts on which a debtor can go to the co. & demand payment.

It is just & equitable to wind up a co., within s. 80 (5), when it is shown that its assets are such & its existing liabilities are such as to make it reasonably certain that the existing & probable assets will be insufficient to meet its existing liabilities.

On a petition to wind up a co. the ct. will not order the manager to produce documents to prove its insolvency.—*Re EUROPEAN LIFE ASSURANCE SOCIETY* (1869), L. R. 9 Eq. 122; 39 L. J. Ch. 324; 18 W. R. 9.

Annotations:—*Folld.* *Re Bristol Joint Stock Bank* (1890), 44 Ch. D. 703. *Refd.* *Re National Funds Assco.* (1876), 24 W. R. 1066; *Re Horsham Industrial & Provident Soc.* (1894), 70 L. T. 801.

5336. Neglect "for three weeks" after demand to pay debt—Presentation of petition before expiration of three weeks.—To warrant a winding-up order against a co. on the ground of neglect for three weeks after demand to pay or secure a debt, the three weeks must have expired before presentation of the petition for winding up.

PART III. SECT. 36, SUB-SECT. 2.—C. (a).

q. Admitted insolvency—What amounts to—Declaration of officers—Effect of giving company time.—An insolvent co. had called its creditors together, & a deed was executed whereby the co. assigned certain property to trustees to answer the creditors' claims, & the creditors agreed to extend the time for payment:—*Held*: the creditors who had executed the deed were estopped from presenting a winding-up petition until the period of extension had expired. Declarations of insolvency made by the officers of a co. do not operate as an acknowledgment of insolvency by the co.; such acknowledgment must be a corporate one.—*Re ATLAS CANNING CO.* (1897), 5 B. C. R. 661.—CAN.

r. —————Petition to wind up a co.:—*Held*: there was no proper evidence of insolvency, & verbal admissions by officers were not sufficient evidence of insolvency.—*Re OUTLOOK HOTEL CO.* (1909), 12 W. L. R. 181.—CAN.

s. ———— Admission by counsel at bar.—To enable a co. to be wound up under Winding-up Act, it is not sufficient for the co. to appear by counsel & admit insolvency & consent to be wound up; the fact of such insolvency must be disclosed on the material on which the petition is based.—*Re GRUNDY STOVE CO.* (1901), 7 O. L. R. 252; 24 C. L. T. 132; 3 O. W. R. 175.—CAN.

jurisdiction to refuse winding-up order—Though creditors willing to continue under voluntary

assignment.]—Where the insolvency of the co. is admitted, the ct. has no discretion under Winding-up Act, R. S. C., c. 129, s. 9, to refuse to grant a winding-up order on the petition of a creditor who has a substantial interest in the estate, although the co. has made a voluntary assignment for the benefit of its creditors, & most of them are willing that the winding up should be under such assignment.—*Re WILLIAM LAMB MANUFACTURING CO. OF OTTAWA* (1900), 32 O. R. 243.—CAN.

a. Evidence of insolvency—What requisite—"Opinion" of accountant—Admission by manager.—*Re MANITOBA COMMISSION CO.* (1912), 21 W. L. R. 86; 2 W. W. R. 276; 2 D. L. R. 1.—CAN.

b. Effect of company agreeing to find security for petitioners' debt.—*POLLOCK v. GAETA PIONEER MINING CO., LTD.*, [1907] S. C. 182; 44 Sc. L. R. 144; 14 S. L. T. 526.—SCOT.

PART III. SECT. 36, SUB-SECT. 2.—C. (b).

c. Non-compliance with statutory demand of creditor—Service of demand—"Acknowledgment" of insolvency—Judgment unpaid.—Notice of an application for a winding-up order need not be served upon creditors, contributories or shareholders of the co. They should be served with notice of the application to appoint a liquidator.

Service by a creditor of a demand for payment, in order to establish insolvency, upon directors of the co. is not sufficient.

A co. does not "acknowledge" in-

Where upon a winding up of a petition there is a *bona fide* dispute as to the existence of the debt the non-payment whereof is made the foundation for the petition, the convenient & proper course is, not to try the question of debt upon the petition, but to adjourn the hearing of the petition under 1862 Act, s. 86, until the debt has been established at law.—*Re CATHOLIC PUBLISHING & BOOKSELLING CO., LTD.* (1864), 2 De G. J. & Sm. 116; 3 New Rep. 655; 33 L. J. Ch. 325; 10 L. T. 79; 10 Jur. N. S. 301; 12 W. R. 538; 46 E. R. 319, L. J.J.

Annotations:—*Appld.* *Re General Exchange Bank* (1866), 14 W. R. 826. *Distd.* *Re Ry. Finance Co.* (1866), 14 W. R. 785. *Folld.* *Re Imperial Silver Quarries Co.* (1868), 16 W. R. 1220. *Consd.* *London & Paris Banking Corp.* (1874), L. R. 19 Eq. 444; *Re London & Paris Banking Corp.* (1875), 23 W. R. 643. *Distd.* *Re Globe New Patent Iron & Steel Co.* (1875), L. R. 20 Eq. 337. *Refd.* *Re Caerphilly Colliery Co., Ex p. Dolling* (1875), 32 L. T. 15.

Opposition to petition—Discretion of court to refuse order.—See Sub-sect. 3, E. (g), *post*.

(b) What amounts to.

See 1908 Act, s. 130.

5337. Possible inability to meet contingent liabilities.—Sect. 5 (8), of 1848 (Winding-up) Act, must be interpreted as supplying tests *ejusdem generis* as those in the former clauses, & therefore, in considering whether or not the condition of a co. is such as to bring it within the scope of the Act, the ct. will not look into the affairs of the co. to ascertain, in the absence of any proof of insolvency, its possible incompetency to meet contingent liabilities.—*Re AGRICULTURIST CATTLE INSURANCE CO., Ex p. SPACKMAN* (1849), 1 Mac. & G. 170; 1 H. & Tw. 229; 18 L. J. Ch. 261; 13 L. T. O. S. 358; 13 Jur. 415; 41 E. R. 1228, L. C.

Annotations:—*Refd.* *Re Suburban Hotel Co.* (1867), 2 Ch. App. 737; *Murray v. Bush* (1873), L. R. 6 H. L. 37. *Mentd.* *Re Imperial Salt & Alkali Co.* (1850), 15 L. T. O. S. 180; *Re Royal Bank of Australia, Ex p. Latta* (1850), 3 De G. & Sm. 186; *Re Anglo-Greek Steam Co.* (1866),

solvency by allowing a judgment against it to remain unpaid:—*Held*: insolvency had arisen from the inability of a co. to meet its liabilities in full, & a conveyance of the main part of its assets to another co. without the consent of the creditors, & without satisfying their claims.—*Re QU'APPELLE VALLEY FARMING CO.* (1888), Man. L. R. 160.—CAN.

d. ———— Effect of return nulla bona to execution.—In supporting a petition for an order against a co. under Winding-up Act, 1886, c. 129, it is not sufficient to show that several demands of payment have been made by the creditor without success, unless a demand in writing has been served on the co. in the manner in which process may legally be served on it, under sect. 6 of the Act: nor can the co. be deemed to be insolvent within the Act, because an execution has been returned *nulla bona* by a county ct. bailiff. Sects. 5 & 6 of the Act are exclusive, & a petitioner for a winding-up order must strictly prove the existence of one or more of the circumstances there set forth, or his petition will be dismissed.—*Re RAPID CITY FARMERS' ELEVATOR CO.* (1894), 9 Man. L. R. 574.—CAN.

e. —————An order winding up a co. refused & the hearing of the petition enlarged, notwithstanding the fact that petitioner showed the co.'s technical insolvency by proving that it had permitted a writ of execution under which its goods were levied upon to remain unsatisfied for fifteen days after seizure, there being no suggestion of any unpaid capital & no

Sect. 36.—Winding up by court: Sub-sect. 2, C. (b) & D. (a).]

L. R. 2 Eq. 1; *Ex p. London & Colonial Co., Tooth's Case* (1868), 19 L. T. 599; *British & Foreign Ry. Plant Co. v. Ashbury Carriage & Iron Co., Smith v. Ashbury Carriage & Iron Co.* (1869), 20 L. T. 360; *Re Accidental Death Insee., Allin's Case* (1873), L. R. 16 Eq. 449; *Re Brinsmead*, [1897] 1 Ch. 406.

5338. Company insolvent—Difficulties alleged to be temporary—Hopes of more prosperous times.]—By a deed of settlement of a joint-stock co., exors. were not to be proprietors:—*Held*: nevertheless, they were contributories, & might maintain a petition to wind up.

Where a co. is insolvent, & has been getting worse, it is no answer to an application to wind it up to say, that the difficulties are temporary, & that there is hope of more prosperous times.—*Re NORWICH YARN CO.* (1850), 12 Beav. 366; 14 L. T. O. S. 315; 50 E. R. 1101.

5339. Suit pending against company.]—The mere pendency of a suit against a co. is not, *per se*, evidence of its insolvency.—*Re ANGLO-AUSTRALIAN & UNIVERSAL FAMILY LIFE ASSURANCE CO., Ex p. SMITH, Re BRITISH PROVIDENT LIFE & FIRE ASSURANCE SOCIETY, Ex p. COLLINS* (1860), 1 Drew. & Sm. 113; 3 L. T. 168; 8 W. R. 170; 62 E. R. 321.

5340. Debt disputed—Not established by creditor by action.]—Any creditor or contributory may take advantage of a demand requiring payment of his debt served by another creditor upon a co., & the neglect of the co. to pay, secure or compound for the same, within the time prescribed by 1856 Act, s. 68 (1), as a foundation for a petition to wind up the co. A co. will not be regarded as unable to pay its debts, simply because it has not paid a debt which it disputes & which the creditor has not established by action at law.—*Re ANGLE-SEA ISLAND COAL & COKE CO., LTD., Ex p. OWEN* (1861), 4 L. T. 684.

—*See, further*, Sub-sect. 3, B. (b) iv., *post*.

evidence of the assets of the co. other than its plant & stock in trade.—*Re EDMONTON BREWING & MALTING CO., LTD.*, [1918] 2 W. W. R. 350.—**CAN.**

f. — Four days' notice of petition—What is sufficient demand—Service of specially endorsed writ.]—Service of the specially endorsed writ of summons in an action against the co. to recover the amount of a creditor's claim is not a sufficient demand in writing, within Winding-up Act, c. 129, s. 6, to serve as the foundation for a petition by the creditor for a winding-up order. As sect. 8 of the Act requires petitioner to give four days' notice of his application, effect could not be given to a ground of which the co. had not that notice.—*Re ABBOTT-MITCHELL IRON & STEEL CO.* (1901), 2 O. L. R. 143; 21 C. L. T. 438.—**CAN.**

g. — Time.]—By Winding-up Act, R. S. C., c. 129, s. 8, "a creditor may, after four days' notice of the application to the co., apply by petition for a winding-up order":—*Held*: the petition was properly lodged when notice of the application was served on Nov. 4 for Nov. 8.—*Re ARNOLD CHEMICAL CO.* (1901), 2 O. L. R. 671; 21 C. L. T. 594.—**CAN.**

h. — Necessity for demand—To make out case of insolvency.]—Petition for the winding up of the co., under Dominion Winding-up Act, R. S. C., c. 129. The petition alleged that the co. were unable to pay their debts as they became due, within sect. 5 (a) of the Act, but gave no evidence of demand in writing & neglect by the co. to pay within sixty days thereafter, as required by sect. 6:

—*Held*: sect. 6 specifies the only way of proving a case under sect. 5 (a), & the petition must be dismissed, unless amended, & additional evidence offered.—*Re EWART CARRIAGE WORKS, LTD.* (1904), 8 O. L. R. 527; 24 C. L. T. 374; 4 O. W. R. 149.—**CAN.**

j. — When creditor holds security.]—It is not a good answer by a co. to a petition founded on non-compliance with a statutory demand that the apparent value of a security held by petitioner exceeds the debt, unless it can also be shown that it is truly a marketable security for the amount of the debt.—*COMMERCIAL BANK OF SCOTLAND, LTD. v. LANARK OIL CO., LTD.* (1886), 14 R. (Ct. of Sess.) 147; 24 Sc. L. R. 146.—**SCOT.**

k. — Effect of opposition by other creditors.]—The creditor of a co. having charged for payment of his debt, & the *induciae* having expired without payment having been made, he presented a petition for a winding-up order. The application was opposed by the creditors who held much the greater part of the debt due by the co., on the grounds that a liquidation would be injurious to the just interests of the creditors & that petitioner would get nothing by it:—*Held*: petitioner was entitled to the order craved, resps. having failed to show that there were no assets which could be made available in the liquidation for the payment of his debt.—*GARDNER & CO. v. LINK* (1894), 21 R. (Ct. of Sess.) 967; 31 Sc. L. R. 804.—**SCOT.**

l. — Not necessary to allege & prove failure—Or insolvency.]—Under Act 31 of 1909, s. 112 (6), the ct. may

5341. Non-compliance with statutory demand of creditor.]—The fact of a co. having neglected to pay a debt three weeks after demand made, under 1862 Act, ss. 79, 80, is not sufficient to entitle the creditor to a winding-up order, unless it be shown that the co. is also unable to pay its debts. Where a debt is disputed by a co., a petition by the creditor to wind it up will not be allowed to stand over, unless it is believed that when the debt has been established by a judgment, such judgment could not be enforced against the co.—*Re LONDON WHARFING & WAREHOUSING CO., LTD.* (1865), 35 Beav. 37; 55 E. R. 808.

Annotation:—Re Ld. Re London & Paris Banking Corpn. (1874), L. R. 19 Eq. 444.

5342. —.]—A creditor of a co. who cannot get paid without a winding up, is entitled *ex debito justitiæ* to an order for winding up.

Sect. 91 of 1862 Act, is applicable when a petition for winding up is before the ct., & does not necessarily presuppose a winding-up order. Where it appears that there is a reasonable chance of a creditor getting paid without a winding-up order sooner than if an order was made, the ct. may order a creditor's petition to stand over, although the creditor has, under sect. 80 of above Act, served on the co. a formal demand for payment, & not been paid within the three weeks.—*Re WESTERN OF CANADA OIL, LANDS & WORKS CO.* (1873), L. R. 17 Eq. 1; 43 L. J. Ch. 184; 22 W. R. 44.

Annotations:—Expld. Re St. Thomas Dock Co. (1876), 2 Ch. D. 116. *Consd. Re Chapel House Colliery Co.* (1883), 24 Ch. D. 259. *Follid. Re Globe Trust* (1915), 84 L. J. Ch. 903. *Re Ld. Re Krasnapolsky Restaurant & Winter Garden Co.* (1892), 61 L. J. Ch. 593; *Re Crigglestone Coal Co.*, [1906] 2 Ch. 327.

5343. —.]—The omission of a joint-stock co. to comply with a statutory notice requiring payment of a debt, served by a creditor under 1862 Act, s. 80 (1), is not "neglect" within that sub-sect., unless there is no reasonable cause for the omission. A creditor who has served such a notice is not entitled to a winding-up order if the

place a co. in liquidation on the ground that it is unable to pay its debts. Sect. 113 of the Act states that a co. shall be deemed unable to pay its debts if, *inter alia*, it has neglected for three weeks after demand to pay a debt of over £50:—*Held*: in a petition for the liquidation of a co., on the ground that it was unable to pay its debts, it was not necessary for a creditor to allege or prove a failure to pay a debt for three weeks after a demand, nor was it necessary to set out the grounds of the co.'s inability to pay its debts.—*ADAMS & CO. v. LYCEUM THEATRES, LTD.*, [1912] W. L. D. 176.—**S. AF.**

m. General allegation insufficient.]—In applying for the winding-up order it should be shown in the petition that the co. is insolvent, the general statement "that the co. is insolvent within 45 Vict. c. 23," not being sufficient.—*Re ELDERADO UNION STORE CO.* (1886), 6 R. & G. 514; 6 C. L. T. 542.—**CAN.**

n. Non-appearance of company to oppose—Admission of president.]—Petitioner, who was president of the co., as well as a large creditor, stated in his affidavit that from his knowledge of co.'s affairs he knew it to be unable to pay its debts in full, but gave no comparative statement of its assets & liabilities:—*Held*: not sufficient evidence of insolvency.

The non-appearance of a co. to oppose a petition for a winding-up order is not an acknowledgment of insolvency.—*Re LAKE WINNIPEG TRANSPORTATION, LUMBER & TRADING CO.* (1891), 7 Man. L. R. 255.—**CAN.**

o. Inability to meet liabilities—Means liabilities to creditors—Not

co. *bonâ fide* dispute the debt, & there is no evidence of the insolvency of the co., other than the non-compliance with the notice, & insolvency is denied on the part of the co. Where a creditor whose debt was disputed served such a notice, & at the expiration of three weeks filed a petition to wind up the co. under circumstances which, in the opinion of the ct., showed that the object of the petition was not to obtain a winding-up order, but to put pressure on the co.:—*Held*: petition must be dismissed with costs.—*Re LONDON & PARIS BANKING CORPN.* (1875), L. R. 19 Eq. 444; 23 W. R. 643.

Annotation:—*Apld.* *Cadiz Waterworks Co. v. Barnett* (1874), L. R. 19 Eq. 182.

5344. — **Where demand to be made—Company having no registered office.**—*Re BRITISH & FOREIGN GENERATING APPARATUS CO., LTD.*, No. 5766, *post*.

5345. — **Demand in excess of debt.**—*CARDIFF PRESERVED COAL & COKE CO., LTD. v. NORTON*, No. 6065, *post*.

5346. — **Demand by assignee of part of debt.**—The assignment of part of a debt operates in equity to transfer the part assigned, & the assignee, as a creditor in equity of the original debtor, can, when the debtor is a co., present a petition for winding up the co. under 1908 Act, s. 137. He cannot, however, serve an effective demand for payment under sect. 130 (1) of above Act in the absence of the person entitled to the remainder of the debt, but must otherwise establish the co.'s inability to pay its debts. The omission from s. 130 of 1908 Act, of the words "at law or in equity," which occurred in s. 80 of 1862 Act, has not changed the law by limiting the meaning of the word "creditor" in s. 137 of 1908 Act to creditor at law.—*Re STEEL WING CO.*, [1921] 1 Ch. 349; 124 L. T. 664; 65 Sol. Jo. 240; [1920] B. & C. R. 160; *sub nom. Re STEEL RING CO., LORD'S PETITION*, 90 L. J. Ch. 116.

5347. — **Walver of demand—What amounts to.**—*Re IMPERIAL HYDROPATHIC HOTEL CO., BLACKPOOL, LTD.*, No. 5425, *post*.

5348. **Information by company's solicitor that there are no assets—Judgment creditor—No execution.**—Where a judgment creditor is told by the solrs. of the co. indebted to him that they have no assets on which he can levy, that is such evidence of their inability to pay their debts as relieves him from the necessity of issuing execution in order to bring himself within 1862 Act, s. 80 (2).—

shareholders.—By Winding-up Act, R. S. C., c. 129, s. 5 (c), a co. is deemed insolvent "if it exhibits a statement showing its inability to meet its liabilities":—*Held*: the inability to meet liabilities means liabilities to creditors as distinguished from liabilities to shareholders. On the hearing of a petition based on such a statement the statement must be accepted as correct.—*Re BRITISH COLUMBIA UNITED CANNERS, LTD.* (1903), 9 B. C. R. 528; 23 C. L. T. 254.—**CAN.**

p. Decision to discontinue business—In face of liabilities.—The mere fact that a co. have liabilities, & have decided that in view of them they are unable to carry on their business, is not proof of insolvency.—*RED DEER MILL & ELEVATOR CO. v. HALL* (1908), 1 Alta. L. R. 530.—**CAN.**

q. Insufficient evidence of insolvency.—*Re NELSON FORD LUMBER CO.* (1908), 9 W. L. R. 438.—**CAN.**

r. Existence of voluntary winding up—Not conclusive.—A shareholder is not absolutely entitled to a winding-up order under Dominion Winding-up Act, R. S. C. 1906, c. 144, merely

because he shows that a voluntary winding up is proceeding; but, if it appears that the co. is really insolvent, or if "the ct. is of opinion that for any other reason it is just & equitable that the co. should be wound up," an order should be made under the Act.—*Re COLONIAL INVESTMENT CO. OF WINNIPEG* (1913), 25 W. L. R. 843.—**CAN.**

s. Unsatisfied judgment.—Where there was an unsatisfied judgment against a co., & a meeting of creditors called & an offer of composition made:—*Held*: there was sufficient evidence of insolvency.—*Re MANITOBA COMMISSION CO.* (1913), 22 W. L. R. 950.—**CAN.**

t. Failure of bank to pay sum placed on deposit—No reason alleged.—*STEPHEN v. SCOTTISH BANKING CO.* (1884), 21 Sc. L. R. 764.—**SCOT.**

5350 i. Dishonour by company of bill.—In a petition under 1908 Act for the winding up of a co. petitioner produced a dishonoured bill of exchange & correspondence which showed that though petitioner had repeatedly asked for payment of the bill, it had not been made. The bill had not been protested

Re FLAGSTAFF SILVER MINING CO. OF UTAH (1875), L. R. 20 Eq. 268; 45 L. J. Ch. 136; 23 W. R. 611.
Annotation:—*Apld.* *Re Yate Collieries & Limeworks Co.*, [1883] W. N. 171.

5349. — — — — —.]—*Re YATE COLLIERIES & LIMWORKS CO.*, [1883] W. N. 171.

5350. Dishonour by company of bill.—A co. bought goods, giving in part payment its acceptance which was dishonoured on presentation, & continued unpaid; & vendor presented a petition for winding up the co.:—*Held*: the dishonour of the bill was proof to the satisfaction of the ct. under 1862 Act, s. 80 (4), that the co. was unable to pay its debts, although petitioner had not served a demand requiring payment under (1) of above sect.—*Re GLOBE NEW PATENT IRON & STEEL CO.* (1875), L. R. 20 Eq. 337; 44 L. J. Ch. 580; 23 W. R. 823.

5351. Appointment of receiver for debenture-holders.—*Re LYRIC CLUB* (1892), 36 Sol. Jo. 801.

5352. Assets consisting solely of uncalled capital—Refusal of directors to make calls.—*Re WORLD INDUSTRIAL BANK, LTD.*, [1909] W. N. 148.

D. "Just and Equitable."

(a) In General.

See 1908 Act, s. 129 (vi).

5353. Whether confined to cases ejusdem generis with statutory grounds for winding up.—*Re ANGLO-GREEK STEAM CO.*, No. 5396, *post*.

5354. — — — — —.]—The power given to the ct. by 1862 Act, s. 79 (5), to wind up a limited co. whenever it is of opinion that it is "just and equitable" so to do, is confined to cases *ejusdem generis* with those mentioned in the previous sub-sects. of the above sect., that is, to what would amount to insolvency, or other incapability of continuing the business of the co. Where, then, the capital of the co. is not exhausted, & no new state of things has arisen as compared with what existed at the date of the formation of the co., the fact that a loss has been hitherto, or even is likely to be hereafter, sustained on the operations of the co., is not an adequate reason for the exercise of the jurisdiction under sect. 79 (5) & the ct. has not in time past suffered, & will not suffer, its winding-up process to be used as a means of evoking a judicial decision that the business will, or will not, continue to be an unprofitable mode of employing the capital of the co. *Semble*: in the event of the whole of the business which a co. was incorporated

nor had any charge for payment been given thereon. The ct. granted the order.—*GANDY, PETITIONER* (1912), 50 Sc. L. R. 3. **SCOT.**

PART III. SECT. 36, SUB-SECT. 2.— D. (a).

a. Even though company has no assets.—Even if a co. has no assets it may be "just & equitable" within Winding-up Act, R. S. B. C., c. 39, that it shall be wound up.—*Re DOMINION TRUST CO., LTD. & BOYCE & MACPHERSON*, [1918] 3 W. W. R. 751; 43 D. L. R. 538.—**CAN.**

b. Not merely at wish of majority of shareholders.—It is not right for the ct. to make an order for compulsory winding up merely on the ground that there was a majority of shareholders who voted at a meeting, directed to be held by the ct., in favour of winding up under supervision of the ct., or winding up by the ct., in the absence of any finding by the judges of any other ground for compulsory winding up & in the absence of any valid resolution for voluntary winding up.—*ORIENTAL NAVIGATION CO., LTD. v. BHUAARAM*

Sect. 36.—Winding up by court: Sub-sect. 2, D. (a)

to carry on, becoming actually impossible, the ct. would, whether under its statutory powers, or on general principles, wind up the co.

Where a person holds fully paid-up shares in a co., which have been allotted to him in payment for property sold by him to the co., in the absence of anything to impeach the contract by which he sold the property to the co., he is in just the same position as any shareholder who had really paid up the whole money on his shares, & any vote which he gives in respect of his shares must have full weight in ascertaining the majority or minority in the case.—*Re SUBURBAN HOTEL CO.* (1867), 2 Ch. App. 737; 36 L. J. Ch. 710; 17 L. T. 22; 15 W. R. 1096, L. J.J.

Annotations:—*Expld.* *Re Joint Stock Coal Co.* (1869), L. R. 8 Eq. 146. *Consd.* *Re Great Northern Copper Mining Co. of South Australia* (1869), 20 L. T. 264; *Re German Date Coffee Co.* (1882), 20 Ch. D. 169; *Re Bristol Joint Stock Bank* (1890), 44 Ch. D. 703; *Re Horsham Industrial & Provident Soc.* (1894), 70 L. T. 801; *Re Coolgardie Consolidated Gold Mines* (1897), 76 L. T. 269. *Refd.* *Re Langham Skating Rink Co.* (1877), 5 Ch. D. 669; *Re Diamond Fuel Co.* (1879), 13 Ch. D. 400; *Re Rica Gold Washing Co.* (1879), 27 W. R. 715; *Re Haven Gold Mining Co.* (1882), 20 Ch. D. 151.

5355. —.—.]—*Re SAILING SHIP KENTMERE CO.*, [1897] W. N. 58.

Annotation:—*Refd.* *Re Yenidje Tobacco Co.* (1916), 115 L. T. 530.

5356. —.—.]—*Re BRINSMEAD (THOMAS EDWARD) & SONS*, No. 5379, *post*.

5357. —.—.]—The fact that the substratum of a co. is gone is not a ground for a winding-up order on a shareholder's petition, if all that remains to be done is to distribute the surplus assets, that being a matter for the domestic forum. *Secus*: if the directors are proposing to carry on a business which is *ultra vires* the co.

Where the primary objects enumerated in the memorandum of assocn. of a co. were to acquire certain Jubilee undertakings, followed by general words authorising the co. "to carry on all kinds of promotion business," & the Jubilee objects had come to an end:—*Held*: such general words must be read as incidental to the Jubilee objects, & as the Jubilee objects had come to an end, & the directors were wrongfully proposing to engage in general promotion business, under those words, a shareholder was entitled to a winding-up order to prevent misapplication of the assets.

Semble: the old rule, that the words "just & equitable" in sect. 79 (5) of 1862 Act, are to be construed as relating only to matters *eiusdem generis* with the grounds for winding up mentioned in the earlier parts of the sect. has been con-

siderably relaxed.—*Re AMALGAMATED SYNDICATE*, [1897] 2 Ch. 600; 66 L. J. Ch. 783; 77 L. T. 431; 46 W. R. 75; 42 Sol. Jo. 13; 4 Mans. 308.

Jurisdiction of court to make order—Notwithstanding wishes of majority of shareholders.]—*See* No. 5526, *post*.

— **Assets covered by debentures.]—***See* Subsect. 3, E., *post*.

(b) Failure of Substratum.**i. In General.**

5358. When not ground for winding-up order—Only distribution of surplus assets among shareholders remaining to be done—Voluntary winding up sufficient.]—*Re AMALGAMATED SYNDICATE*, No. 5357, *ante*.

When petition ordered to stand over—Submission to shareholders of scheme for employment of company's capital.]—*See* No. 5676, *post*.

Company in voluntary liquidation.]—*See* No. 7185, *post*.

ii. Failure of Principal Object of Company.

5359. Impossibility of carrying out objects—Impossibility of working mine—Company having no title.]—Where the ct. is satisfied that the subject-matter of the business for which a co. was formed has substantially ceased to exist, it will make an order for winding up the co., although the large majority of the shareholders desire to continue to carry on the co. Where a co. was established for working a gold-mine in New Zealand & it turned out that the co. had no title to the mine, & had no prospect of obtaining possession of it, except as to a small portion for a few months, a winding-up order was made, although there were general words in the memorandum of assocn. enabling the co. to purchase & work other mines, & the large majority of the shareholders wished to continue the co. *Semble*: the mere fact of there having been fraud in the formation of the co., or fraudulent misrepresentation in the prospectus, would not in itself be sufficient to induce the ct. to make a winding-up order, because the majority of the shareholders would have power at a general meeting to waive the fraud & confirm the transactions affected by it.

A winding-up order will be made even though the co. is not insolvent.—*Re HAVEN GOLD MINING CO.* (1882), 20 Ch. D. 151; 51 L. J. Ch. 242; 46 L. T. 322; 30 W. R. 389, C. A.

Annotations:—*Apld.* *Re German Date Coffee Co.* (1882), 20 Ch. D. 169. *Consd.* *Re Bristol Joint Stock Bank* (1890), 44 Ch. D. 703. *Apld.* *Re Coolgardie Consolidated Gold Mines* (1897), 76 L. T. 269. *Refd.* *Re Bidwell*, [1893]

AGARWALLA (1921), I. L. R. 49 Calc. 399.—**IND.**

c. Scope of just & equitable clause.]—The power of the ct. to order the winding up of a co. as being just & equitable under 1908 Act, s. 129 (6), is not confined to cases the circumstances of which are *eiusdem generis* with those mentioned in the preceding sub-sects.—*Re NEWBRIDGE SANITARY STEAM LAUNDRY, LTD.*, [1917] 1 I. R. 67.—**IR.**

*to serve individual interests.]—*A joint-stock co. formed for a special purpose, after its object had been accomplished, but before its shares had been allotted, as agreed on with the vendor, had a large surplus of assets. The vendor held the majority of the shares already issued, but under the co.'s arts. he had only a single vote. With the view of preventing a further & as he alleged unequitable allotment of shares which the directors were about to make, the vendor, in respect

of his shares, which were fully paid-up, presented a petition to the ct. for a winding-up order under 1862 Act, s. 79 (6):—*Held*: as the object of the petition was to give petitioner an advantage in the trial of a question between himself & the remaining shareholders, & not to serve any co. purpose, the sub-sect. did not apply.—*ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPN., LTD. v. SCOTTISH BRUSH ELECTRIC LIGHT & POWER CO., LTD.* (1882), 9 R. (Ct. of Sess.) 972; 19 Sc. L. R. 732.—**SCOT.**

e. — Concurrency of majority of shareholders unnecessary.]—The "just & equitable" clause in Cos. Act, 1908, s. 177 (e), applies to something beyond the other grounds for winding up mentioned in the Act, & the ct. may make an order notwithstanding the fact that a large majority of the shareholders desires to carry on.—*Re UPPER HUTT TOWN HALL CO., LTD.*, [1920] N. Z. L. R. 125.—**N.Z.**

PART III. SECT. 36, SUB-SECT. 2.—D. (b) 1.

f. When not ground for winding up—Mere prospect of making losses.]—When the law requires the fulfilment of one or more of several conditions, before an order can be made, the part fulfilment of two or more of such conditions should not be taken as having cumulative effect justifying the order. If the ct. comes to the conclusion that the main original object, for which the co. was formed, has substantially failed or that the substratum of the co. is gone, it will consider that it would be just & equitable to wind up the co. & will make an order for its compulsory winding up. The ct. would not be justified in making a winding-up order merely on the ground that the co. has made losses & is likely to make further losses.—*Re SHAH STEAM NAVIGATION CO.* (1908), I. L. R. 32 Bom. 415.—**IND.**

1 Ch. 603; *Re General Phosphate Corpn.* (1893), 37 Sol. Jo. 683; *Re Brinsmead*, [1897] 1 Ch. 406; *Stephens v. Mysore Reefs (Kangundy) Mining Co.*, [1902] 1 Ch. 745.

5360. —.]—*Re SUBURBAN HOTEL Co.*, No. 5354, *ante*.

5361. — *Failure to obtain patent.*—The memorandum of assocn. of a co. stated that it was formed for working a German patent, & also for obtaining other patents for improvements & extensions of the said inventions or any modifications thereof or incident thereto; & to acquire or purchase any other inventions for similar purposes; & to acquire or lease buildings, either in connection with the above mentioned purposes, or otherwise for the purposes of the co. The intended German patent was never granted, but the co. purchased a Swedish patent, & also established works at Hamburg, where they made & sold coffee made from dates without a patent. Many of the shareholders withdrew from the co. on ascertaining that the German patent could not be obtained; but the large majority of those who remained desired to continue the co., which was in solvent circumstances. A petition having been presented by two shareholders:—*Held*: the substratum of the co. had failed, & it was impossible to carry out the objects for which it was formed; & therefore it was just & equitable that the co. should be wound up, although the petition was presented within a year from its incorporation.—*Re GERMAN DATE COFFEE CO.* (1882), 20 Ch. D. 169; 51 L. J. Ch. 564; 46 L. T. 327; 30 W. R. 717, C. A.

Annotations:—*Consd. Re Bristol Joint Stock Bank* (1890), 44 Ch. D. 703; *Pedlar v. Road Block Gold Mines of India*, [1905] 2 Ch. 427. *Refd. Re International Cable Co.* (1890), 2 Meg. 183; *Re Coolgardie Consolidated Gold Mines* (1897), 76 L. T. 269; *Stephens v. Mysore Reefs (Kangundy) Mining Co.*, [1902] 1 Ch. 745; *Butler v. Northern Territories Mines of Australia* (1906), 96 L. T. 41; *Re Anglo Cuban Oil, Bitumen & Asphalt Co.*, [1917] 1 Ch. 477; *Cotman v. Brougham*, [1918] A. C. 514.

5362. — *Failure of main object.—Whether company can continue under subsidiary powers in memorandum.*—(1) The memorandum of assocn. of a co., duly incorporated under 1862 Act, stated in the widest & most comprehensive terms the object of the co. to be (a) the acquisition by purchase or otherwise of patents & patent rights for improvements in the manufacture of gas, & “more especially the acquisition, by purchase or otherwise, of the letters patent granted to R. for improvements in the manufacture of such gas as aforesaid”; (b) to supply such gas in the United Kingdom or elsewhere; (c) to carry on the business of oil refiners; (d) to purchase & deal with mineral oils; & (e) to construct, acquire, & carry on any gasworks. The patent proved a total failure, but the co. obtained some contracts which they were carrying on by manufacturing common coal gas.

A shareholder presented a petition, alleging that the whole substratum of the co. had failed; that the business being carried on was not that contemplated by the memorandum, & such as it was, was being carried on at a loss; that the co. had in fact suspended its operations for a whole year; & that it was just & equitable to wind up the co. The co. filed no affidavit in opposition to the petition, treating it as demurrable on the memorandum:—*Held*: the business carried on by the co. was within the terms of its memorandum, & the petition was therefore demurrable, & must be dismissed.

(2) Under the General Rules of 1862, there is no distinction in respect to costs between a shareholder's petition & a creditor's petition. The rule that where a winding-up petition is dismissed, the creditors who appear & oppose it are entitled to one set of costs, applies to a petition of shareholders as well as to a petition of creditors.

(3) Notwithstanding Ord. 58, r. 5, the Ct. of Appeal will not open a decision, which it otherwise affirms, for the mere purpose of making a different order as to costs.—*Re NEW GAS CO.* (1877), 5 Ch. D. 703; 37 L. T. 111; 25 W. R. 643, C. A.

Annotations:—*As to (2) Follid. Re Diamond Fuel Co.*, [1878] W. N. 11. *Distd. Re The Investment Co.*, [1903] 2 Ch. 373.

5363. —.]—A co. was incorporated in Jan. 1888, & was formed with the object of purchasing & working the R. mine. There were further objects mentioned in the memorandum, namely, to purchase & otherwise acquire mines & other properties in the colony of New South Wales & elsewhere, & generally to carry on the business of milling & mining in all its branches. In Oct. 1889, the directors reported to the shareholders that the R. mine was a failure, & that the co. must either go into liquidation or employ the unexpended capital, amounting to £12,000, in other ways. At a meeting of shareholders, a resolution was passed requesting the directors to use their best endeavours to obtain some suitable property in which to invest the remaining assets of the co. A petition was presented by a shareholder holding 1,050 shares to wind up the co. The petition was opposed by the co., & a person holding 950 shares:—*Held*: the main object for which the co. was formed had failed, & therefore, though there were large subsidiary powers in the memorandum of assocn., there must be a winding-up order.—*Re RED ROCK GOLD MINING CO., LTD.* (1889), 61 L. T. 785; 1 Meg. 436.

Annotation:—*Consd. Coolgardie Consolidated Gold Mines* (1897), 76 L. T. 269.

5364. —.]—A co. issued a prospectus which stated that “An exclusive concession for twenty years from the Govt. of Portugal

PART III. SECT. 36, SUB-SECT. 2.—
D. (b) ii.

5362 i. *Impossibility of carrying out objects.—Failure of main object.—Whether company can continue under subsidiary powers in memorandum.—By purchasing another mine.*—A co. was formed with the object of purchasing, acquiring, & working a particular coal-bearing property, & also of purchasing, taking on lease or exchange, or otherwise acquiring other lands, etc., in N. S. W. or elsewhere; there were also other objects clearly ancillary. The particular colliery having been worked out, the directors proposed to purchase further lands in New South Wales, believed to be coal bearing, in another district, some 35 miles from the old mine, & this proposal was approved by a majority of the shareholders. Upon a petition of

some of the minority to wind up the co.:—*Held*: the proposed purchase was *intra vires* the co., & the substratum of the co. had not failed.—*Re WICKHAM & BULLOCK ISLAND COAL CO.* (1905), 5 S. R. N. S. W. 365.—**AUS.**

5362 ii. —.]—Where the objects of a co. as set out in the memorandum of assocn. can be fulfilled in other ways, & by the employment of other agencies, it cannot be rightly held that the substratum was gone, & the ct. will not grant an application for winding up.—*MURALI-DAR ROY v. BENGAL S.S. CO.* (1920), 1 L. R. 47 Calc. 654.—**IND.**

g. —.]—*One ship company.—Total loss.*—On Dec. 1, 1893, a shareholder, holding ten out of 215 shares of a limited co., incorporated to own & work a particular ship, presented a

petition to have the co. wound up by the ct., on the ground that the ship had become a total loss off the coast of North America on Nov. 25, 1893. Answers were lodged by the co., in which they stated that no good reason had been given or existed for a winding up, & that it would not be just that the co. should be wound up by the ct. It appeared that notice of abandonment had not yet been formally accepted by the underwriters who had insured the vessel, & that no meeting of shareholders had been called to consider the question of a voluntary winding up. The ct. refused the petition.—*Cox v. GOSFORD SHIP CO.* (1894), 21 R. (Ct. of Sess.) 334; 31 Sc. L. R. 257; 1 S. L. T. 431.—**SCOT.**

h. —.]—A majority in number & value of the shareholders of a co. formed to

Sect. 36.—Winding up by court: Sub-sect. 2, D. (b) ii. & (c).]

has been secured for landing & working submarine telegraph cables at the Azores. . . . The present issue of capital will be applied in the first place in laying the cable between Portugal & the Azores. . . .” The objects of the company as stated in the memorandum of assocn. were (*inter alia*) (a) “To establish, maintain, & work lines of telegraphic communication between the Azores, etc.” (p) “To establish or promote . . . any other co. . . .” (q) “To take or otherwise acquire or hold shares in any co. . . .” The capital subscribed was not sufficient to enable the Azores cable referred to in the prospectus to be laid. The co. then promoted another co. for laying a different cable between Halifax & Bermuda, & this cable was about to be laid. The promoting co. held a large number of shares in the new co., from which it would derive an income as soon as the cable was laid. Meanwhile its right to the concession for laying the Azores cable had expired, but whether it had become totally void, or only voidable, was not clear. There was some slight evidence of negotiations for a renewal of the concession. On petition for a winding-up order presented by a shareholder, whose shares were not paid-up in full, & which was supported by a minority of shareholders:—*Held*: the substratum of the co. was the working of the concession referred to in the prospectus as having been acquired from the Portuguese Govt., & the other objects in the memorandum were merely ancillary to this one; the petition must stand over, & the co. must undertake not to enforce payment beforehand of the arrears due on shares.—*Re INTERNATIONAL CABLE CO.* (1890), 2 Meg. 183.

5365. ———.]—Where a co. puts in the forefront of its memorandum of assocn. a special object, as to which definite information can be obtained by intending subscribers for shares, & the subsequent clauses of the memorandum contain a list of general objects, the reasonable mode of construing the memorandum in ordinary cases is to say that the object first stated is the paramount object of the co., & that the other objects are ancillary & subservient to that object. Where, therefore, the paramount object of a co. was to work gold mines in the colony of West Australia, the promoters of the co. having in view one particular mine near Coolgardie in that colony, although the memorandum of assocn. specified as one of the objects of the co. to acquire & work mines “in West Australia or elsewhere,” the acquiring & working a mine in the colony of Victoria was held not to be a carrying out of the objects of the co.; & the real object for which the co. was formed having therefore failed, & its substratum having gone, an order for winding up the co. was made.—*Re COOLGARDIE CONSOLIDATED GOLD MINES, LTD.* (1897), 76 L. T. 269; 13 T. L. R. 301; 41 Sol. Jo. 365, C. A.

Annotations:—Distd. Re McDonald Gold Mines, Ex p. Duncan (1898), 14 T. L. R. 204. *Refd. Re Anglo Cuban Oil, Bitumen & Asphalt Co.* (1917), 61 Sol. Jo. 282.

purchase, charter, hire, or otherwise acquire steam or other ships, & to work, hire, or to employ them, & to carry on the business of shipowners, which had lost the only vessel it possessed, & whose only remaining asset was a balance of £363 in the bank, presented a petition to have the co. wound up by the ct. A minority of the shareholders desired to carry on the business as charterers, & a resolution to wind up voluntarily failed to obtain the necessary three-fourths

majority:—*Held*: in the circumstances it was just & equitable that the co. should be wound up.—*Pirie v. Stewart* (1904), 6 F. (Ct. of Sess.) 847; 41 Sc. L. R. 685; 12 S. L. T. 179.—**SCOT.**

k. ———. *Mines found to contain no minerals.*]—Where a co. had been formed for the acquisition of mining rights over land subsequently declared to be devoid of metals, a creditor applied for a winding-up order on the ground that the objects

5366. ———.]—*Re AMALGAMATED SYNDICATE, No. 5357, ante.*

5367. ———.]—*Petition not presented in good faith.*]—*Re M'DONALD GOLD MINES, LTD., Ex p. DUNCAN* (1898), 14 T. L. R. 204, C. A.

5368. ———.]—*Re KRONAND METAL CO., LTD.* (1899), 43 Sol. Jo. 368.

5369. ———.]—*Company carrying on ultra vires business.*]—*Re PALACE RESTAURANTS, LTD.* (1909), 127 L. T. Jo. 430.

5370. ———.]—(1) The name of a co. is important in construing the objects defined in the memorandum of assocn. (2) A statement in the memorandum of assocn. of a co. that its objects were to carry on any business that the co. might think profitable would not be such statement of objects as is required by the 1862 Act. (3) Where a co. has ceased to carry on its proper business, but carries on a business *ultra vires*, a shareholder is not confined to a remedy by injunction, but is entitled to have the co. wound up. A co. was registered under the name of the Mid-Northamptonshire Bank, Ltd. In addition to wide & general objects, the memorandum of assocn. stated particularly numerous objects of diverse character in fifteen paragraphs. The first three paragraphs related to banking, discounting, & money-lending, & borrowing respectively; others referred to purchasing & developing land, investing & dealing in shares & securities, & promoting cos. The co. commenced business as a country bank in Northamptonshire, with an office in London. After a short time its name was changed to the Crown Bank, Ltd.; it gave up its country offices, ceased to do banking business, & carried on in London, in addition to some land speculation & business connected with promoting a foreign co., the business of investing in shares & securities. On a petition by a shareholder to wind up the co. on the ground that its main objects had failed:—*Held*: the co. were not carrying on a business authorised by the memorandum of assocn., & it was just & equitable that the co. should be wound up.

(4) Before the order was drawn up an application was made by the shareholders who had opposed the petition, that the order should be varied by dismissing the petition, the appcts. having agreed to take a transfer of the shares of the petitioner & all shareholders supporting the petition:—*Held*: the order not having been drawn up the judge had jurisdiction to vary it.—*Re CROWN BANK* (1890), 44 Ch. D 634; 59 L. J. Ch. 739; 62 L. T. 823; 38 W. R. 666.

Annotations:—Apld. Re International Cable Co. (1890), 2 Meg. 183. *Refd. Re Amalgamated Syndicate*, [1897] 2 Ch. 600.

5371. ———.]—*Re FROMM'S EXTRACT CO., LTD.* (1901), 17 T. L. R. 302, C. A.

5372. ———.]—*Impossibility of performing contract which company formed to carry out.*]—The ct. made an order for winding up a co. on the grounds that it had no reasonable probability of carrying out a contract which it was formed to carry out & the substratum of the co. was gone, & that in the

for which the co. was formed could not be attained, & that its existence would be purposeless:—*Held*: the substratum of the co. having fallen away, it was just & equitable that it should be wound up.—*Re RHENOSTERKOP COPPER CO., STERN'S PETITION* (1908), 18 C. T. R. 931.—**S. AF.**

l. ———.]—*Although memorandum contains subsidiary objects.*]—In a petition by contributories for the winding up of a co. it appeared that the co. had been formed with the main

circumstances it was just & equitable that it should be wound up as part of the money of the co., which had considerable capital, had been misapplied & the co. was so constituted that it was deprived of its usual remedies.—*Re BLÉRIOT MANUFACTURING AIR CRAFT CO., LTD.* (1916), 32 T. L. R. 253; [1917] H. B. R. 279.

5373. Company established for several alternative purposes—Failure or abandonment of one only—Other purposes carried on.]—It is not an abandonment of the objects of a co. if, where, being established for three or four purposes, it abandons one & carries on the others; provided such abandonment does not alter the fundamental principle of the co.—*Re NORWEGIAN TITANIC IRON CO., LTD.* (1865), 35 Beav. 223; 55 E. R. 881.

5374. ——— Shareholders & execution creditors desirous of carrying on other purposes.]—*Re PATENT BREAD MACHINERY CO., LTD.*, No. 5405, *post*.

(c) *Impossibility of Carrying on Business at Profit.*

5375. No prospect of profit.]—*Re CHELTENHAM HOTEL CO.* (1850), 16 L. T. O. S. 259.

5376. ——— Shareholder's petition before whole of capital called up.]—A limited co., whose business is being carried on at a loss without any reasonable prospect of ultimate success, may be wound up, on the petition of a shareholder, before the whole of the capital has been called up.—*Re FACTAGE PARISIEN, LTD.* (1864), 5 New Rep. 178; 34 L. J. Ch. 140; 11 L. T. 500; 13 W. R. 214; *reversd.* on other grounds (1865), 5 New Rep. 227, L. C.

*Annotations:—***Consd.** *Re Suburban Hotel Co.* (1867), 2 Ch. App. 737. **Mentd.** *Re General Rolling Stock Co.* (1865), 13 W. R. 423; *Re Bwlch y Plwm Co.* (1867), 17 L. T. 235; *Re General Co. for Promotion of Land Credit* (1869), 5 Ch. App. 367, n.

5377. ———.]—A co. had for some time ceased to carry on business, though it was not clearly made out that it had so ceased for a year. Its business had been carried on at a constant loss; all its capital had been expended; its property had been sold at a ruinous sacrifice with the exception of some patents which were nearly worthless, & it had nothing left but these patents & a sum of money far from sufficient for payment of its debts. A shareholder, who had paid up his shares with the exception of the last call, presented a petition for winding up, alleging a case of misconduct against some of the directors, by reason of which, if established, they would be liable to pay considerable sums to the co., which would probably leave a surplus for division among the shareholders. The objection was taken that petitioner, being in default for payment of calls, could not petition. He offered to pay the amount

into ct., & Malins, V.-C., allowed him to do so, & made a winding-up order. A liquidator was then appointed, after which the co. appealed. One of the directors had in the meantime been ordered to pay a considerable sum under 1862 Act, s. 165:—*Held*: (1) although a liquidator had been appointed, the co. was not precluded from appealing; (2) the fact that a shareholder is in arrear with calls is not an absolute bar to his petitioning for a winding-up order; (3) as it was established that the business of the co. could not possibly be resuscitated, it was just & equitable that the co. should be wound up; & as a reasonable probability was shown that sums could be recovered from the directors to such an amount as would leave a surplus for division among the shareholders, an order for winding up had been properly made on the petition of a fully paid-up shareholder.

(4) Where a co. alone appeals from a winding-up order without joining any one personally responsible for costs, an application for security for costs will be entertained.—*Re DIAMOND FUEL CO.* (1879), 13 Ch. D. 400; 49 L. J. Ch. 301; 41 L. T. 573; 28 W. R. 309, C. A.

*Annotations:—***As to (2) Consd.** *Re Crystal Reef Gold Mining Co.*, [1892] 1 Ch. 408. **As to (3) Refd.** *Re Brinsmead*, [1897] 1 Ch. 406. **As to (4) Foll.** *Re Photographic Artists' Co-op. Assoc.* (1883), 23 Ch. D. 370. **Refd.** *Re Consolidated South Rand Mines Deep*, [1909] W. N. 66.

5378. ——— Company commercially insolvent.]—*Re GENERAL PHOSPHATE CORPN., LTD.* (1893), 37 Sol. Jo. 683.

*Annotation:—***Refd.** *Re Brinsmead*, [1897] 1 Ch. 45.

5379. Company hopelessly embarrassed.]—A co. fraudulent in its inception, carrying on a small business at a loss, having no capital of its own, all the subscribed capital having found its way into the hands of the real, though not the ostensible, promoters & hopelessly embarrassed by numerous actions brought by shareholders on the ground of fraud, was ordered by the Ct. of Appeal to be wound up, the ct. holding that the case was one in which it was “just & equitable,” within 1862 Act, s. 79 (5), to make the order, that being the most effective means for recovering for the shareholders the money dishonestly retained by the real promoters.

Although the words “just & equitable” have had a narrow construction put upon them, they have never been construed so narrowly as to exclude such a case as this (SMITH, L.J.).—*Re BRINSMEAD (THOMAS EDWARD) & SONS*, [1897] 1 Ch. 406; 66 L. J. Ch. 290; 76 L. T. 100; 13 T. L. R. 232; 41 Sol. Jo. 12; 4 Mans. 70, C. A.

*Annotation:—***Refd.** *Re International Securities Corp.* (1908), 99 L. T. 581.

5380. No profit for several years—Business suspended for several months.]—*Re GREAT NORTHERN*

object of acquiring a lease of a hall at S. for bioscope purposes, although the memorandum of assocn. of the co. contained provisions for other subsidiary objects. The lease of the hall having expired & the bioscope machine & goods of the co. having been sold, there appeared little likelihood of the co. being able to continue its operations:—*Held*: the substratum of the co. having been destroyed, it was just & equitable that the co. should be wound up.—*Re MARKET HALL BIOSCOPE SYNDICATE, LTD.* (1912), S. R. 183.—S. AF.

m. ———.]—In winding-up proceedings instituted by a shareholder it appeared that the substratum was gone & that the co. was unable to carry on business:—*Held*: it was just & equitable that the co. should be wound up.—*Re FLORIDA MINING CO., LTD.* (1902), 9 B. C. R. 108; 22 C. L. T. 273.—CAN.

PART III. SECT. 36, SUB-SECT. 2.— D. (c).

n. No prospect of profit — Business at standstill—Majority of assets sold.]—A year before the filing of a petition, the co. sold most of its assets to another co., which had since gone into liquidation, & was indebted to the vendor co. Outside of moneys due to it, the co.'s assets were of small value. No active business was being carried on & there was no apparent prospect of a resuscitation of the business:—*Held*: it was the duty of the ct. in the proper exercise of its discretion, to make an order for the winding up of the co. under sect. 11 (d) of Winding-up Act, R. S. C. 1906, c. 144, giving the ct. power to do so when the capital is impaired, & sect. 11 (e), giving the ct. power to do so when of opinion that it is just & equitable that the co. should be wound up.—*Re HAMILTON*

IDEAL MANUFACTURING CO. (1915), 34 O. L. R. 66.—CAN.

o. ——— High cost of manufacture—Insufficiency of plant.]—Within about six months from the incorporation of a steel foundry co. which had acquired a patent for making steel horseshoes, three preference shareholders presented a petition for an order for winding up by the ct. under 1862 Act, s. 79 (5). Petitioners averred that the patent was worthless; that hardly any horseshoes had been manufactured, that the actual cost of making the horseshoes largely exceeded the estimated cost set forth in the prospectus of the co., that the plant was insufficient, that the business could only be carried on at a loss, & that all the subscribed capital of the co. had been spent. The co. lodged answers in which they admitted that practically they had not begun business, gave reasons for the delay, & denied

Sect. 36.—Winding up by court: Sub-sect. 2, D. (c), (d) & (e).]

COPPER MINING CO. OF SOUTH AUSTRALIA, LTD., *Ex p.* GREAT NORTHERN COPPER MINING CO. OF SOUTH AUSTRALIA, LTD., No. 5525, *post*.

5381. — Portion of capital incapable of being called up except for purpose of winding up.]—*Re* BRISTOL JOINT STOCK BANK, No. 5536, *post*.

—.]—*See, also*, No. 5395, *post*.

5382. Company solvent—Although continuous loss suffered from commencement.]—A limited co., established for trading purposes, had suffered continuous loss from its commencement, but was nevertheless solvent & “able to meet its engagements”:—*Held*: under these circumstances, the ct. could not order a compulsory winding up.

Where no case is made for a compulsory winding up, the ct. will not order a special meeting of shareholders to be called to consider the expediency of winding up voluntarily.—*Re* JOINT STOCK COAL CO. (1869), L. R. 8 Eq. 146; 20 L. T. 966; *sub nom.* *Re* JOINT-STOCK COAL CO., *Re* GREEN, *Re* COPELAND, 38 L. J. Ch. 429; 17 W. R. 585.

Annotation:—Folld. *Re* London Suburban Bank (1871), 19 W. R. 600.

5383. —.]—*Re* NEW ZEALAND QUARTZ CRUSHING CO., [1873] W. N. 174.

(d) Deadlock.

5384. General rule.]—*Re* SAILING SHIP KENTMERE CO., [1897] W. N. 58.

5385. —.]—*Re* FROMM'S EXTRACT CO., LTD. (1901), 17 T. L. R. 302, C. A.

5386. Allegation that no directors existed & that no meetings could be called—Subscribers to memorandum directors.]—*Re* BRICK & STONE CO., [1878] W. N. 140.

5387. Deadlock only temporary—Deadlock between two sole directors—Solution possible by appointing third director under articles.]—*Re* FURRIERS' ALLIANCE, LTD. (1906), 51 Sol. Jo. 172.

Annotation:—Distd. *Re* Yenidje Tobacco Co. (1916), 115 L. T. 530.

generally the petitioners' averments. The question of winding up had never been considered at a meeting of the shareholders:—*Held*: it would not be just & equitable that the co. should be wound up.—*SCOBIE v. ATLAS STEEL WORKS, LTD.* (1906), 8 F. (Ct. of Sess.) 1052; 43 Sc. L. R. 739; 14 S. L. T. 212.—*SCOT*.

p. — Trading loss not per se sufficient ground—Important ingredient—State of company's assets considered.]—The fact that a co. is carrying on business at a loss is not sufficient to justify its being wound up by the ct., although it is an important ingredient in the decision of the question whether circumstances exist which make it just & equitable that the winding up should take place.

A newspaper co. with £24,000 subscribed out of a nominal capital of £30,000, in the first eight months of its working incurred a loss of £6,000, but had a considerable amount of cash in hand with which to continue its business, & additional shares were being taken up. One shareholder, possessed of 100 shares (apparently all the other shareholders objecting) applied to have the co. placed under liquidation:—*Held*: there had not been such just & equitable grounds disclosed as would justify the ct. in ordering the co. to be wound up.—*FAIRBRIDGE v. SOUTH AFRICAN NEWSPAPER CO.* (1900), 17 S. C. 32; 10 C. T. R. 10.—*S. AF.*

No profit for several years—Apprehension for future—No ground for

*winding up.]—*All that was shown by appets., who prayed for a winding-up order, was that the co. had not of late years made any profits, & that appets. themselves were apprehensive that, if the co. continued to work, loss instead of gain would result. On the other hand, it was not apparent either that the substratum of the co. was gone or that the co. was conceived & brought forth in fraud:—*Held*: appets. had failed to make out a case that it was just & equitable that the co. should be wound up.—*Re* MAHAMANDAL SHASHITRA PRAKASHAK SAMITY, LTD. BENARES, (1917) I. L. R. 39 All. 334.—*IND.*

PART III. SECT. 36, SUB-SECT. 2.— D. (d).

5384 i. General rule.]—A winding-up order may be made where there is a complete deadlock as to the management of the co.'s affairs.—*Re* TOWN TOPICS CO. (1911), 17 W. L. R. 646.—*CAN.*

r. — Clear case necessary.]—Where there are ample indications that it is possible to carry on the business of the co., it is not possible to hold that there is a complete deadlock, which must be got rid of by compulsory winding up. As between shareholders a domestic tribunal has been created, & unless a clear case is made out, the ct. will be slow to withdraw from it the decision, whether the co.'s business shall or shall not be carried on.—*MURALIDAR ROY v. BEN-*

5388. Private company—Deadlock & litigation between two sole shareholders & directors—Principle of partnership applied.]—In 1914, W. & R. agreed to amalgamate their businesses, & in order to do so formed a private limited co. in which they were the only shareholders & directors. The constitution of the co. was such that under the arts. of assocn. W. & R. had equal voting powers, one director was to form a quorum, & if any dispute or difference should arise consequent whereon inability to pass a directors' resolution should result, the matter in dispute should be referred to arbn., the award to be entered in the minute-book as a resolution duly passed by the board. The co.'s business was successfully carried on until June, 1915, when differences arose between the parties. One of such differences was referred to arbn., which resulted in an award to which R. declined to give effect. He brought an action against W., & the parties became so hostile that neither of them would speak to the other. In spite of this the co. continued to transact business & large profits were made. Under these circumstances W. presented a petition alleging that a complete deadlock had arisen, that the substratum of the co. was gone, & that it was “just & equitable” within 1908 Act, s. 129, that a winding-up order should be made:—*Held*: if this were a case of partnership there would clearly be grounds for a dissolution, & the same principle ought to be applied where there was in substance a partnership in the guise of a private co. The position amounted to a complete deadlock, & it was “just & equitable” that the co. should be wound up.—*Re* YENIDJE TOBACCO CO., LTD., [1916] 2 Ch. 426; 86 L. J. Ch. 1; 115 L. T. 530; 32 T. L. R. 709; 60 Sol. Jo. 707; [1916] II. B. R. 140, C. A.

5389. — Deadlock & litigation between three sole shareholders—Petition by one opposed by other two shareholders.]—A private co. consisted of three shareholders only; they were the original allottees & held all the issued shares, which were fully-paid, in equal proportions. Of these three

GAL S.S. CO. (1920), I. L. R. 47 Calc. 651.—*IND.*

s. Private company—Incompatibility of two sole members.]—The co. was registered as a private co. with a capital of 6,000 shares of £1 each, petitioner holding 1,500 shares & R. the remainder. The evidence was that it was hopeless to expect the two members to work together, & neither of them could carry on the business alone:—*Held*: there being a complete deadlock in the management of the co.'s affairs, the co. should be wound up by the ct.—*Re* MATARA, [1921] N. Z. L. R. 807.—*N.Z.*

t. — Quarrel between two brothers—Practically sole shareholders.]—Two brothers, H. & D., who had carried on a partnership for working quarries which they held on lease entered into an agreement to make over the working of the quarries to a private limited co., the shares in which were to be issued one half to each brother or their nominees, with a small holding to J., a third brother, “to enable him to hold the balance for voting.” The co. was formed & registered in 1899, H., D. & J. under arts. of assocn. being appointed directors of the co. & H. being appointed the managing director. Quarrels between the brothers having ensued at a meeting of the co. it was moved & carried by a majority, the majority consisting of H. & four members of the co. whose interest was merely nominal, & the minority consisting of D. & J., that H. should be

one was resident in America & the two others were the present directors of the co. Owing to dissensions between them the affairs of the co. were now at a deadlock, & there were pending actions between the shareholders & the co. The arts. of assocn. provided that a shareholder desirous of withdrawing from the co. should offer his shares to the others, & in the event of neither of them purchasing the same the shareholder desirous of withdrawing should be entitled to have the co. wound up. One of the directors offered his shares pursuant to this clause to the two other shareholders respectively, but neither of them purchased them. He now presented this petition for the compulsory winding up of the co. The petition was opposed by the two other shareholders. The co. had sufficient assets to realise a considerable sum for the shareholders in a winding up:—*Held*: it was just & equitable that the co. should be wound up by the ct.—*Re AMERICAN PIONEER LEATHER CO.*, [1918] 1 Ch. 556; 87 L. J. Ch. 493; 118 L. T. 695; [1918–19] B. & C. R. 40.

(c) *Fraud in Inception of Company and Misconduct of Directors.*

5390. Fraud in inception of company—Fraudulent prospectus.]—*Re HAVEN GOLD MINING CO.*, No. 5359, *ante*.

5391. — Company defrauded by vendors.]—In Nov. 1886, a co. was incorporated for the purpose of acquiring certain gold mining property. It subsequently became doubtful whether the property purported to be sold to the co. did in fact exist, & it seemed that the co. had been defrauded. A petition was accordingly presented by a shareholder for the winding up of the co. Petitioner's case was, that the objects of the co. were impossible, inasmuch as the property alleged to have been acquired did not really exist; that, notwithstanding the generality of the objects of the co., the principal one was the acquisition of this particular property, & the working of gold therefrom; that the substratum of the co. had gone; & that petitioner was therefore entitled to an order, notwithstanding that the great majority of the shareholders desired to continue the co.:—*Held*: (1) because a co. had been defrauded it was not a ground for saying that it ought to be wound up, inasmuch as the co. might, if it preferred, make the best of things & go on; (2) when

the sole director. In a petition presented by D. & J. for the winding up of the co.:—*Held*: it was just & equitable under 1862 Act, s. 79 (5), that the co. be wound up.—*SYMINGTON v. SYMINGTON'S QUARRIES, LTD.* (1906), 8 F. (Ct. of Sess.) 121; 43 Sc. L. R. 157; 13 S. L. T. 509.—*SCOT*.

a. Deadlock between directors — Three resident in England & three in Sydney—Attempt by London directors to assume sole control.]—A co. was registered in England but carried on its business chiefly in Sydney. A considerable number of the shareholders resided in each country. The arts. of assocn. provided for the management of the co. by six directors, & for the holding of meetings at the registered offices in London & for notices of such meetings to be given to no shareholder who had not an address in the United Kingdom. Three of the six directors resided in Sydney & the other three in London. Differences having arisen between the two sets of directors, the London directors attempted to take upon themselves the whole management, & sent out a manager with a power of attorney to assume the conduct of the business to the exclusion

of the Sydney directors. Upon the petition of a Sydney shareholder:—*Held*: it was just & equitable to wind up the co. by the ct.—*Re MASON BROTHERS, LTD.* (1891), 12 N. S. W. Eq. 183.—*AUS*.

b. Directors below minimum — No quorum attending general meetings—Property falling into disrepair.]—Where it was shown that the number of directors of a co. had fallen below the minimum required to form quorum, that no new directors had been appointed & that on several occasions general meetings of shareholders had been convened but in no case did a quorum of shareholders attend, that the property of the co. was falling into disrepair & that a deadlock had been arrived at in connection with the management of the co.'s business:—*Held*: it was just & equitable that a winding-up order should be made.—*Re OUTRAM SOCIETIES HALL CO., LTD.* (1914), 33 N. Z. L. R. 1249.—*N.Z.*

PART III. SECT. 36, SUB-SECT. 2.—D. (e).

c. Fraud in inception of company — Directors not independent & dis-

in the present case the property purchased by the co. was ascertained, there would be a substratum, & the ct. ought not to interfere with the discretion of the co.—*Re NYLSTROOM CO., LTD.* (1889), 60 L. T. 477; 5 T. L. R. 318; 1 Meg. 169.

5392. — Power of shareholders to waive fraud — Effect of 1890 Act.]—*Re GENERAL PHOSPHATE CORPN.* (1893), 37 Sol. Jo. 683.

Annotation:—*Refd. Re Brimsmead*, [1897] 1 Ch. 45.

— **Before 1890 Act.]—***See* Nos. 5359, 5391, *ante*.

5393. — Whole of subscribed capital in hands of fraudulent promoters.]—*Re BRINSMEAD (THOMAS EDWARD) & SONS*, No. 5379, *ante*.

5394. — Secret agreement with promoters—Public defrauded.]—The arts. of a co. adopted an agreement whereby 240 paid-up shares were to be delivered to the manager "for his own use, & in order to supply him with the means for commencing the duties of management, & for discharging obligations incurred by him in promoting the formation of the co." Petitioner, in reply to an advertisement for a secretary, announcing that he would be required to invest £240, applied for & obtained the appointment, & paid £240 for shares in the co. He then discovered a second agreement, whereby the manager had agreed, as soon as he should receive the 240 shares, to give to each of the four promoters who had signed the first agreement on behalf of the co., & who were named directors in the arts., forty shares, that being the number of shares necessary for the qualification of directors. Only one promoter & director out of the seven promoters (five of whom were named directors) who signed the memorandum, six of them for forty shares & one for ten, had paid anything in respect of his shares, & there were only six other shareholders. Upon petition for winding up the co., although presented within three months of the date of incorporation, the ct., upon the above facts, made the order.—*Re LONDON & COUNTY COAL CO.* (1866), L. R. 3 Eq. 355; 15 W. R. 151.

Annotations:—*Refd. Re New Gas Generator Co.* (1877), 4 Ch. D. 874; *Re Brimsmead*, [1897] 1 Ch. 45.

5395. Misconduct of directors—Interest paid out of capital—Directors' shares unpaid.]—A co. established in 1853 had since carried on its business at a loss. There were irregularities in the management, the directors had not paid for shares subscribed for by them, interest had been paid out of capital, & the balance at the bankers had

*interested.]—*Fraud in promotion, misfeasance & neglect of duty on the part of the directors, the fact that the directors are not independent, but under the control of the promoters, or that their interests conflict with those of the shareholders, these & similar matters are not in themselves sufficient to justify the ct. in winding up a solvent co. against the wishes of the majority of the shareholders.—*HULL v. TURF MINES, LTD.*, [1906] T. S. 68.—*S. AF*.

d. Misconduct of directors — Alleged fraudulent sale of company's property to nominee for themselves—Inadequate price.]—The directors of a solvent co. empowered by the arts. to absolutely dispose of all or any part of the co.'s assets, sold the whole of the co.'s property to persons at a price alleged to be wholly inadequate. The directors who resolved on the sale were believed by certain of the shareholders who presented a petition for the compulsory winding up of the co. to have been the nominees of the purchasers, who held, or were interested in a large majority of the shares in the co.:—*Held*: no sufficient reason had been shown for granting a compulsory

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been reduced to £300; on the other hand, the calls on the shares had hitherto been one-fifth only:—*Held*: there was no case for winding it up.—*Re NATIONAL LIVE STOCK INSURANCE CO.* (1858), 26 Beav. 153; 27 L. J. Ch. 669; 31 L. T. O. S. 277; 6 W. R. 822; 53 E. R. 855, L. JJ.

5396. — *No evidence that insolvency produced by misconduct—Prospect of success under proper management.*—(1) The misconduct of the directors & manager of a limited co., though it may be such as to render them liable if a suit were instituted against them by the shareholders, is not a ground on which the ct. will consider it "just & equitable" to wind up the co. under 1862 Act, s. 79, where there is no evidence that their mismanagement has produced insolvency, or that the co. is a mere bubble co., & where there is a reasonable prospect that, under proper management, it may be successfully carried on.

(2) Where shareholders appear to resist a petition for winding up a co., they do so at their own costs; but where the petition contains a personal charge against any director or any member of the co., the director or member so assailed is entitled to appear separately, & if the case against him fails, he is entitled to his costs.

(3) Sub-sect. 5 of the above sect. which empowers the ct. to wind up a co. whenever it is "just & equitable" so to do, applies only to cases *ejusdem generis* with the other four sub-sects.—*Re ANGLO-GREEK STEAM CO.* (1866), L. R. 2 Eq. 1; 35 Beav. 399; 14 L. T. 120; 30 J. P. 515; 12 Jur. N. S. 323; 14 W. R. 624; 55 E. R. 950.

Annotations:—As to (1) *Apprvd.* *Re Shepherd's Bush Improvements* (1909), *Times*, Mar. 9. *Refd.* *Re Bwlch y Plwm Co.* (1867), 17 L. T. 235; *Re Brinsmead*, [1897] 1 Ch. 45. As to (2) *Folld.* *Re Humber Iron Works Co.* (1866), 35 Beav. 346. As to (3) *Appld.* *Re Suburban Hotel Co.* (1867), 2 Ch. App. 737. *Refd.* *Horsham Industrial & Provident Soc.* (1894), 70 L. T. 801.

order for the winding up of the co.—*Re GREAT COBAR COPPER MINING CO.* (1902), 2 S. R. N. S. W. 94.—AUS.

e. — *Governing director—Private company with restricted right of transfer.*—An isolated transaction, carried out in a co.'s name & for its benefit by the governing director, which in the ct.'s opinion is unlikely to recur, is not necessarily a circumstance which would make it just & equitable that the co. should be wound up, notwithstanding the fact, that owing to the co. being a small one, with a limited number of shareholders, & to the restrictions under the arts. of assocn., surrounding the alienation of shares, it might be difficult for petitioners to dispose of their shares, thus compelling them to continue as shareholders in a co., the reputation of which may have been affected by the misconduct of its governing director. In considering what is just & equitable all these circumstances must be looked at.—*Re HORWOOD & CO.* (1921), 21 S. R. N. S. W. 750.—AUS.

independent domestic forum.—An order was made to wind up a co. on the ground that there was grave suspicion of fraud in the management requiring investigation & that there was no independent domestic forum to which the matter could be referred.—*Re YUE HING CO., LTD.* (1916), 11 Hong Kong L. R. 53.—HONG KONG.

g. — *Trafficking in shares—False reports—Refusal of access to books.*—To procure the winding up of a co. one shareholder filed a petition making several charges of fraud against the directors, tending to show that the co. was not a *bona fide* concern; & of trafficking in the shares, fabricating

the reports, neglecting to give petitioner notice of their meetings, refusing him access to the books, & that the mines had stopped working. The directors denied the charges, but did not produce the co.'s books which petitioner relied on to support the petition. Under these circumstances, & the directors agreeing to give petitioner an opportunity of inspecting the books, the petition was directed to stand over to enable the co. either to continue the works, or to discontinue them & wind up the co., if the shareholders should so determine.—*Re HOARE v. HIBERNIAN MINING CO.* (1856), 8 Ir. Jur. 228.—IR.

h. — *Secret profit from contract—Neglect to account to company.*—L., the managing director of a co., entered into contracts in his own name for work to be done by the co., the profits of which amounted to £3,268, of which L. accounted to the co. for £1,038 only. This he alleged was done with the consent of his co-directors. In an action brought by two shareholders against the co. & L., to compel an account of the profits so received, an order was made that he should so account; but no payment was made or account rendered by L., & no steps were taken by the co. to compel him to account, & subsequent to the action a resolution of confidence in his management was passed by a majority of shareholders at a general meeting. Pltfs. in the action having presented a petition to wind up the co. on the ground that in the circumstances it was just & equitable that the co. should be wound up:—*Held*: a winding-up order should be made.—*Re NEWBRIDGE SANITARY STEAM LAUNDRY, LTD.*, [1917] 1 I. R. 67.—IR.

5397. *Presents of shares as inducement to become directors.*—Money or paid-up shares given to persons who become directors of a co. The mere fact that money or shares are so given is not a ground for a winding-up order.—*Re BWLCH Y PLWM CO., LTD.* (1867), 17 L. T. 235.

(f) *Issue of Shares at a Discount.*

5398. *Surplus for shareholders if difference paid.*—The fact that shares in a limited co. have been issued at a discount is not a ground for making a winding-up order on the petition of a fully paid-up shareholder—even where, if the amounts unpaid on the shares were called up, there would be a surplus to be divided among the members of the co.—*Re PIONEERS OF MASHONALAND SYNDICATE*, [1893] 1 Ch. 731; 62 L. J. Ch. 507; 68 L. T. 163; 41 W. R. 492; 9 T. L. R. 212; 37 Sol. Jo. 231; 3 R. 265.

Issue of shares at discount generally.—See Sect. 20, sub-sect. 1, *ante*.

E. Existing Winding up Disadvantageous to Creditors or Contributories.

Superseding voluntary winding up.—See Sect. 37, sub-sect. 15, *post*.

Superseding winding up under supervision of court.—See Sect. 38, sub-sect. 10, *post*.

SUB-SECT. 3.—PETITION.

A. In General.

5399. *Nature of petition—Not proceeding to execution—Nor proceeding to enforcement of judgment.*—A petition by a judgment creditor to wind up a co. is not a proceeding "to execution on, or otherwise to the enforcement of" the judgment within Courts (Emergency Powers)

PART III. SECT. 36, SUB-SECT. 2.—D. (f).

k. *Shares issued at different percentages of their face value.*—In winding-up proceedings it appeared, *inter alia*, that shares had been unlawfully issued at a discount & at different percentages of their face value:—*Held*: it was just & equitable that the co. should be wound up.—*Re FLORIDA MINING CO., LTD.* (1902), 9 B. C. R. 108.—CAN.

PART III. SECT. 36, SUB-SECT. 3.—A.

l. *Winding-up order set aside for irregularity in notice—Irregularity cured—No new petition necessary.*—An order was made for the winding up of the co., & under that order, a provisional liquidator was appointed. The order was set aside, as notice had not been given as required by statute. Notice was thereupon given, & a new order taken without any further petition:—*Held*: no new petition was necessary.—*Re STEEL CO. OF CANADA, LTD.* (1884), 5 Ir. & G. 141.—CAN.

m. *Grounds to be alleged in petition—Discretion of judge to admit bona fides—Restraining petition.*—Any ground alleged under sect. 128 (e) of Indian Cos. Act in a petition for the winding up of a co. presented under sect. 131 of that Act must be of a like nature to the specific grounds given under clauses (a), (b), (c) & (d) of sect. 128. If any other grounds are alleged they do not fulfil the requirements of the Act. Allegations as to the internal management or mismanagement of a co. are matters for the shareholders to deal with & do not call for the interference of the ct. A petition by a shareholder stands on a different footing to a petition by a creditor & should be

Act, 1914 (c. 78), s. 1 (1), & a winding-up order may therefore be made without leave from the ct. in which the judgment was obtained.—*Re A COMPANY*, [1915] 1 Ch. 520; 84 L. J. Ch. 382; 31 T. L. R. 241; [1915] H. B. R. 65, C. A.

Annotation:—*Apld.* *Re Globe Trust* (1915), 84 L. J. Ch. 903.

Compare No. 5816, *post*.

5400. Malicious presentation of petition—Action lies against petitioner—Even though no special damage to company.—An action will lie for falsely & maliciously & without reasonable or probable cause presenting a petition under 1862–1867 Acts, to wind up a trading co., even although no pecuniary loss or special damage to the co. can be proved, for the presentation of the petition is from its very nature calculated to injure the credit of the co.—*QUARTZ HILL GOLD MINING CO. v. EYRE* (1883), 11 Q. B. D. 674; 52 L. J. Q. B. 488; 49 L. T. 249; 31 W. R. 668, C. A.; *subsequent proceedings* (1884), 50 L. T. 274, D. C.

Annotations:—*Refd.* *Wyatt v. Palmer*, [1899] 2 Q. B. 106. *Mentd.* *Allen v. Flood*, [1898] A. C. 1; *Wiffen v. Bailey & Romford U. C.*, [1915] 1 K. B. 600.

5401. Petition not presented bonâ fide—Power of court to restrain.—Where a petition against a co. is presented ostensibly for a winding-up order, but really for another purpose, such as putting pressure on the co., the ct. has an inherent jurisdiction to prevent such an abuse of process, & will do so, without requiring an action to be commenced, by restraining the advertisement of the petition & staying all proceedings on it.

Semble: the power to restrain proceedings against a co., after the presentation of a winding-up petition, given to the ct. by 1862 Act, s. 85, relates to proceedings other than those taken with the view of obtaining a winding-up order.—*Re A COMPANY*, [1894] 2 Ch. 349; 63 L. J. Ch. 565; 71 L. T. 15; 42 W. R. 585.

5402. Solicitor employed in formation of company—Whether entitled to act for petitioner.—Notwithstanding the rule that a solr. must not use information acquired in his professional capacity in any subsequent proceedings against

more closely scrutinised on presentation. There is no obligation of the ct. to admit a petition merely because it is presented. Not only must a petition allege facts which, if proved, would justify an order for winding up a co., but even if it alleges such facts the judge has a discretion to consider whether it is really *bonâ fide*. The ct. may, if it thinks fit, refuse to admit a petition, or, as an alternative course, give the co. concerned notice that a petition has been presented, so that it may take proceedings to restrain petitioner from proceeding with his petition.—*Re PIONEER BANK, LTD.* (1914), 1 L. R. 39 Bom. 16.—**IND.**

n. False & malicious statements in petition—Whether petitioner liable—Allegation of malice.—In an action for damages against shareholders of a co. in respect of the wrongful presentation of a petition to have the co. wound up & of false & malicious statements in the petition concerning the pursuers, whereby their credit had been impaired, defenders pleaded that the action was irrelevant, an action of damages for instituting a judicial proceeding requiring an allegation of malice & want of probable cause, & the present action containing no relevant averment of malice & want of probable cause:—*Held*: there was sufficient material upon record for which these elements might be inferred; it was hard to believe that shareholders who thought that the co. was insolvent should demand a price above par as the value of their holding in it, yet defenders admittedly, did

this former client, a solr., who has acted in the formation of a co. & been discharged, may act for a petitioner to wind up the same co. when all the facts upon which the petition is based might have been ascertained by any person in the position of petitioner.—*Re HOLMES, Re ELECTRIC POWER CO., LTD.* (1877), 25 W. R. 603.

Annotation:—*Mentd.* *Little v. Kingswood Collieries Co.* (1882), 20 Ch. D. 733.

— **Whether entitled to petition in respect of promotion expenses.**—*See* Sub-sect. 6, G. (b), iii., *post*.

5403. Part payment by company after petition presented—Subsequent winding-up order on petition—Duty of creditor to refund amount paid.—A creditor presented a petition for winding up a co. The co. paid a part of the debt, & promised to pay the remainder on a certain day. This was not done, & the creditor proceeded with his petition, & a winding-up order was made upon that petition & another petition:—*Held*: the creditor must pay back the money paid to him.—*Re LIVERPOOL CIVIL SERVICE ASSOCN., Ex p. GREENWOOD* (1874), 9 Ch. App. 511; 43 L. J. Ch. 609; 30 L. T. 451; 22 W. R. 636, L. JJ.

5404. Petition by company—By authorised officer—Whether necessary for resolution delegating authority to be under seal.—*Semble*: In the case of a co. presenting a petition by an officer authorised in that behalf it is unnecessary that the resolution of the board to delegate its authority should be under seal, provided that the seal of the co. is affixed to the authority.—*Re MIDGLEY* (1913), 108 L. T. 45; 57 Sol. Jo. 247, D. C.

Annotation:—*Mentd.* *Re A Debtor, Ex p. Cardiff & Channel Mills* (1917), 117 L. T. 574.

B. Who may petition.

(a) In General.

5405. General rule.—(1) None but a creditor, or a contributory to the debts of a co., can present a petition for an order to wind it up.

Where, therefore, the original inventor & owner

borrow—*Unsustainable.*—A resolution authorising the transfer from one bank to another of an existing overdraft, incurred by a mining co. & giving authority to the directors of the co. to borrow money, was passed at an alleged extraordinary meeting, convened by a person having no authority to call one, by a notice which contained no intimation of any intention to borrow. No mention was made in the co.'s books of any resolution giving authority to the directors of the co. to borrow. An order having been made to wind up the co., the foundation of which order was the debt so transferred & incurred:—*Held*: there was no valid petitioning creditor's debt, & no foundation for the order.—*R. v. BOWMAN, Ex p. WILLAN* (1872), 3 V. R. (Law) 258.—**AUS.**

r. Petition by company—By its attorney—Extent of authority.—A corp'n. by deed authorised its attorney to commence & carry on any action, suit or other proceeding, & upon the bkpcy. or insolvency of any firm, or upon any such firm entering into a composition or arrangement with its creditors, to prove against the estate of such firm & to take such other proceedings in relation to any such bkpcy., insolvency, composition, or arrangement, as the attorney might think expedient for promoting or protecting the interests of the corp'n.:—*Held*: such a power did not authorise the attorney to originate proceedings in bkpcy., or insolvency, & the attorney having presented a petition for the compulsory winding up of a banking co., it was

this only two or three months before the petition was presented; such conduct was scarcely consistent with a belief that the co. was unable to pay its debts, but it was not difficult to see that the presentation of the petition might be considered a means of compelling pursuers to buy up their shares; in the circumstances, pursuers averment that defenders were well aware of the falsity of their statements as to the co.'s insolvency when they presented the petition was sufficient.—*SEASPRAY S.S. CO., LTD. v. TENANT* (1908), 15 S. L. T. 874.—**SCOT.**

PART III. SECT. 36, SUB-SECT. 3.— B. (a).

o. Directors—Without authority of company.—Directors of a co. have no general powers which authorise them upon a resolution passed at a meeting of direction to present a petition on the co.'s behalf to have it wound up.—*Re STANDARD BANK OF AUSTRALIA, LTD.* (1898), 24 V. L. R. 304.—**AUS.**

p. — Ratification by company.—The directors of a co., are not entitled, without the authority of a general meeting of the shareholders, to present a winding-up petition in the name of the co.; but where directors have presented a winding-up petition in the name of the co., without authority it is open to a general meeting of the shareholders to ratify their action.—*Re GALWAY & SALTHILL TRAMWAYS CO.*, [1918] 1 L. R. 62.—**IR.**

q. Petition by creditor—Having lent money to company which has no power to

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(b) i., ii. & iii.]

of a patent sold it to a co. for a certain number of fully paid-up shares in the co., & was, moreover, paid all other claims which he had against the co.:—*Held*: a petition presented by him for a winding-up order must be dismissed with costs.

(2) It appeared, further, by the arts. of assocn. of the co., & the agreement for the sale of the patent to them, that if the co. was ordered to be wound up the patent was to revert to the petitioner. It appeared, also, that the co. was formed for two distinct purposes, one of which had failed; but that the shareholders & execution creditors were anxious to continue the other, which they believed would be successful:—*Held*: that was not a case in which the ct. would make a winding-up order.—*Re PATENT BREAD MACHINERY CO., LTD.* (1866), 14 L. T. 582; 14 W. R. 787.

Discretion of court to regard wishes of creditors & shareholders.]—See Sub-sect. 3, D. (a), post.

(b) Creditors.

i. Creditor for less than £50.

5406. General rule—Petition either dismissed or allowed without costs.]—Re STANDRING & CO., LTD. (1895), 39 Sol. Jo. 603.

Annotation:—Fold. Re FANCY DRESS BALLS CO. (1899), 43 Sol. Jo. 657. Refd. Re HYDE (1900), 44 Sol. Jo. 731.

5407. — Petition dismissed—With costs.]—Re FANCY DRESS BALLS CO., LTD. (1899), 43 Sol. Jo. 657.

5408. — — —.]—Re HYDE (W. H.), LTD. (1900), 44 Sol. Jo. 731.

5409. — — — Unless special circumstances.]—Re INDUSTRIAL INSURANCE ASSOCN., LTD., [1910] W. N. 245.

5410. — Petition allowed—Without costs—Unless supported by other substantial creditors.]—Where a compulsory winding-up order is made on the petition of a creditor whose debt is under £50, he may, if supported by creditors for a larger amount, be allowed his costs.—Re LEYTON & WALTHAMSTOW CYCLE CO., LTD. (1901), 50 W. R. 93; 46 Sol. Jo. 71.

5411. What are special circumstances—Execution issued.]—B., the assignee of a debt from a joint-stock co. to an amount under £50, upon which judgment had been obtained & execution issued, petition in his own name, & as attorney

dismissed with costs.—Re PROVINCIAL & SUBURBAN BANK, LTD. (1879), 5 V. L. R. 159.—AUS.

s. — — — Authority to “recover” moneys.]—An attorney of a co. who has power to sue & “recover” moneys is sufficiently authorised to petition for the winding up of another co.—Re GILBERT MACHINERY CO. (No. 1) (1906), 26 N. Z. L. R. 47.—N.Z.

t. — — —.]—A bank having its head office in London, & branch offices in the colonies, sent out a power of attorney to G., by which they appointed him to be their attorney to represent the bank in all or any of the colonies, & authorised him “in the name & on behalf of the bank to commence, institute, prosecute & carry on one or more action or actions, suit or suits, at law or in Equity, or other proper proceedings as the said attorney for the time being acting in the execution of this power as aforesaid shall deem requisite & necessary to compel the payment of any money due to the bank; to petition the ct. for the relief of insolvent debtors that the estate of any insolvent person indebted to the bank may be placed under sequestra-

& to take & use all such other ways & means for the conduct, etc., of the bank as shall seem meet:—Held: G. was authorised by the power of attorney to petition the ct. on behalf of the bank for the winding up of a co. which was unable to pay its debts.—*Re FEDERAL LAND CO., LTD.* (1889), 15 V. L. R. 135.—AUS.

PART III. SECT. 36, SUB-SECT. 3.—B. (b) i.

a. What are special circumstances—Creditor who has charged on an extract decree—But not received payment.]—A creditor who has charged on an extract decree but has not received payment within the *inducia*, is entitled under 1908 Act, to a winding-up order, notwithstanding that the debt due to him is under £50 & that the co. has no assets.—SPEIRS (J.) & CO. v. CENTRAL BUILDING CO., LTD., [1911] S. C. 330.—SCOT.

PART III. SECT. 36, SUB-SECT. 3.—B. (b) ii.

b. Debenture-holder—Entitled “ex *justitia*.”]—A co. having made

of the original creditor, for a winding-up order under 1856 Act & Joint-Stock Companies Act, 1857 (c. 14). The Commissioner dismissed the petition as the debt was under £50, & the petition was not presented by the legal creditor:—*Held*: there having been execution, the amount of the debt was unimportant, & the petition was regular, it being presented in the name of the original creditor.—*Re LONDON & BIRMINGHAM FLINT GLASS & ALKALI CO., LTD., Ex p. WRIGHT* (1859), 1 De G. F. & J. 257; 28 L. J. Bcy. 17; 7 W. R. 539; 45 E. R. 357, L. C.

5412. — Company unable to pay its debts.]—Re YATE COLLIERIES & LIMWORKS CO., [1883] W. N. 171.

5413. — Deliberate refusal of company to pay debt.]—Re WORLD INDUSTRIAL BANK, LTD., [1909] W. N. 148.

ii. Secured Creditor.

5414. Debenture-holder—Debentures secured by trust deed—No right of action against company except through trustees.]—Re URUGUAY CENTRAL & HYGUERITAS RY. CO. OF MONTE VIDEO, No. 5508, post.

5415. — — — Debenture payable to bearer—Held as security.]—A co. issued debentures payable to bearer, the payment of which was secured by a deed by which the co. purported to assign all their present & future property to trustees, on trust for the benefit of the debenture-holders, & covenanted with the trustees for payment of the principal & interest of the debentures. By the debentures the co. agreed to pay the amount thereby secured to the bearer:—*Held*: the holder of some of the debentures the interest on which was overdue, the debentures having been deposited with him by the original holder as security for a debt, was entitled to petition for the winding up of the co.

There being some evidence that the co. had no assets beyond the property comprised in the trust deed, the ct. directed an inquiry in chambers whether the co. had any & what assets not included in the deed & available for the general creditors, & referred it to chambers to appoint a provisional liquidator, with all the powers of an official liquidator, but the liquidator was to take no steps without the direction of the judge in chambers, beyond taking possession of the co.'s property within the jurisdiction, including their

default with regard to debentures issued by them, a debenture-holder is entitled to a winding-up power *ex debito justitiæ*, & it is no answer to a petition presented by him that certain special remedies have been reserved for debenture-holders under a trust.—*Re NORTH SYDNEY INVESTMENT CO.* (1893), 14 N. S. W. L. R. 367.—AUS.

c. — Bondholder—Interest overdue—Valuation of security.]—A co. issued bonds payable to bearer, payment of which was secured by a trust mtge., by which the co. purported to assign certain of its property to trustees, in trust, for benefit of bondholders, & covenanted with trustees for payment of principal & interest on the bonds to shareholders:—*Held*: holder of some of the bonds, interest on which was overdue, was entitled to petition for winding up of the co.; & a secured creditor can make a demand, & petition for winding up of the co., & is not bound to value in his petition his security.—Re CUSHING SULPHITE FIBRE CO. (1906), 37 N. B. R. 254.—CAN.

d. Mortgagee—In spite of express power to appoint receiver.]—The ct. has

books & papers.—*Re OLATHE SILVER MINING Co.* (1884), 27 Ch. D. 278; 33 W. R. 12.

Annotations:—*Refd.* Combined Weighing & Advertising Machine Co. (1889), 43 Ch. D. 99; *Re* London Health Electrical Institute (1897), 76 L. T. 98.

5416. ——— **Covenant by company with trustees to pay principal & interest.**—The holders of a co.'s debenture-stock secured by trust deed are not creditors of the co. entitled to present a winding-up petition, nor are they made so by the fact that the deed contains a covenant by the co. with the trustees to repay the capital to the stockholders & meanwhile to pay interest to the latter.—*Re DUNDERLAND IRON ORE Co., LTD.*, [1909] 1 Ch. 446; 78 L. J. Ch. 237; 100 L. T. 224; 16 Mans. 67.

5417. ——— **No present claim for principal or interest.**—A debenture-stockholder of a co. who has no present claim for principal or interest is not a creditor in such a sense as to be entitled to petition for a winding-up order.—*Re MELBOURNE BREWERY & DISTILLERY*, [1901] 1 Ch. 453; 70 L. J. Ch. 198; 84 L. T. 288; 49 W. R. 250; 17 T. L. R. 173; 8 Mans. 403.

———.]—*See, also*, Part IX., Sect. 14 (4), C. (e), *post*, & *generally*, Sect. 34, *ante*.

5418. Mortgagee—Restrained from exercising power of sale pending petition.—Where a mtgee. who was also a shareholder in the co. filed a petition for winding up the co., alleging that if the business were sold as a going concern there would be assets to return a dividend to the shareholders, but that there were at present no assets available for payment of his debt except the lease, plant, & machinery, which could not be sold without stopping the business:—*Held*: as mtgee. of the lease, plant, & machinery, he ought to be restrained from exercising his power of sale until the hearing of the petition.—*Re CAMBRIAN MINING Co., LTD.*, *Ex p.* FELL (1881), 50 L. J. Ch. 836; 29 W. R. 881.

Proof by secured creditors.—*See* Sub-sect. 11, E., *post*.

iii. Judgment Creditor.

5419. Allegation that judgment obtained by fraud—Petition ordered to stand over—For company to take proceedings to impeach judgment.—Ordinarily speaking, where a valid debt, both at law & in

jurisdiction under 1862 Act, s. 199, to make an order to wind up a tramway co. consisting of more than seven members, incorporated by Order in Council pursuant to the Tramway (Ireland) Acts; where the Order in Council, after giving borrowing powers, expressly provided that mtgees. might enforce payment by the appointment of a receiver:—*Held*: this did not preclude a mtgee. who had obtained judgment against the co. from obtaining a winding-up order.—*Re PORTSTEWART TRAMWAY Co.*, *Ex p.* O'NEILL, [1896] 1 I. R. 265.—IR.

e. Creditors who have agreed to & taken benefit of deed of assignment.—An insolvent co. had called its creditors together, & a deed was executed whereby the co. assigned certain property to trustees to answer the creditors' claims, & the creditors agreed to extend the time for payment:—*Held*: the creditors who had executed the deed were estopped from presenting a winding-up petition until the period of extension had expired.—*Re ATLAS CANNING Co.* (1897), 5 B. C. R. 661.—CAN.

f. — When entitled to petition.—When an assignment for the benefit of its creditors has been made by a co., a creditor of the co. is not entitled as of course to a winding-up order. A discretion to grant or refuse the order exists notwithstanding the making of

the assignment. Where an assignment for the benefit of its creditors had been made by a co., & its assets had been sold with the approval of the great majority of its creditors & shareholders, an application to wind up the co. made by a creditor & shareholder who had taken part in all the proceedings, & had himself tried to purchase the assets, was refused.—*Re STRATHY WIRE FENCE Co.* (1904), 8 O. L. R. 186; 24 C. L. T. 307; 3 O. W. R. 889.—CAN.

g. — Unless impeached—Misrepresentation.—If petitioning creditors wish to make a deed of assignment by a debtor, to which they themselves are parties, the foundation of their petition, & wish to go behind the deed on the ground that their execution of the deed was obtained by misrepresentation, they must allege clearly the circumstances of the misrepresentation in order to enable them to adduce the necessary proof. A deed of assignment was executed by a private co. by a director of the co. signing on its behalf without affixing the common seal. The co. filed a creditors' petition alleging the deed of assignment as an act of bkpcy.:—*Held*: it is not necessary that the deed should be actually executed by a petitioning creditor in order that he may be estopped by the deed, it being sufficient to show that he is privy to its execution & the

equity, is established against a co., it is not, under 1862 Act, a discretionary matter with the ct. to say whether the co. shall be wound up or not; but it is the duty of the ct. to direct the winding up. Where, however, the sole creditor of a co. claiming under a judgment upon which execution had been issued & a return of *nulla bona* been made, but which judgment was of a suspicious character & was alleged to have been obtained by fraud, applied to have the co. wound up:—*Held*: the co. ought to have an opportunity of impeaching the debt, by filing a bill, as there was a doubt whether a valid debt existed: & the petition for winding up was ordered to stand over for that purpose.—*BOWES v. HOPE, ETC. SOCIETY* (1865), 11 H. L. Cas. 389; 35 L. J. Ch. 574; 12 L. T. 680; 11 Jur. N. S. 643; 13 W. R. 790; 11 E. R. 1383, H. L.

Annotations:—*Distd.* *Re* United Stock Exchange (1884), 51 L. T. 687. *Refd.* *Re* Inventors' Assocn. (1865), 12 L. T. 840; *Re* London Indiarubber Co. (1866), 1 Ch. App. 329; *Re* Brighton Hotel Co. (1868), 37 L. J. Ch. 915; *Re* General Co. for Promotion of Land Credit (1869), 5 Ch. App. 367, n.; *Re* Western of Canada Oil, Lands & Works Co. (1873), L. R. 17 Eq. 1; *Re* St. Thomas Dock Co. (1875), 24 W. R. 544; *Re* Chapel House Colliery Co. (1883), 24 Ch. D. 259; *Re* Baker, Nichols v. Baker (1890), 59 L. J. Ch. 661; *Re* Krasnapolsky Restaurant & Winter Garden Co. (1892), 61 L. J. Ch. 593; *Re* Crigglestone Coal Co., [1906] 2 Ch. 327; *Re* Globe Trust (1915), 84 L. J. Ch. 903. *Mentd.* *Re* Manchester, Middleton, & District Tram. Co., [1893] 2 Ch. 638.

5420. — Question tried on petition—Evidence available before court.—Where upon the hearing of a winding-up petition presented by a judgment creditor, evidence is before the ct. upon which the issue of whether the judgment was or was not obtained by collusion can be decided, the petition will be forthwith disposed of, notwithstanding that the judgment has not been impeached in an action at law.—*Re UNITED STOCK EXCHANGE Co., LTD.* (1884), 51 L. T. 687.

5421. Appeal—Judgment reversed—Appeal by petitioner to higher court pending.—*Re ANGLO-BAVARIAN STEEL BALL Co.*, [1899] W. N. 80.

5422. — Pending.—*WYLER & IBO & NYASSA CORPN. v. LEWIS & MARKS* (1910), cited, [1917] 2 Ch. at p. 122, 86 L. J. Ch. at p. 534, 33 T. L. R. at p. 401; [1917] H. B. R. at p. 144, C. A.

Annotation:—*Folld.* *Re* Amalgamated Properties of Rhodesia, Ltd., [1917] 2 Ch. 115.

execution by the director was ample evidence that the creditor was privy to the deed.—*Re ABURN* (1908), 27 N. Z. L. R. 442.—N.Z.

PART III. SECT. 36, SUB-SECT. 3.— B. (b) iii.

h. Appeal—Pending.—To determine the question of insolvency it must be assumed that an outstanding judgment against a co. will be sustained, although in appeal, when beyond question it will not have sufficient assets to meet its liabilities.—*Re DOMINION ANTIMONY Co.* (1908), 6 E. L. R. 177.—CAN.

k. For costs.—A judgment creditor for costs under decree in Equity by virtue of which judgment is enforceable at future date is a creditor to be entitled to petition for a winding-up order at any time after date of master's certificate.—*Re ACETYLENE GAS Co. OF AUSTRALASIA, LTD.* (1901), 1 S. R. N. S. W. 102.—AUS.

l. Execution creditor—But unsatisfied for four days—Computation of time.—In computing time under Winding-up Act, s. 5 (h), the day fixed for the sale is exclusive, & where an unsatisfied writ was in the sheriff's hands on Dec. 30, & the sale was fixed for Jan. 3, it was a writ remaining "unsatisfied till within four days of

Sect. 36.—Winding up by court: Sub-sect. 3, B. (b) iii. & iv.]

5423. — *No application by company for stay of execution.*—Judgment creditors of a limited co. are entitled *ex debito justitiæ* after having given the usual statutory notice demanding payment of their debt, to have the judgment debt enforced by execution in the shape of a winding-up order against the debtor co. where it has not applied for stay of execution, notwithstanding the pending of an appeal from the judgment by the debtor co., & in the absence of clear proof that the creditors are seeking to use their right for the purpose of hampering the debtor co., in the prosecution of its appeal, the creditors are not to be deprived of the right on the ground that a winding-up order might in fact have such result.—*Re AMALGAMATED PROPERTIES OF RHODESIA* (1913), LTD., [1917] 2 Ch. 115; 33 T. L. R. 414, C. A.

5424. Claim not admitted in voluntary winding up.—An order made by the registrar in the voluntary winding up of a co. that a claim in respect of a judgment should not be admitted to proof does not estop claimant from presenting a compulsory winding-up petition if after the date of the order he ascertains facts which show that the transactions of the co. ought to be investigated by the official receiver.—*Re INECTO, LTD.* (1922), 38 T. L. R. 797.

iv. Creditor in respect of Disputed Debt.

5425. General rule.—A. having lent a co. £500 required repayment by serving a statutory notice on the co. on Oct. 27, 1881. In Mar., 1881, the co. had by special resolution changed its name & admitted a new class of shareholders, but it was virtually the same co. The money not having been paid, in May & June, 1882, some correspondence took place between A. & the secretary, who resisted payment on the ground that the money was lent to the old co. On July 24, 1882, A. presented a petition for the winding up of the co. The co. was not in fact insolvent:—*Held*: (1) petitioner had not waived his statutory demand

by delay, as he was not bound to present his petition as soon as the three weeks had expired; (2) petitioner had not waived his demand by receiving interest on his debt in the meantime; (3) the co. had no reasonable excuse for not paying the debt, & though, if the debt was *bonâ fide* disputed, a winding-up petition was not the way to enforce it, petitioner might reasonably think he was being trifled with, & was entitled to succeed on his petition as a means of enforcing payment, unless the debt was paid.—*Re IMPERIAL HYDROPATHIC HOTEL CO., BLACKPOOL, LTD.* (1882), 49 L. T. 147, C. A.

5426. ——B., a dismissed servant of a co., claimed £15 for arrears of salary, & £95 damages for alleged wrongful dismissal. The co. disputed both claims. B. filed a petition to wind up the co., alleging it to be insolvent, but there was no evidence of insolvency except the common statutory affidavit of petitioner:—*Held*: where a petition to wind up is improperly filed the ct. has jurisdiction on motion to stay all proceedings under it, or to dismiss it; the present petition was an abuse of the process of the ct., being brought to compel payment of a small debt which was *bonâ fide* disputed, & being unsupported by any evidence that the co. was insolvent; the petition therefore must be dismissed with costs.—*Re GOLD HILL MINES* (1883), 23 Ch. D. 210; 49 L. T. 66; 31 W. R. 853, C. A.

Annotation:—Refd. Re Hyde (1900), 44 Sol. Jo. 731.

5427. ——*Re COMPAGNIE GÉNÉRALE DES ASPHALTES DE PARIS, Ex p. NEUCHÂTEL ASPHALTE Co.,* [1883] W. N. 17.

5428. Petition dismissed—Without prejudice to any action at law in respect of debt.—Where a creditor of a co., who *bonâ fide* contested his debt, though they admitted that more than £50 would be due to him on taking the accounts between them, presented a petition for a winding-up order under 1862 Act, ss. 79, 80:—*Held*: the ct. had no jurisdiction to make such an order, & the petition must be dismissed with costs; but without prejudice to any action at law against the co. which petitioner might be advised to bring.—*Re BRIGHTON CLUB & NORFOLK HOTEL CO., LTD.* (1865), 35 Beav. 204; 6 New Rep. 80; 12 L. T.

the time fixed for the sale," & the co. was insolvent within the Act.—*Re LAKE WINNIPEG TRANSPORTATION, LUMBER & TRADING CO.* (1891), 7 Man. L. R. 255.—CAN.

m. Assignee of judgment debt—Title.—In a petition for an order against a co. petitioner alleged that the co. "is insolvent & utterly unable to pay your petitioner's said debts & its other debts." Petitioner's claim was based on a judgment alleged to have been recovered by another person, & acquired by petitioner, of which he, "is now the *bonâ fide* holder & owner":—*Held*: a sufficient statement of the claim of petitioner, without an allegation that the judgment had been assigned by an instrument in writing.—*Re RAPID CITY FARMERS' ELEVATOR CO.* (1894), 9 Man. L. R. 571.—CAN.

n. Mortgagee who has obtained judgment.—The ct. has jurisdiction, under 1862 Act, s. 199, to make an order to wind up a tramway co. consisting of more than seven members, incorporated by Order in Council pursuant to the Tramway (Ireland) Acts; where the Order in Council, after giving borrowing powers, expressly provided that mtgees. might enforce payment by the appointment of a receiver:—*Held*: this did not preclude a mtgee. who had obtained judgment against the co. from obtaining a winding-up order.—*Re PORT-*

STEWART TRAMWAY CO., Ex p. O'NEILL [1896] 1 I. R. 265.—IR.

o. Under decree-arbitral—Objection by company to part of debt—No proceedings for reduction taken.—In a petition for the judicial winding up of a co. which was admittedly deemed insolvent, petitioners founded on a judgment debt for £58 awarded to them under a decree-arbitral, the *inducia* of a charge upon the extract decree having expired without payment. The co. admitted that £43 of the £58 was due, & in order to make good their objection to the remaining portion, it would have been necessary to suspend the decree & reduce the decree-arbitral:—*Held*: no sufficient ground had been shown why the prayer in the petition should not be granted.—*COWAN v. SCOTTISH PUBLISHING CO.* (1892), 19 R. (Ct. of Sess.) 437.—SCOT.

p. Creditor charging on extract decree—Though under £50.—In a petition by a creditor for an order to wind up a co. it was stated that the creditor had obtained decree against the co. for a sum & interest which decree had been extracted & that the co. had been charged on the extract but the *inducia* of the said charge for payment had expired without payment being made:—*Held*: the creditor who had charged on an extract decree but had not received payment within the *inducia*, was entitled under

1908 Act to a winding-up order, notwithstanding that the debt due to him was under £50 & that the co. had no assets.—*SPEIRS (J.) & CO. v. CENTRAL BUILDING CO., LTD.*, [1911] S. C. 330.—SCOT.

PART III. SECT. 36, SUB-SECT. 3.—B. (b) iv.

q. General rule—Winding-up proceedings not to be used for recovering disputed debts—Petition dismissed.—Recourse is not to be had to winding-up proceedings for the purpose of recovering a disputed debt. A petition for the winding up of a co. was presented by W., who alleged that he was a creditor of the co. in the sum of \$9,000; that a demand for payment of this sum had been served upon the co. & had not been satisfied; & that, accordingly, the co. was insolvent. It appeared that the claim was in good faith disputed:—*Held*: W. must be left to establish his claim in the ordinary way, by an action against the co., & the petition must be dismissed.—*Re MEAFORD MANUFACTURING CO.* (1919), 46 O. L. R. 282.—CAN.

r. ——The principle upon which a co. can be wound up on a creditor's application is simply its inability to pay its just debts. The inability is indicated by its neglect to pay after proper demand made & the lapse of three weeks. Such

PART III.—COMPANIES UNDER COMPANIES (CONSOLIDATION) ACT, 1908, ETC.

484; 11 Jur. N. S. 436; 13 W. R. 733; 55 E. R. 873.

Annotations:—**Consd.** *Re* Imperial Silver Quarries Co. (1868), 16 W. R. 1220. **Folld.** *Re* London & Paris Banking Corpn. (1874), L. R. 19 Eq. 444. **Refd.** *Re* Ry. Finance Co. (1866), 14 W. R. 785.

5429. —.]—A petition was presented by creditors of a co., praying a winding-up order. Petitioners' debt was a disputed one. After the presentation of the petition, but before the hearing of it, an advertisement was inserted in the newspapers which reflected upon the motives of petitioners in presenting their petition. The advertisement stated, *inter alia*, that they had no legal claim against the co., & they knew it; & was signed by the chairman on behalf of the directors of the co. A motion was made for an order to commit the chairman for contempt of ct., & for an injunction to restrain him & the directors from continuing the obnoxious advertisement, & from publishing any others of the same character in future:—*Held*: on the chairman giving an undertaking not to continue or repeat the advertisement, he should not be committed; but the costs of the motion must be determined when the petition to wind up was disposed of.

The petition for the winding-up order came on to be heard in due course. The ct. was of opinion that the compulsory powers given by 1862 Act, & enabling any person who claimed to be a creditor of a co. to present, after 21 days' notice, a petition to wind it up, were not intended to permit petitioner to extort payment of a doubtful debt, under threat of annoyance to the co. if they should resist; & that the alleged debt of petitioners in this case was a *bond fide* disputed one, the nature of which could not be properly determined on a petition to wind up the co.:—*Held*: (2) petitioners who had had previous notice of the views taken by the co. of the debt, were not now entitled to the relief for which they prayed by their petition: & it must be dismissed, they paying the costs of it; (3) with respect to the costs of the motion to commit, the chairman continuing his undertaking not to publish or repeat the advertisement, & petitioners undertaking not to bring any action at law on account of the advertisement already issued, the directors of the co. must pay the costs of the motion.—*Re* GENERAL EXCHANGE BANK, LTD. (1866), 14 L. T. 582; 12 Jur. N. S. 465; 14 W. R. 826.

5430. — **Excuse for petition.**—*Re* BRITISH ALLIANCE ASSURANCE CORPN., [1877] W. N. 261.

5431. —.]—*Re* PUBLIC WORKS & CONTRACT CO., LTD. (1888), 4 T. L. R. 670.

5432. — **No evidence of insolvency.**—*Re* LONDON & PARIS BANKING CORPN., No. 5343, *ante*.

5433. — —.]—*Re* GOLD HILL MINES, No. 5426, *ante*.

5434. — —.]—*Re* COMPAGNIE GÉNÉRALE DES ASPHALTES DE PARIS, *Ex p.* NEUCHATEL ASPHALTE CO., [1883] W. N. 17.

5435. — —.]—*Re* QUEENSLAND STEAM SHIPPING CO. (1887), 3 T. L. R. 377, C. A.

5436. — —.]—*Re* WALLIS (MARTIN) & CO., LTD. (1893), 38 Sol. Jo. 112, C. A.

5437. — — **Petition by solicitor founded on**

neglect must be judged by reference to the facts of each particular case. Where the defence is that the debt is disputed all that the ct. has first to see is whether that dispute is on the face of it genuine or merely a cloak of the co.'s real inability to pay its just debts.—*TULSIDAS LALLUBHAI v. BHARAT COTTON MILL CO., LTD.* (1914), 1 L. R. 39 Bom. 47.—**IND.**

5439 i. Petition ordered to stand over—*Until dispute determined by action.*—In a petition at the instance of creditors for winding up a co., the co. lodged answers in which they denied certain of the averments of petitioners with regard to the existence of the debt & moved the ct. to dismiss the petition. The ct. in respect that it was doubtful whether there was a *bond fide* dispute

doubtful article.]—*Re* RHODESIAN PROPERTIES, LTD. (1901), 45 Sol. Jo. 580.

5438. — **On writ being served by petitioner—Costs of petitioner to be costs in action.**—*BULUWAYO ESTATE & TRUST CO., LTD.* (1897), 41 Sol. Jo. 756.

— **Without costs.**—*See* Nos. 5343, 5426, 5427, 5430, 5431, 5435, 5436, *ante*.

5439. Petition ordered to stand over—Until dispute determined by action.—A person, claiming to be a creditor of a limited co., served a demand under 1856 Act, s. 68, & the co. not having paid, secured or compounded for the sum claimed, he presented a petition for winding up. It did not appear that there was any ground for supposing the co. unable to pay its debts, & the co. disputed the debt, there being unsettled accounts between the co. & petitioner, so that it could not, on the materials before the ct., be ascertained whether anything was due to petitioner or not:—*Held*: the petition ought not to be dismissed, but must stand over till it had been ascertained by proceedings at law whether petitioner was a creditor or not.—*Re* RHYDYDEFED COLLIERY CO., GLAMORGANSHIRE, LTD., *Ex p.* RHYDYDEFED COLLIERY CO., GLAMORGANSHIRE, LTD. (1858), 3 De G. & J. 80; 44 E. R. 1199, L. J.J.

Annotation:—**Refd.** *Re* London & Paris Banking Corpn. (1875), L. R. 19 Eq. 444.

5440. —.]—*Re* CATHOLIC PUBLISHING & BOOKSELLING CO., LTD., No. 5336, *ante*.

5441. — —.]—*Re* INVENTORS' ASSOCN., LTD., No. 5609, *post*.

5442. — —.]—A co. had passed a resolution in favour of a voluntary winding up. A petition for a compulsory winding-up order was afterwards presented by a person alleging himself to be a creditor of the co. The alleged debt arose upon some promissory notes of the co., which had, after they were overdue, been indorsed to petitioner for value. The validity of the notes was disputed by the liquidator under the voluntary winding up:—*Held*: the petition ought to stand over, with liberty to petitioner to bring an action at law on the notes, all the costs to be reserved.—*Re* UNIVERSAL BANK, LTD. (1866), 14 W. R. 906, L. J.J.

5443. — — **Only if debt disputed on substantial ground.**—On a petition to wind up a co. by a debenture-holder where the co. admitted the validity of the debenture, but contended that the interest was only payable out of profits, the ct. took upon itself to decide the dispute at the hearing of the petition, & made the winding-up order without waiting till the debt had been established at law.

Under the circumstances, I do not think this so substantial a dispute that it ought to be referred elsewhere (MALINS, V.-C.).—*Re* IMPERIAL SILVER QUARRIES CO., LTD. (1868), 16 W. R. 1220.

5444. — — —.]—Where a creditor's petition to wind up a co. is opposed on the ground that petitioning creditor's debt is disputed, the ct. will not, as a matter of course, direct the petition to stand over with leave to bring an action; but is bound, before doing so, to see that the debt is disputed on some substantial ground.—

between the parties as to the indebtedness of the co. sisted the petition to enable the petition to constitute their debt.—*LANDAUER & CO. v. ALEXANDER & CO.*, [1919] S. C. 492; 2 S. L. T. 2; 56 Sc. L. R. 467.—**SCOT.**

s. *Part of debt disputed—Too shadowy & unsubstantial to justify refusal of petition.*—Creditors of a public co. holding an extract decree—

Sect. 36.—Winding up by court: Sub-sect. 3, B. (b)
iv., v., vi. &

Re KING'S CROSS INDUSTRIAL DWELLINGS CO. (1870), L. R. 11 Eq. 149; 23 L. T. 585; 19 W. R. 225.

Annotation:—Folld. *Re Imperial Anglo-German Bank* (1872), 25 L. T. 895.

5445. — Offer by voluntary liquidators to be responsible for debt.]—Claimants against an assurance co. in respect of a disputed policy brought an action. Shortly before the commencement of the action the co. had agreed to sell & transfer their business to another co.; & shortly afterwards they went into voluntary liquidation. Claimants then presented a petition praying for the compulsory winding up of the co. About a month after the presentation of the petition, the voluntary liquidators offered petitioners to hold themselves personally liable to pay petitioners whatever might be adjudged due to them in the action; & to set aside out of the assets a sum sufficient to meet the claim, if it should be established, with interest & costs. Petition ordered to stand over till after the trial of the action, the liquidators continuing the undertaking; & petitioners ordered to pay all the costs of the petition incurred since the offer.—**Re IMPERIAL GUARDIAN LIFE ASSURANCE SOCIETY** (1869), L. R. 9 Eq. 447; 39 L. J. Ch. 147.

Annotation:—Folld. *Re Times Life Assce. & Guarantee Co.* (1869), L. R. 9 Eq. 382.

5446. — If judgment when obtained could not be enforced.]—*Re LONDON WHARFING & WAREHOUSING CO., LTD.*, No. 5341, *ante*.

— To take proceedings to impeach judgment debt.]—*See* Sub-sect. 3, B. (b), iii, *ante*.

5447. Petition restrained by injunction—Company solvent.]—A creditor of a solvent co., whose debt is *bona fide* disputed, will be restrained from presenting a petition for winding up the co.

A contractor entered into a contract with a co. for the execution of certain works for the sum of £290,000 of which £200,000 was to be paid in cash, & the rest in paid-up shares. The contractor had received £203,000 in cash, & a large number of shares, but he claimed to be entitled to a further sum of £30,000. The co. disputed the claim, & alleged, on the contrary, that the contractor had been largely overpaid. The contractor threatened to present a petition to wind up the co., & served on the co. a demand under 1862 Act, s. 80:—**Held:** there being no proof of the co. being insolvent, & the alleged debt of the contractor being *bona fide* in dispute, the contractor must be restrained from presenting a petition to wind up the co.—**CADIZ WATERWORKS CO. v. BARNETT** (1874), L. R. 19 Eq. 182; 44 L. J. Ch. 529; 31 L. T. 640; 23 W. R. 208.

Annotation:—Folld. *Niger Merchants Co. v. Capper* (1877), 18 Ch. D. 557, n.

5448. —.]—*MERCHANT BANKING CO. OF LONDON v. HOUGH*, [1874] W. N. 230.

Annotation:—Folld. *Niger Merchants Co. v. Capper* (1877), 18 Ch. D. 557, n.

5449. —.]—The ct. has jurisdiction to

restrain by injunction the creditor of a solvent co., whose claim is disputed, from presenting a petition to wind up the co.

A co. appointed C. as their agent in Africa, & consigned to him goods for sale in the ordinary course of business. C., without notice, returned to England, & claimed from the co. £630, in respect of alleged expenditure on behalf of the co. The co. disputed the claim, & alleged that a sum was due to them from C. largely exceeding any claim which he could substantiate against them. C. thereupon threatened to present a petition to wind up the co.:—**Held:** the co. not being shown to be insolvent, & the claim of C. being disputed, C. must be restrained from presenting the winding-up petition.—**NIGER MERCHANTS CO. v. CAPPER** (1877), 18 Ch. D. 557, n.; 25 W. R. 365.

5450. —.]—*BROWN (JOHN) & CO. v. KEEBLE*, [1879] W. N. 173.

5451. —.]—The ct. has jurisdiction to restrain by injunction a person claiming to be a creditor of a co., from presenting a petition to wind up the co., where the debt is *bona fide* disputed & the co. is solvent.—**CERCLE RESTAURANT CASTIGLIONE CO. v. LAVERY** (1881), 18 Ch. D. 555; 50 L. J. Ch. 837; 30 W. R. 283.

Annotation:—Folld. *New Travellers' Chambers v. Cheese & Green* (1894), 70 L. T. 271.

5452. — Solicitor's petition—In respect of promotion expenses—Not presently payable.]—This was a motion by pltf. co. for an injunction to restrain defts., the late solrs. of the co., from presenting a winding-up petition, threatened on account of the alleged non-payment by the co. of certain expenses incurred by defts. in the promotion of the co. On Jan. 10, 1894, defts. gave the co. formal notice demanding payment of their debt, & stating, "This demand is in compliance with the provisions of the Cos. Acts." The co., however, considered that under an agreement the existing liabilities of the co. ought to be paid before any part of the preliminary expenses, & as they believed that defts. were about to commence winding-up proceedings, they issued the writ in this action, & gave notice of this motion:—**Held:** the ct. had jurisdiction to grant an injunction to restrain the presentation of a winding-up petition, & in this case, assuming that there was a debt, it appeared that it was not a debt presently payable, therefore the injunction must be granted with costs.—**NEW TRAVELLERS' CHAMBERS, LTD. v. CHEESE & GREEN** (1894), 70 L. T. 271.

5453. Part of debt disputed—Petition dismissed.]—*Re BRIGHTON CLUB & NORFOLK HOTEL CO., LTD.*, No. 5428, *ante*.

5454. — Company insolvent.]—*Re VALLENTINE (JAMES) & CO., LTD.* (1893), 37 Sol. Jo. 823.

v. Contingent or Prospective Creditor.

5455. Company not insolvent when petition presented—But likely to become so—Petition designed to carry out scheme of arrangement under Joint Stock Companies Arrangement Act, 1870 (c. 104).]

arbitral for £58 12s. 2d. presented a petition for the winding up of the co. The co. admitted their liability for the debt to the amount of £43, but disputed it to the extent of £15 12s. 2d., & stated that they wished to test the regularity of arbiters' decree:—**Held:** the disputed debt was of too shadowy & unsubstantial a nature to justify the refusal of the petition.—**COWAN v. SCOTTISH PUBLISHING CO.** (1892), 19 R. (Ct. of Sess.) 437; 29 So. L. R. 375.—**SCOT.**

PART III. SECT. 36, SUB-SECT. 3.— **B. (b) v.**

t. Creditor who has given the company time—Not yet expired—Meaning of creditor.]—Upon the petition for a winding-up order it appeared that the application was made by a creditor who had given the co. an extension of time, not yet expired, for payment of the debt. The affidavit in support of the petition was made by a person who deposed upon information & belief, & upon cross-examination

thereon it appeared that he had no personal knowledge of the matters deposed to:—**Held:** the debt, though not yet payable, was sufficient to support the petition. The distinction between the language of sect. 6 of Winding-up Act, which refers to a creditor whose debt is "then due," & that of sect. 8, in which the term is "creditor" only, is not unmeaning, & a creditor, whose debt is not yet due, is a good petitioning creditor for winding up under sect. 8.—**Re ATLAS**

—AUSTRALIAN JOINT-STOCK BANK, LTD. (1897), 41 Sol. Jo. 469.

Annotation :—*Distd.* *Re* Melbourne Brewery & Distillery, [1901] 1 Ch. 453.

5456. Investment bond holder of assurance company—Entitled to payment at future date.—The owner of an investment bond issued by an assurance co., who, upon making periodical payments to the co., will at a future date become entitled to the payment of a certain sum of money, is a "contingent or prospective creditor" of the co. within 1908 Act, s. 137, & can under that sect. petition for the winding up of the co.—*Re* BRITISH EQUITABLE BOND & MORTGAGE CORPN., LTD., [1910] 1 Ch. 574; 79 L. J. Ch. 288; 102 L. T. 421; 17 Mans. 177.

5457. Landlord—In respect of rent not yet due.—This was a creditor's petition for the winding up of a co., petitioner being the landlord of the co.'s premises. The lease of the premises reserved rent payable on the usual quarter days, & the alleged debt upon which petitioner based his claim for a winding-up order was the proportion of rent calculated at the rate of £1,850 per annum from Christmas last to the date of the presentation of the petition, although the quarter's rent due from Christmas would not be actually payable till Lady-day next:—*Held*: (1) the Apportionment Act, 1870 (c. 35), which provides that rent shall, like interest on money lent, be considered as accruing from day to day, does not alter the date at which it becomes due; (2) petitioner was not entitled under 1862 Act to petition as creditor in respect of rent not yet due.—*Re* UNITED CLUB & HOTEL CO., LTD. (1889), 60 L. T. 665; 5 T. L. R. 368; 1 Meg. 186.

5458. Holder of bill of exchange—Not matured—Repudiation by company before maturity.—*Re* POWELL (W.) & SONS, LTD. (1892), 36 Sol. Jo. 523;

vi. Assignee of Debt.

5459. Equitable assignee.—The equitable assignee of a debt can present a winding-up petition as a creditor under 1862 Act, s. 82.—*Re* MONTGOMERY MOORE SHIP COLLISION DOORS SYNDICATE, LTD. (1903), 72 L. J. Ch. 624; 89 L. T. 126; 19 T. L. R. 554; 10 Mans. 327.

Annotation :—*Folld.* *Re* Steel Wing Co., [1921] 1 Ch. 349.

5460. — Of part of debt.—*Re* STEEL WING CO., No. 5346, *ante*.

5461. Sale of debt—After presentation but before hearing of petition—Sale of right to proceed with petition.—A creditor of a co. being unable to obtain payment of his debt, presented a petition to wind up the co. Before the petition was heard he sold his debt & the right to proceed with the petition to a shareholder of the co., who obtained leave to amend the petition by making himself a co-petitioner:—*Held*: the sale of the right to proceed with a winding-up petition ought not to be allowed, & the petition was dis-

missed.—*Re* PARIS SKATING RINK CO. (1877), 5 Ch. D. 959; 37 L. T. 298; 25 W. R. 701, C. A.; *subsequent proceedings* (1877), 6 Ch. D. 731.

vii. Other Creditors.

5462. Creditor no longer interested in debt—Company holding shares on which calls due—Assignment of calls—Right of company to petition.—*Re* PENTALTA EXPLORATION CO., [1898] W. N. 55.

5463. — Mortgage of interest in judgment debt—Petition cured by joinder of mortgagee.—*Re* BARTITSU LIGHT CURE INSTITUTE, LTD. (1909), *Times*, Jan. 13.

5464. Creditor in respect of debt incurred by voluntary liquidators.—A debt arising under an agreement with the voluntary liquidator of a co. is a sufficient debt to support a petition for compulsory winding up.

Semble: such a debt is also sufficient to support a petition for the continuance of the voluntary winding up under supervision.—*Re* BANK OF SOUTH AUSTRALIA (2), [1895] 1 Ch. 578; 64 L. J. Ch. 397; 72 L. T. 273; 43 W. R. 359; 39 Sol. Jo. 314; 2 Mans. 129; 12 R. 166; *sub nom.* *Re* BANK OF SOUTH AUSTRALIA, LTD., *Ex p.* UNION BANK OF AUSTRALIA, 11 T. L. R. 265, C. A.

5465. Garnishor—Garnishee order absolute.—A garnishee order absolute obtained against a co. does not constitute the garnishor a creditor of the co. so as to entitle him to present a winding-up petition.—*Re* COMBINED WEIGHING & ADVERTISING MACHINE CO. (1889), 43 Ch. D. 99; 59 L. J. Ch. 26; 61 L. T. 582; 38 W. R. 67; 6 T. L. R. 7; 1 Meg. 393, C. A.

Annotations :—*Apld.* *Re* Montgomery Moore Ship Collision Doors Syndicate (1903), 72 L. J. Ch. 624; Norton v. Yates, [1906] 1 K. B. 112. *Refd.* Pritchett v. English & Colonial Syndicate, [1899] 2 Q. B. 428; Geisse v. Taylor, [1905] 2 K. B. 658; Cairney v. Back, [1906] 2 K. B. 746; *Re* Steel Wing Co., [1921] 1 Ch. 349. *Mentd.* *Re* Greenwood, Sutcliffe v. Gledhill (1901), 70 L. J. Ch. 326; *Re* Anglesey, De Galve v. Gardner, [1903] 2 Ch. 727; Shinnott v. Bowden, [1912] 2 Ch. 414.

5466. — Right to obtain judgment on garnishee order—& petition thereon as judgment creditor.—A garnishee order absolute had been obtained, under R. S. C., Ord. XLV., r. 3, against a limited co., having property abroad, but none in this country on which execution could be levied:—*Held*: under R. S. C., Ord. XLII., r. 24, the garnishor could maintain an action on the garnishee order for the debt thereby ordered to be paid to him by the co., the garnishees, with a view to his presenting a petition, as a judgment creditor for winding up the co.—PRITCHETT v. ENGLISH & COLONIAL SYNDICATE, [1899] 2 Q. B. 428; 68 L. J. Q. B. 801; 81 L. T. 206; 47 W. R. 577; 43 Sol. Jo. 602, C. A.

Annotations :—*Refd.* Geisse v. Taylor, [1905] 2 K. B. 658. *Mentd.* Furber v. Taylor, [1900] 2 Q. B. 719; Savill v. Dalton, [1915] 3 K. B. 174.

See, now, R. S. C., Ord. 45, r. 1, as amended.

5467. Legal personal representatives—Executor

CANNING CO. (1897), 5 B. C. R. 661.—CAN.

a. Depositor in building society—Right to withdraw deposit "as funds permit"—Debt not "presently exigible."—By the rules of a building society members were allowed to withdraw their shares "at any time after twelve months from the date of entry by giving one month's notice, when the whole instalments in the shares withdrawn shall be repaid, with interest." It was further provided that "members withdrawing shall be paid out in the order of their application, & as the funds permit." A member who had withdrawn

& demanded, but not received, payment in terms of the rules, presented a petition to the ct. under 1862 Act, s. 199, for an order for the winding up of the society, on the ground that the society was unable to pay its debts, & that it was just & equitable that such order should be pronounced as the society was in a state of great pecuniary embarrassment. Answers were lodged by the directors to the effect that the co. was solvent, & that petitioner would be paid in due course as required by the rules. They further stated that in their opinion it would be fatal to the interests of the society if the petition were granted.

Petition refused on the ground that petitioner was not a creditor in a debt presently exigible, & that no sufficient ground had been shown to satisfy the ct. that the course suggested would be just & equitable.—MARTIN v. SCOTTISH SAVINGS INVESTMENT SOCIETY (1879), 7 R. (Ct. of Sess.) 352; 17 Sc. L. R. 221.—SCOT.

PART III. SECT. 36, SUB-SECT. 3.—B. (b) vii.

b. Creditor's petition dismissed—Other creditors not estopped from petitioning.—Where an application for a winding-up order was refused because the material submitted did

Sect. 36.—Winding up by court: Sub-sect. 3, B. (b) vii. &

—**Before probate—Probate obtained before hearing.**—The exor. of a creditor of a co. is entitled to present a winding-up petition before he has obtained probate; it is sufficient if he has obtained probate before the hearing of the petition.—*Re MASONIC & GENERAL LIFE ASSURANCE CO.* (1885), 32 Ch. D. 373; 55 L. J. Ch. 666; 34 W. R. 739.

—**Death of petitioner—Petition continued by legal personal representative.**—*See Sub-sect. 3, E. (l), post.*

5468. Party claiming unliquidated damages—For fraudulent misrepresentation.—A claim against a co. for unliquidated damages in respect of fraudulent misrepresentations does not entitle claimant to present a petition as a creditor for winding up the co. either by the ct. or under supervision.—*Re PEN-Y-VAN COLLIERY CO.* (1877), 6 Ch. D. 477; 46 L. J. Ch. 390.

Annotation:—Folld. Re Bank of South Australia, [1894] 3 Ch. 722 (*see*, [1895] 1 Ch. 578).

5469. Solicitor employed in formation of company—In respect of promotion expenses.—A firm of solrs., who had been employed in the formation of a co. which consisted of more than twenty members, & which being unregistered was illegal under 1862 Act, s. 4, & who had also been employed by the manager of the co. to defend actions brought against individual members thereof in respect of matters incidental to the business, being unable to obtain payment of their bill of costs, presented a petition for winding up the co.:—*Held*: whether such a co. could be wound up at all or not, the solrs.' bill of costs did not constitute a sufficient petitioning creditor's debt.—*Re SOUTH WALES ATLANTIC S.S. CO.* (1876), 2 Ch. D. 763; 46 L. J. Ch. 177; 35 L. T. 294, C. A.

Annotations:—Refd. Re Shepherd, Ex p. Ball (1879), 10 Ch. D. 667; *Shaw v. Benson* (1883), 11 Q. B. D. 563. **Mentd.** *Re Padstow Total Loss & Collision Assoe. Asscn.* (1882), 20 Ch. D. 137; *Re National Debenture & Assets Corpn.* (1891), 60 L. J. Ch. 533.

5470. ———.—*NEW TRAVELLERS' CHAMBERS, LTD. v. CHEESE & GREEN*, No. 5452, *ante*.

—**Whether entitled to act for petitioner.**—*See*, No. 5402, *ante*.

5471. ———.—**Claim founded on doubtful article.**—*Re RHODESIAN PROPERTIES, LTD.*, No. 5437, *ante*.

5472. Surety—Covenant to pay company's mortgage debt & interest—Assignment of equity of redemption to another company—Right to petition against second company.—The P. co. mortgaged property belonging to them, certain of the directors, of whom C. was one, being parties to the mtge. deed, & covenanting with the mtgees. that the P. co. would pay the debt & interest. The P. co. afterwards conveyed the equity of redemption in the mortgaged property to the L. co., who covenanted with the P. co. that they would pay the mtge. debt & indemnify the P. co. in respect thereof. Neither C. nor any of the sureties were parties to the conveyance. The P. co. had been dissolved.

C. was dead, & his exors. had been called on to pay, & had paid, considerable sums under C.'s

covenant in the mtge. They contended that they were creditors of the L. co. in respect of the moneys they had paid, & on that co. not complying with their demand for payment, presented a petition to wind up that co.:—*Held*: the relation of debtor & creditor did not exist between the L. co. & petitioners, & petitioners could not get an order for the winding up of the co. as creditors under 1862 Act, s. 82.—*Re LAW COURTS CHAMBERS CO., LTD.* (1889), 61 L. T. 669.

5473. Vendor of land purchased compulsorily—Title not investigated nor accepted.—A claim against a limited co. by a landowner for the amount of purchase & compensation money in respect of land taken, which has been assessed by arbitration under Lands Clauses Act, 1845 (c. 19), does not, until the title has been investigated & accepted by the co., constitute a debt in respect of which the landowner is entitled as an unpaid creditor within 1862 Act, s. 82, to apply for a winding-up order.—*Re MILFORD DOCKS CO., LISTER'S PETITION* (1883), 23 Ch. D. 292 52 L. J. Ch. 774; 48 L. T. 560; 31 W. R. 715.

(c) Contributories.

i. In General.

See 1908 Act, s. 137 (1) (a).

5474. Statutory right to petition—Cannot be curtailed by articles.—The right given by 1862 Act, s. 82, to a contributory to petition for the winding up of the co. cannot be excluded or limited by the arts. of assocn. of the co.—*Re PEVERIL GOLD MINES, LTD.*, [1898] 1 Ch. 122; 67 L. J. Ch. 77; 77 L. T. 505; 46 W. R. 198; 14 T. L. R. 86; 42 Sol. Jo. 96; 4 Mans. 398, C. A. *Annotations:—Mentd.* *Payne v. Cork Co.*, [1900] 1 Ch. 308; *Punt v. Symons*, [1903] 2 Ch. 506; *Ayro v. Skelsey's Adamant Cement Co.* (1904), 20 T. L. R. 587; *Bisgood v. Henderson's Transvaal Estates*, [1908] 1 Ch. 743.

5475. Necessity for shares to have been held for six months—Judgment obtained by shareholder that company should allot shares & enter shareholder on register—Neglect of company so to do—Right of shareholder to petition.—A petition for winding up a co. may be presented by persons who have obtained a decree of the ct. ordering the co. to allot them shares & to register them as shareholders, although their names are not on the register at the time of the presentation of the petition.

The technical objection has no weight. Petitioners have been declared by the ct. entitled to be shareholders, & the co. have been ordered to allot them these shares, & to register them as shareholders in respect of them. These orders the co. have failed to comply with, & it is only through their default that petitioners' names were not on the register upwards of six months ago (*BACON, V.-C.*).—*Re PATENT STEAM ENGINE CO.* (1878), 8 Ch. D. 464; 26 W. R. 811.

5476. ———.—**"Held"**—**Liquidation petition filed by insolvent shareholder—Shares registered in shareholder's name.**—A contributory of a co. may present a petition to wind up the co. where his name appears on the register as the holder of

not justify an order:—*Held*: the refusal did not bar a subsequent application by other creditors & upon other material.—*Re MANITOBA COMMISSION CO.* (1913), 22 W. L. R. 950.—**CAN.**

c. Party claiming unliquidated damages—Small claim for arrears of salary.—A person who has a claim against a co. for unliquidated damages by reason of alleged wrongful dismissal is not a creditor of such co., nor does the fact of his having a small claim for

balance of arrear salary, which amount has been tendered to him "without prejudice" by the co., & by him returned, make him such a creditor.—*WILLIAMS v. WILLIAMS & CO., LTD.*, [1914] E. D. L. 129.—**S. AF.**

PART III. SECT. 36, SUB-SECT. 3.— B. (c) i.

d. Statutory right of petition.—On a petition by certain shareholders of the co. praying for a winding-up order under R. S. C., c. 129:—*Held*: R. S. C.,

c. 129, like the Insolvent Act, 1875, which provided for the winding up of incorporated cos., is intended to be put into operation at the instance of creditors only.—*Re UNION RANCH CO. OF CANADA, LTD.* (1888), 15 O. R. 307.—**CAN.**

e. Shareholder in old company having right to apply for shares in a new company—Though no application actually made.—Under an agreement, ratified by legislation, between two cos., the assets of the old co. became vested

shares, though a trustee may have been appointed under a liquidation petition filed by such contributory, during the period of six months mentioned in 1867 Act, s. 40. The word "held" in such sect. has no technical meaning, the true meaning of the word being that the name of the contributory has been on the register as the holder of shares for the period in question.—*Re WALA WYNAAD INDIAN GOLD MINING CO.* (1882), 21 Ch. D. 849; 52 L. J. Ch. 86; 47 L. T. 128; 30 W. R. 915.

—No statement of holding in petition.]—*See* No. 5564, *post*.

5477. Agreement by petitioner to refer matters to arbitration—Arbitrator's award not taken up.—Petitioner had agreed with other members of the co. to refer all matters in difference, & also the adjustment & settlement of the affairs of the co., to arbitration. The arbitrator had made his award, but it had not been taken up:—*Held*: petitioner was not barred from obtaining an order for winding up the affairs of the co.—*Re LANCASTER & NEWCASTLE-UPON-TYNE RY. CO.* (1849), 5 Ry. & Can. Cas. 632; 13 L. T. O. S. 321.

5478. Contributory against whom legal proceedings threatened or begun—On account of company's debt—Payment of debt on behalf of company.—*Re PATENT CONCENTRATED TEA CO.* (1850), 16 L. T. O. S. 189.

5479. ——— Failure of company to pay debt after notice.—A banking co. issued debentures. An action was brought on one of those debentures against A., a shareholder, residing in Scotland, in the Ct. of Session there. The co. declined to indemnify him against such action:—*Held*: this came within Joint-Stock Companies Winding-up Act, 1848 (c. 45), s. 5, para. 8, & A. had a right to petition for the winding up of the co.—*Re ROYAL BANK OF AUSTRALIA, Ex p. LATTA* (1850), 3 De G. & Sm. 186; 19 L. J. Ch. 387; 15 L. T. O. S. 3; 14 Jur. 908; 64 E. R. 437.

Annotations:—*Mentd. Atkins v. Cook* (1857), 5 W. R. 381; *Re Home Assco. Asscn. (No. 2)* (1871), L. R. 12 Eq. 112.

5480. Shareholder acquiring interest in company for sole purpose of presenting petition.—Though it is doubtful whether a holder of paid-up shares can present a petition for the winding up of a co., under 1862 Act, s. 82, such a petition, presented by persons who had merely acquired an interest in the co. for the purpose of presenting it:—*Held*: not to be irregular.—*Re CHESHIRE PATENT SALT CO., LTD.* (1863), 1 New Rep. 533; 9 Jur. N. S. 1098.

5481. Holder of scrip—Admitting liability as contributory.—A holder of scrip certificates for shares in a co. may present a petition for a winding-up order, if he admits his liability as a contributory to the co., & undertakes to do all acts necessary to his becoming a shareholder.—*Re LITTLEHAMPTON, ETC. CO., LTD.* (1865), 2 De G. J. & Sm. 521; 12 L. T. 8; 11 Jur. N. S. 211; 13 W. R. 420; 46 E. R. 476; *sub nom. Re LITTLEHAMPTON, HAVRE & HONFLEUR S.S. CO., LTD., Ex p. ELLIS*, 34 L. J. Ch. 237, L. J.J.

Annotation:—*Reid. Re Gold Co.* (1879), 11 Ch. D. 701.

5482. Shareholder objecting to amalgamation—Object of petition to ascertain position under amalgamation.—Where a corp., having power to buy up other concerns, agreed to amalgamate

with another co., & a shareholder in the latter co., who objected to the amalgamation, presented a petition praying for an order to wind up the corp., alleging that it had ceased to carry on business; but really desiring, by means of the winding-up order, to ascertain his exact position in the concern:—*Held*: the case was not one for a winding-up order within 1862 Act; & petitioner ought to file a bill in equity to have his rights determined.—*Re NATIONAL FINANCIAL CORPN.* (1866), 14 L. T. 749; 14 W. R. 907.

5483. Shareholder petitioning in his own interest only—Claim for unpaid dividend.—*Re POSITIVE GOVERNMENT SECURITY LIFE ASSURANCE CO.*, [1877] W. N. 23.

5484. Executor of deceased shareholder—Provision in deed of settlement that executors not proprietors.—*Re NORWICH YARN CO.*, No. 5338, *ante*.

ii. Shareholder in Arrear with Calls.

5485. Whether entitled to present petition.—A shareholder indebted for calls made two years previously to meet liabilities shown by the accounts of that date:—*Held*: not to be entitled to an order for winding up the affairs of the co., merely on the ground that he had been sued for a sum less than the amount due from him for calls, as a debt claimed from the co., & had not been expressly indemnified or protected by the co. pursuant to Joint Stock Companies Winding-up Act, 1848 (c. 45), s. 5, case 5; the ct. being of opinion that he had in his hands a sufficient indemnity for the action.

But, it appearing that the co. was only existing for the purpose of winding up its affairs, & there being nothing to show that the liabilities had since been paid, & subsequent accounts of the co. showing liabilities still outstanding, & calls being due from other shareholders, including one of the trustees of the co.:—*Held*: although petitioner alone desired the investigation, he was entitled to an order for winding up the affairs of the co.—*Re BIRCH TORR & VITIFER CO., Ex p. LAWTON* (1854), 1 K. & J. 204; 24 L. T. O. S. 190; 3 W. R. 148; 69 E. R. 430.

5486. ————A contributory who is in arrear for calls will not be allowed to petition to wind up a co.—*Re EUROPEAN LIFE ASSURANCE SOCIETY* (1870), L. R. 10 Eq. 403; 22 L. T. 785; 18 W. R. 915; *sub nom. Re EUROPEAN LIFE ASSURANCE SOCIETY, Ex p. CROWE*, 40 L. J. Ch. 87.

Annotations:—*Folld. Re Steam Stoker Co.* (1875), 32 L. T. 143. *Expld. Re Diamond Fuel Co.* (1879), 13 Ch. D. 400. *Consd. Re Crystal Reef Gold Mining Co.*, [1892] 1 Ch. 408. *Reid. Re Petersburgh & Viborg Gas Co., Ex p. Hartmont* (1875), 33 L. T. 637.

5487. ——— Offer by petitioner to pay calls into court.—A petition for winding up by a shareholder in arrear of calls alleged the calls were in danger of waste by the co., & offered payment into ct. The petition was dismissed as demurrable.—*Re STEAM STOKER CO.* (1875), L. R. 19 Eq. 416; 44 L. J. Ch. 386; 32 L. T. 143; 23 W. R. 545.

Annotations:—*Consd. Re Diamond Fuel Co.* (1879), 39 L. T. 662. *Mentd. Re Rica Gold Washing Co.* (1879), 11 Ch. D. 36.

5488. ————*Re DIAMOND FUEL CO.*, No. 5377, *ante*.

5489. ——— Petitioner ordered to pay calls into

PART III. SECT. 36, SUB-SECT. 3.—B. (c) ii.

1. Whether entitled to present petition—On ground that capital lost & unavailable.—A winding-up order will not be granted against a limited liability co. on the ground that three-

in the new co. & the shareholders in the old co. were entitled to exchange their shares for shares in the new co. A shareholder in the old co. who had not made such application was placed upon the list of contributories on the assumption that he had exchanged

his shares. The shares of that shareholder were not fully paid up, & he petitioned for the winding up of the old co.:—*Held*: petitioner had sufficient status to present the petition.—*MACPHERSON v. BOYCE* (1919), 59 S. C. R. 691.—CAN.

Sect. 36.—Winding up by court: Sub-sect. 3, B. (c) ii. & iii., (d), C. & D. (a) i. & ii.]

court.]—The fact that a shareholder is in arrear with a call is not an absolute bar to his presenting & opening a petition for a winding-up order; but, as a general rule, such a petition will not be allowed to be heard, at any rate until he has paid the amount of the call into ct.—*Re CRYSTAL REEF GOLD MINING CO.*, [1892] 1 Ch. 408; 61 L. J. Ch. 208; 66 L. T. 111; 40 W. R. 235; 36 Sol. Jo. 217. *Annotation:—Apld. Re Gee Floor Scrubbing Machine Co.* (1898), 42 Sol. Jo. 819.

5490. ———.]—*Re GEE FLOOR SCRUBBING MACHINE CO., LTD.* (1898), 42 Sol. Jo. 819.

iii. Fully-paid Shareholder.

5491. Whether entitled to present petition.]—*Re CHESHIRE PATENT SALT CO., LTD.*, No. 5480, *ante*.

5492. ———.]—A shareholder who has fully paid up his shares is still a "contributory," so as to be entitled to petition for winding up the co.—*Re LONDON ARMOURY CO., LTD.* (1865), 11 Jur. N. S. 963.

5493. ———.]—(1) Where a petition, presented by a co. to discharge a winding-up order, was dismissed, the form of the order was to direct the costs of resps. to come out of the estate, & make no order as to the costs of the co.

(2) A holder of fully paid-up shares in a co. with limited liability is a contributory within 1862 Act, so as to be entitled to present a petition for a compulsory winding up of the co. by the ct.—*Re NATIONAL SAVINGS BANK ASSOCN.* (1866), 1 Ch. App. 547; 35 L. J. Ch. 808; 12 Jur. N. S. 697; 14 W. R. 1005; *sub nom. Re ANGLESEA COLLIERY CO., LTD., Re NATIONAL SAVINGS BANK ASSOCN., LTD.*, 15 L. T. 127, L. J.

Annotations:—As to (1) Foll. Re Diamond Fuel Co. (1879), 13 Ch. D. 400. *Reid. Re Consolidated South Rand Mines Deep*, [1909] W. N. 66.

5494. ———.]—The ct. will not, except under special circumstances, order a limited co. to be wound up on the petition of a shareholder whose shares are fully paid-up.—*Re PATENT ARTIFICIAL STONE CO., LTD.* (1864), 34 Beav. 185; 5 New Rep. 212; 34 L. J. Ch. 330; 11 L. T. 561; 11 Jur. N. S. 4; 13 W. R. 285; 55 E. R. 605.

5495. ——— Company insolvent.]—The holder of fully paid-up shares in an insolvent co. is not entitled to a winding-up order, but where it is solvent & other shareholders have not paid up in full, he may have a winding-up order, upon showing a proper case, in order to enforce contribution.—*Re LANCASHIRE BRICK & TILE CO.* (1865), 34 Beav. 330; 5 New Rep. 482; 34 L. J. Ch. 331; 11 Jur. N. S. 405; 13 W. R. 569; 55 E. R. 662.

5496. ———.]—*Re DIAMOND FUEL CO.*, [1878] W. N. 11; *subsequent proceedings* (1879), 13 Ch. D. 400, C. A.

5497. ——— Necessity for allegation & proof of assets sufficient to give surplus.]—(1) A fully

paid-up shareholder who presents a petition to wind up the co. must both allege in his petition show by evidence that there are assets of the co. of such an amount that in the event of a winding up he would have a tangible share of surplus to receive.

(2) On a winding-up petition, as well as in an action, a vague allegation of fraud is not sufficient, but the facts which constitute the fraud must be stated, & if there is only a vague general allegation of fraud, evidence of the acts of fraud is not admissible.—*Re RICA GOLD WASHING CO.* (1879), 11 Ch. D. 36; 40 L. T. 531; 27 W. R. 715, C. A.

Annotation:—As to (1) Reid. Re Diamond Fuel Co. (1879), 13 Ch. D. 400.

5498. ———.]—A creditor of a mining co. made repeated applications for payment through the year 1881, & on Dec. 21 obtained a payment on account, & being unable to obtain more, he, on Dec. 28, issued a writ. On Jan. 4, 1882, a paid-up shareholder in the co., who was under considerable liability as a surety for the co., presented a petition to wind it up, setting out a balance-sheet which showed that the assets greatly exceeded the liabilities, but not alleging as a fact that they did so, stating that the co. was unable to pay its debts, & that it was just & equitable that it should be wound up. On Jan. 8 the creditor recovered final judgment without notice of the winding-up petition, & on the following day issued execution. On Jan. 14 the petition came on to be heard & was supported by creditors, & a winding-up order was made. The creditor then applied for leave to go on with the execution:—*Held*: (1) the petition could not be treated as a petition collusively presented on behalf of a solvent co. for the purpose of defeating the execution, for that the balance-sheet could not be treated as proving the co. to be solvent, & petitioner, though not legally a creditor, was virtually such, & by amending the petition by joining one of the supporting creditors it might have been made a creditor's petition; & consequently leave to proceed with the execution ought not to be given; (2) leave ought not to be given on the ground that the creditor had given indulgence to the co., as he had never given time to the co. in the sense of binding himself not to sue, but had merely abstained from suing.

He says he is a shareholder, but he is a fully paid-up shareholder & has no *locus standi* to apply for a winding-up order unless he alleges that there is a surplus & gives some evidence in support of the allegation, for otherwise he has no interest in a winding up (*JESSEL, M.R.*).—*Re VRON COLLIERY CO.* (1882), 20 Ch. D. 442; 51 L. J. Ch. 389; 30 W. R. 388, C. A.

Annotations:—As to (2) Dist. Armorduct Manufacturing Co. v. General Incandescent Co., [1911] 2 K. B. 143. *Generally, Mentd. Re North Carolina Estate Co.* (1889), 5 T. L. R. 328.

5499. ———.]—*Re KASLO-SLOCAN MINING & FINANCIAL CORPN., LTD.*, [1910] W. N. 13.

fourths of the paid-up capital has been lost or is unavailable, where the petition is presented by a shareholder from whom unpaid calls are due.—*ELLERKER v. PREMIER PRODUCTS & INDUSTRIES, LTD.* (1919), 40 N. L. R. 102.—S. AF.

PART III. SECT. 36, SUB-SECT. 3.—B. (c) iii.

5491 i. Whether entitled to present petition.]—A shareholder who has fully paid up his shares in a co. is a "contributory" so as to entitle him to initiate winding-up proceedings.—*Re MACDONALD & NOXON BROTHERS MANU-*

Co., LTD. (1888), 16 O. R. 368.—CAN.

5491 ii. ———.]—*Re INDIAN COMPANIES ACT, 1866, Re SYLHET & CACHAR TEA CO.* (1866), 2 Ind. Jur. N. S. 94.—IND.

5491 iii. ———.]—A holder of fully paid-up shares is a contributory.—*PATERSON v. M'FARLANE, ETC.* (1875), 2 R. (Ct. of Sess.) 490; 12 Sc. L. R. 318.—SCOT.

5491 iv. ———.]—The holder of fully paid-up shares in a limited co. is entitled under Cos. Acts to present a petition for the winding up of such

co.—*Re GOOD HOPE FUNERAL ASSOCN., LTD.* (1907), 24 S. C. 55.—S. AF.

g. ——— Must show assets.]—A holder of fully-paid shares is a "contributory" & can present a petition for winding up; but he must allege & prove at least to the extent of a *prima facie* case, that there are assets of such amount as will give him a tangible share in the event of a winding up.—*BURKHARDT v. BLACK SANDS REDUCTION CO. OF SOUTH AFRICA, LTD.*, [1910] T. L. 244.—S. AF.

A fully paid-up

5500. Assets dwindling away.]—*Re* NEW ZEALAND QUARTZ CRUSHING CO., [1873] W. N. 174.

5501. — Voluntary liquidation pending.]—A contributory of a co., even though he is the holder of fully-paid shares, is not debarred from presenting a compulsory winding-up petition by the mere fact that there is a voluntary liquidation pending in which there is a surplus or probable surplus of assets for distribution.—*Re* NATIONAL DISTRIBUTION OF ELECTRICITY CO., LTD., [1902] 2 Ch. 34; 71 L. J. Ch. 702; 87 L. T. 6; 9 Mans. 314, C. A.

(d) *Official Receiver.*

See 1908 Act, s. 137 (2).

Petition to wind up company already in liquidation—Voluntary winding up.]—*See* Sect. 37 (15), *post*.

Winding up under supervision of court.]—*See* Sect. 38, sub-sect. 2, *post*.

C. *In respect of What Debts.*

Debt for less than £50.]—*See* Sub-sect. 3, B. (b) i., *ante*.

Secured debt.]—*See* Sub-sect. 3, B. (b) ii., *ante*.

Judgment debt.]—*See* Sub-sect. 3, B. (b) iii., *ante*.

Disputed debt.]—*See* Sub-sect. 3, B. (b) iv., *ante*.

D. *Grounds for Granting or Refusing Petition.*

(a) *Wishes of Creditors and Shareholders.*

i. *In General.*

5502. General rule—Shareholder's petition.]—Though a creditor is entitled to a winding-up order against an insolvent co. *ex debito justitiæ*, this is not so as to a contributory.—*Re* PROFESSIONAL, COMMERCIAL & INDUSTRIAL BENEFIT BUILDING SOCIETY (1871), 6 Ch. App. 856; 25 L. T. 397; 19 W. R. 1153, L. J.J.

*Annotations:—***Mentd.** *Chapleo v. Brunswick Permanent Bldg. Soc.* (1881), 6 Q. B. D. 696; *Cunliffe, Brooks v. Blackburn Benefit Bldg. Soc.* (1884), 52 L. T. 225; *Murray v. Scott, Agnew v. Murray, Brimelow v. Murray* (1884), 9 App. Cas. 519; *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352.

5503. — Creditor's petition.]—*Re* INNS OF COURT CO., [1866] W. N. 348.

*Annotations:—***Reid.** *Re Trowbridge Water Supply Co.* (1868), 18 L. T. 115. **Mentd.** *Re United Merthyr Collieries Co.* (1867), 16 L. T. 170.

Company without available assets.]—*See* Sub-sect. 3, D. (b), *post*.

ii. *Wishes of Creditors.*

5504. Creditor's petition.]—A creditor of a joint-stock co. has, as a general rule, a right to a winding-up order.

Semble: if the co. undertakes to pay off the creditor, the ct. will direct the petition to stand over.

shareholder, who seeks to obtain the intervention of the ct. in a question of the compulsory or voluntary winding up of a co., though technically he has a *locus standi* as a shareholder, must show *prima facie* that, when the co. is wound up, the assets will be sufficient after payment of its debts to give him a tangible interest in the winding up of the co.—*WILLIAMS v. WILLIAMS & CO., LTD.*, [1914] E. D. L. 129.—S. AF.

PART III. SECT. 36, SUB-SECT. 3.—
D. (a) i.

k. General rule—As affecting discretion of court to grant or refuse winding-up order.]—The ct. has a discretion to grant or withhold a

winding-up order under R. S. C., c. 129, s. 9. Where the assets of the co. were small & the creditors had almost unanimously entered upon a voluntary liquidation a petition for a compulsory winding-up order was refused.—*Re* MAPLE LEAF DAIRY CO. (1901), 2 O. L. R. 590; 21 C. L. T. 596.—CAN.

l. — *Winding up detrimental to all concerned.]—*The ct., after considering minutes lodged by petitioners & by the objectors, & coming to the conclusion that the winding up of the co. would be detrimental to all concerned, & having regard to the wishes of the creditors & of the great majority of the shareholders, refused to order intimation, & refused the prayer of a

A creditor of a joint-stock co. presented a petition for a winding-up order. It was opposed by creditors to a much larger amount, on the ground that more would be realised under a voluntary winding up. A meeting of shareholders had been called to pass a resolution for a voluntary winding up:—*Held:* the petitioner was entitled to the order.—*Re* GENERAL ROLLING STOCK CO., LTD. (1865), 34 Beav. 314; 5 New Rep. 354; 12 L. T. 9; 11 Jur. N. S. 231; 13 W. R. 423; 55 E. R. 656.

*Annotation:—***Reid.** *Re Manchester Queensland Cotton Co., Ex p. Bank of New South Wales* (1867), 15 W. R. 1070.

5505. —.]—The wishes of the majority of the creditors as to whether a co. shall be wound up voluntarily or compulsorily are to be first considered, & where these are properly expressed by public meeting or otherwise, effect will be given to them. Where therefore a majority of the creditors of a co. desired that the affairs of such co. should be wound up compulsorily under the supervision of the ct., although the directors & a considerable number of the shareholders were opposed to it, the ct. made the order on a petitioning creditor's application to wind up the affairs compulsorily.—*Re* ORIENTAL COMMERCIAL BANK, LTD. (1866), 14 L. T. 755; 15 W. R. 7; *on appeal*, 15 L. T. 8, L. C.

5506. —.]—A winding-up order cannot be claimed *ex debito justitiæ* by an unpaid creditor of a co., & the ct. will have regard to the wishes of the majority of the creditors; & may, under 1862 Act, s. 91, dismiss a creditor's petition, though the debt has not been paid, where the majority of creditors desire a voluntary winding up, & the ct. is satisfied that that will be the preferable course.—*Re* LANGLEY MILL STEEL & IRON WORKS CO. (1871), L. R. 12 Eq. 26; 40 L. J. Ch. 313; 24 L. T. 382; 19 W. R. 674.

5507. — Offer by single shareholder to pay petitioner's debt.]—A petition by small creditors for the winding up of a co. was supported by other creditors for sums amounting to £20,000. The co. admitted insolvency, & it was not suggested that the business could be carried on. The petition was, however, opposed by a shareholder who offered to pay petitioner's debt:—*Held:* the order for winding up must be made.

Semble: where a co. is admittedly insolvent a shareholder cannot stop a creditor's petition to wind up the co. by paying off petitioner's claim.—*Re* PAVY'S PATENT FELTED FABRIC CO., LTD. (1875), 24 W. R. 91.

5508. —.]—A limited railway co. issued, under the provisions of a trust deed, £100 mtge. bonds, in order to raise money for the construction of their railway. By the deed the co. covenanted with the trustees that all the bonds should rank *pari passu*, & that every bond should entitle the holder to a fully paid-up ordinary share in the co. as a "bonus share"; that the co. would

petition for winding up.—*BLACK v. UNITED COLLIERIES, LTD.* (1904), 7 F. (Ct. of Sess.) 18; 42 Sc. L. R. 18; 12 S. L. T. 373.—SCOT.

PART III. SECT. 36, SUB-SECT. 3.—
D. (a) ii.

m. *Creditors' petition—Existing assignment for benefit of creditors—Majority desiring that liquidation should be proceeded with under assignment.]—*Sect. 9 of Dominion Winding-up Act gives a wide discretionary power to the ct. to grant or refuse a winding-up order; & where, upon an application for such an order, it appeared that the co. had previously made a voluntary assignment for the benefit of creditors

Sect. 36.—Winding up by court: Sub-sect. 3, D. (a)

pay to the trustees the interest on the bonds, & also an annual sum by way of sinking fund for the discharge of the bonds; & that the bond debt, interest, & sinking fund should be a charge on the railway. Each bond contained a covenant by the co. with the trustees for payment of £100 to the "bearer thereof," & of interest to the "bearer" of the coupons annexed thereto.

The interest on the bond debt having fallen into arrear, a winding-up petition was presented by a holder of six bonds, but was dismissed with costs, on the ground (1) that neither the bearer of the bond, as to principal, nor the bearer of the coupons, as to interest, was a creditor of the co. either at law or in equity within the Companies Acts, his right of action being through the trustees only; & (2) that assuming a bondholder to be a creditor, then, under 1862 Act, s. 91, regard must be had to the wishes of the bondholders other than the petitioner, all of whom opposed the petition.

As a general rule, an unpaid creditor of a co. is entitled to a winding-up order *ex debito justitiæ*; but that rule is subject to exceptions: *e.g.* where all the other creditors oppose the petition, & it appears that the petitioning creditor will not be in a better position by obtaining a winding-up order.

But there is another ground on which I think also the petition should be dismissed, & it is this, that bondholders to the amount of £142,700 have instructed counsel to appear for them to oppose the petition. Now under sect. 91, it has been decided that the ct. may have regard to the wishes of persons opposing a winding-up petition. It has been decided that the sect. authorises the ct. even to refuse a winding-up order. I agree that, as a general rule, a creditor is entitled to a winding-up order *ex debito justitiæ*; but that rule is not without an exception; & if ever there was a case of exception I think I have it here (JESSEL, M.R.).—*Re URUGUAY CENTRAL & HYGUERITAS RY. CO. OF MONTE VIDEO* (1879), 11 Ch. D. 372; 48 L. J. Ch. 540; 41 L. T. 267; 27 W. R. 571.

Annotations:—*Apld.* *Re Chapel House Colliery Co.* (1883), 24 Ch. D. 250. *Distd.* *Re Olathe Silver Mining Co.* (1884), 27 Ch. D. 278. *Apld.* *Re Ilfracombe Permanent Mutual Benefit Bldg. Soc.*, [1901] 1 Ch. 102.

5509. —.]—In determining whether regard should be paid to the wishes of creditors who oppose the making of a winding-up order, the ct. ought to consider not only the number of the creditors & the amount of their debts, but also the reasons which they assign for their conclusion. The *prima facie* right of an unpaid creditor of a co. to a winding-up order is rebutted when it is shown that a large mass of other creditors oppose the making of such an order. A creditor's winding-up petition ordered to stand over for six months upon terms similar to those imposed in *Re St. Thomas Dock Co.*, No. 5663, *post.*—*Re GREAT WESTERN (FOREST OF DEAN) COAL CONSUMERS'*

Co. (1882), 21 Ch. D. 769; 51 L. J. Ch. 743; 46 L. T. 875; 30 W. R. 885.

Annotations:—*Apld.* *Re Clandown Colliery Co.*, [1915] 1 Ch. 369. *Refd.* *Re Chapel House Colliery Co.* (1883), 24 Ch. D. 259.

5510. —.]—Although as a general rule an unpaid creditor of a co. which cannot pay its debts is entitled to a winding-up order, that order will not be made when it is shown that the petitioning creditor cannot gain anything by a winding-up order, & *à fortiori*, it will not be made under those circumstances if the other creditors oppose it.—*Re CHAPEL HOUSE COLLIERY CO.* (1883), 24 Ch. D. 259; 52 L. J. Ch. 934; 49 L. T. 575; 31 W. R. 933, C. A.

Annotations:—*Consd.* *Re Krasnapolsky Restaurant & Winter Garden Co.*, [1892] 3 Ch. 174; *Re London Health Electrical Institute* (1897), 76 L. T. 98; *Re Melson*, [1906] 1 Ch. 841. *Folld.* *Re East Kent Colliery Co.* (1914), 30 T. L. R. 659. *Refd.* *Re United Stock Exchange* (1884), 51 L. T. 687; *Re Free Fishermen of Faversham Co. or Fraternity* (1887), 36 Ch. D. 329; *Re Greenwood*, [1900] 2 Q. B. 306; *Re Ilfracombe Permanent Mutual Benefit Bldg. Soc.*, [1901] 1 Ch. 102; *Re Manchester & Liverpool Transport Co.* (1903), 19 T. L. R. 227; *Re Crigglestone Coal Co.*, [1906] 2 Ch. 327. *Mentd.* *Re Olathe Silver Mining Co.* (1884), 27 Ch. D. 278; *Re A Company* (1915), 31 T. L. R. 171.

5511. — Supervision order asked for at hearing—Order opposed by majority of creditors.]—

A petition for the compulsory winding up of a co. having been presented by a creditor, if, at the hearing of the petition, petitioner asks only for a supervision order:—*Semle*: 1862 Act, s. 149, does not authorise the ct., even at the request of a majority of the creditors, to order a compulsory winding up against the wish of petitioner.—*Re CHEPSTOW BOBBIN MILLS CO.* (1887), 36 Ch. D. 563; 57 L. J. Ch. 168; 57 L. T. 752; 36 W. R. 180.

5512. —.]—A building society was established & certified in 1868 under Building Societies Act, 1836 (c. 32), but was never incorporated. By Building Societies Act, 1894 (c. 47), the Act of 1836 was repealed as from Aug. 1896, as to all societies certified under it after 1856. Early in 1900 the society was found to be insolvent, & a winding-up petition was then presented against the society, but C., one of its creditors, did not appear on that petition, which was withdrawn, all the other undisputed creditors of the society agreeing to accept 12s. 6d. in the pound, which was paid to them. There was nothing for distribution amongst the shareholders, as the assets when sold did not realise enough to pay the composition. The balance of this was provided by the directors out of their own pockets, & they took an assignment of the claims of the assenting creditors, & retained in hand enough to pay, & offered C. 12s. 6d. in the pound on his debt. C. refused the offer, & petitioned for a winding-up order, alleging irregularities by the society's officers, & that an investigation into its affairs was necessary. The ct. was of opinion that nothing substantial would result from a winding-up order:—*Held*: on the facts above stated, the petition must be dismissed.—*Re ILFRACOMBE PERMANENT MUTUAL BENEFIT*

& that it was the desire of the great majority in number & value of the creditors that liquidation should be proceeded with under the assignment, the application was refused.—*WAKEFIELD RATTAN CO. v. HAMILTON WHIP CO.* (1893), 24 O. R. 107.—CAN.

n. — Insolvency of company admitted—No discretion to refuse winding-up order.]—Where the insolvency of the co. is admitted, the ct. has no discretion under Winding-up Act, R. S. C., c. 129, s. 9, to refuse to grant a winding-up order on the petition of a creditor who has a substantial

interest in the estate, although the co. has made a voluntary assignment for the benefit of its creditors, & most of them are willing that the winding up should be under such assignment.—*Re WILLIAM LAMB MANUFACTURING CO. OF OTTAWA* (1900), 32 O. R. 243.—CAN.

o. — Nothing to be gained by winding up.]—A company will not be compulsorily wound up at the instance of unsecured creditors, where it is shown that nothing can be gained by a winding up, *e.g.* where there would not be any assets to pay liquidation

expenses.—*Re OKELL & MORRIS FRUIT PRESERVING CO.* (1902), 9 B. C. R. 153.—CAN.

p. — Entitled *ex debito justitiæ* as between himself & company—Not so entitled as between himself & other creditors.]—In considering the right *ex debito justitiæ* to a winding-up order it is immaterial whether the insolvency of the co. be proved by an unsuccessful demand for payment or by other sufficient evidence. Where it is not made to appear that petitioner for a winding-up order has a substantial interest in the winding up & he is the

BUILDING SOCIETY, [1901] 1 Ch. 102 ; 70 L. J. Ch. 66 ; 84 L. T. 146 ; 17 T. L. R. 44 ; 45 Sol. Jo. 103.

5513. —.]—*Re* EAST KENT COLLIERY CO., LTD., No. 5666, *post*.

5514. — **Order opposed by minority of creditors—Interested in preventing forced realisation of company's assets.**]—A petition to wind up a co. on the ground of its inability to pay its debts, ought not to be refused or ordered to be stayed until after the war merely because it is opposed by creditors representing a minority in amount, & the less weight should be given to the wishes of such creditors where it appears that they are interested in preventing a forced realisation of the assets of the debtor co.—*Re* OILFIELDS FINANCE CORPN., LTD. (No. 1) (1915), 59 Sol. Jo. 475, C. A.

5515. **Shareholder's petition.**]—Where the proper majority of shareholders in a co. resolve upon a voluntary winding up, & there is no fraud or improper influence, this ct. will not interfere at the instance of a minority, either by ordering the co. to be wound up compulsorily or under supervision.—*Re* BEAUJOLAIS WINE CO. (1867), 3 Ch. App. 15 ; 17 L. T. 399 ; 32 J. P. 195 ; 16 W. R. 177 ; *sub nom.* *Re* BEAUJOLAIS WINE CO., *Ex p.* WRAGGE, 37 L. J. Ch. 220, L. J.

Annotations :—**Folld.** *Re* Madras Coffee Co. (1869), 17 W. R. 643 ; *Re* Union Hill Silver Co. (1870), 22 L. T. 400. **Consd.** *Re* Irrigation Co. of France, Fox's Case (1870), 23 L. T. 453. **Refd.** *Re* County Marine Insee., Rance's Case (1870), 6 Ch. App. 104. **Mentd.** *Re* Star & Garter (1873), 42 L. J. Ch. 374.

Superseding voluntary winding up generally, *see* Sect. 37, sub-sect. 15, *post*.

5516. — **Company insolvent—Shares fully paid.**]—Where all the shares of a co. have been fully paid up & the assets of the co. are insufficient to discharge its debts, the ct. will pay regard to the wishes of creditors in preference to those of shareholders.—*Re* LONSDALE VALE IRONSTONE CO. (1868), 16 W. R. 601.

5517. —.]—*Re* MANCHESTER & LIVERPOOL TRANSPORT CO., LTD. (1903), 19 T. L. R. 227.

5518. **Petition by company—For supervision order.**]—Where a petition is presented asking for a supervision order, or "such other order as to the ct. shall seem meet," the ct. has the power, if the petitioner be willing, to make an order for a compulsory winding up.—*Re* ELECTRIC & MAGNETIC CO. (1881), 50 L. J. Ch. 491 ; 44 L. T. 604 ; 29 W. R. 714.

Annotation :—**Refd.** *Re* Chepstow Bobbin Mills Co. (1887), 36 Ch. D. 563.

5519. **How wishes of creditors ascertained.**]—The wishes of creditors as to the mode of winding up an insolvent co. may be sufficiently shown under 1862 Act, ss. 91, 149, by the appearance of a majority of them by counsel at the Bar, although no general meeting of creditors has been held.—*Re* WEST HARTLEPOOL IRONWORKS CO. (1875), 10 Ch. App. 618 ; 44 L. J. Ch. 668 ; 33 L. T. 149 ; 23 W. R. 938, L. J.

Annotations :—**Consd.** *Re* St. Thomas Dock Co. (1875), 24 W. R. 544 ; *Re* New York Exchange Co. (1888), 58 L. T. 915. **Folld.** *Re* Bishop, [1900] 2 Ch. 254.

5520. —.]—*Re* GREAT WESTERN (FOREST OF DEAN) COAL CONSUMERS' CO., No. 5509, *ante*.

only creditor desiring the order, the order should not be made.—*MARSDEN v. MINNEKAHDA LAND CO., LTD.*, [1918] 2 W. W. R. 471 ; 40 D. L. R. 76.—**CAN.**

q. — — —.]—While a creditor of a co. who is unable to secure payment of his debt is, as between

himself & the co., entitled *ex debito justitiae* to a winding-up order yet as between petitioner & the other creditors, there is no such *ex debito* right.—*Re* EDMONTON BREWING & MALTING CO., LTD. (No. 2), [1913] 3 W. W. R. 988 ; 43 D. L. R. 748.—**CAN.**

iii. Wishes of Shareholders.

5521. **Shareholder's petition.**]—*Re* BANWEN IRON CO. (1849), 13 L. T. O. S. 400.

5522. — **Company carrying on business with prospect of ultimate success.**]—Where a winding-up order had, on the petition of certain shareholders, been made against a co., which, after considerable losses had retrieved its affairs, & was carrying on business with a prospect of ultimate success:—*Held*: the winding-up order should be suspended for a time, in order to enable the co. to call a meeting of shareholders for the purpose of deciding whether the business should be carried on or not.

The meeting having been held, & a resolution having been passed, that it was undesirable that the winding-up order should be proceeded with:—*Held*: the petition should be dismissed, but upon terms, without costs.—*Re* FACTAGE PARISIEN, LTD. (1865), 5 New Rep. 227 ; 34 L. J. Ch. 142, n. ; 11 L. T. 556 ; 11 Jur. N. S. 121 ; 13 W. R. 330, L. C.

Annotations :—**Consd.** *Re* Bwlch y Plwm Co. (1867), 17 L. T. 235 ; *Re* Suburban Hotel Co. (1867), 2 Ch. App. 737. **Mentd.** *Re* General Rolling Stock Co. (1865), 13 W. R. 423 ; *Re* General Co. for Promotion of Land Credit (1869), 5 Ch. App. 367, n.

5523. —.]—If, on a petition for winding up a co., the ct. is of opinion that the circumstances are such that the opinion of the shareholders ought to be obtained, & such opinion, when obtained, is to the effect that there should be no winding up, the ct., if satisfied that such is the *bonâ fide* opinion of the shareholders, will consider itself bound thereby. Therefore, such a petition having been ordered to stand over for the wish of the shareholders to be ascertained, & the shareholders expressing a *bonâ fide* desire to continue their concern, the ct. dismissed the petition ; but, being of opinion that the petitioner had a *bonâ fide* case at the time of presenting the petition, dismissed it without costs.—*Re* GREAT NORTHERN COPPER MINING CO., LTD. (1866), 14 W. R. 705 ; *subsequent proceedings, sub nom.* *Re* GREAT NORTHERN COPPER MINING CO. OF SOUTH AUSTRALIA, LTD., *Ex p.* THE CO. (1869), 20 L. T. 347, L. J.

5524. — **Company unable to pay existing liabilities—Without further call on shareholders.**]—A co. made a call upon its shareholders, payable in two months' time ; but in the *interim*, being unable to pay its debts, two petitions, one by a shareholder & the other by a judgment & execution creditor, were presented for winding it up. The ct., notwithstanding the opposition of a majority of the shareholders, & an allegation on the part of the co. that it would be in a position to meet all its engagements so soon as the call had been paid, made an order to wind up the co. on both petitions.—*Re* INTERNATIONAL CONTRACT CO., LTD., *Ex p.* SPARTALI & TABOR (1866), 14 L. T. 726 ; *subsequent proceedings*, 1 Ch. App. 523, L. C.

5525. — — —.]—A petition was presented by a shareholder to wind up a co., which worked mines in Australia, from which no profit had been derived during the last four years, & the working of which had been entirely suspended during the last six months. The liabilities of

r. **How wishes of creditors ascertained—Jurisdiction of court to consult.**]—The ct. may, on a petition for the compulsory winding up of a co. & prior to making an order, consult the wishes of the creditors.—*Re* BELMONT LAND CO. (1913), 32 N. Z. L. R. 864.—**N.Z.**

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the co. were much smaller than the amount of their unpaid capital, but these liabilities could not be discharged without making further calls. The petition was supported by a considerable minority of the shareholders, but was opposed by the majority:—*Held*: this was a case in which the ct. ought to interpose. Usual winding-up order made accordingly.—*Re GREAT NORTHERN COPPER MINING CO. OF SOUTH AUSTRALIA, LTD., Ex p. GREAT NORTHERN COPPER MINING CO. OF SOUTH AUSTRALIA, LTD.* (1869), 20 L. T. 347, L. JJ.; *previous proceedings, sub nom. Re GREAT NORTHERN COPPER MINING CO., LTD.* (1866), 14 W. R. 705.

5526. — “Just & equitable” that company should be wound up.—Where it appears just & equitable the ct., under 1862 Act, s. 79, has power to order a co. to be wound up, notwithstanding such winding up is contrary to the wishes of a majority of the shareholders.—*Re BRITISH OIL & CANNEL CO.* (1867), 15 L. T. 601.

5527. ——*Re SUBURBAN HOTEL CO., No. 5354, ante.*

5528. — Petitioner’s interest & liability very small.—The ct. will not, at the instigation of one or two shareholders, make a winding-up order when the other shareholders oppose it, but will consider the interests of the majority, & will not give any encouragement to one or two against the majority.—*Re IRRIGATION CO. OF FRANCE, Ex p. FOX* (1871), 6 Ch. App. 176; 40 L. J. Ch. 433; 24 L. T. 336, L. JJ.

Annotations:—Apld. Re Tunis Rys. (1874), 10 Ch. D. 270, n. *Refd. Re Langley Mills Steel & Iron Works Co.* (1871), 40 L. J. Ch. 313; *Re Tumacacori Mining & Land Co.* (1874), 43 L. J. Ch. 417; *Re Hester* (1875), 44 L. J. Ch. 757; *Re Amalgamated Syndicate*, [1897] 2 Ch. 600. *Mentd. Thomson v. Henderson’s Transvaal Estates*, [1908] 1 Ch. 765; *Thomas v. United Butter Co.’s of France*, [1909] 2 Ch. 484; *Etheridge v. Central Uruguay Northern Extension Ry.*, [1913] 1 Ch. 425; *Re Anglo-Continental Supply Co.*, [1922] 2 Ch. 723.

5529. ——A co. was formed with limited liability, having a capital of £50,000, in 10,000 shares, of which 2,300 were taken, & calls made to the amount of £4 per share. A holder of five shares, on which £4 per share had been paid, presented a petition for winding up the co., alleging it to be unable to pay its debts. The great body of shareholders were opposed to a winding up:—*Held*: the petition ought to be dismissed, for that the ct. had a judicial discretion as to ordering a winding up on the petition of a shareholder, & ought not, in the case of a limited co., to make the order against the wish of the bulk of the shareholders on the application of a person whose interest & liability were so small.—*Re LONDON SUBURBAN BANK* (1871), 6 Ch. App. 641; 40 L. J. Ch. 774; 19 W. R. 763, L. JJ.

Annotations:—Consd. Re Second Commercial Benefit Bldg. Soc. (1879), 48 L. J. Ch. 753. *Mentd. Re Chapel House Colliery Co.* (1883), 31 W. R. 933.

5530. — Company prosperous—Petition on ground of past misconduct of director.—*Re SHEPHERD’S BUSH IMPROVEMENTS, LTD.* (1909), *Times*, Mar. 9, C. A.

5531. ——*Re PETERSBURG & VIBORG GAS CO., [1874] W. N. 196.*

PART III. SECT. 36, SUB-SECT. 3.—D. (b).

No realisable assets—Beyond uncalled capital—Winding-up order made.—A winding-up order will not be granted where there are no assets, & the petitioning creditor would therefore get nothing by the order. Where, however, on a petition for such an order which was contested on the ground of the alleged non-existence

of assets, it appeared that there was an amount of subscribed stock only partially paid up, an amount of stock issued as paid up, the consideration for which did not satisfactorily appear, & also a large issue of bonds which appeared to have been of very little benefit to the co., & it was impossible to say whether they were held for value or not, an order was granted winding up the co.—*Re GEORGIAN BAY SHIP*

5532. — Company solvent.—The ct. will not upon the petition of a shareholder make an order for winding up a solvent co. against the wishes of the majority of the shareholders.—*Re PATENT COCOA FIBRE CO.* (1876), 24 W. R. 483.

5533. — No prospect of carrying on business for which company formed.—*Re HAVEN GOLD MINING CO., No. 5359, ante.*

5534. ——*Re MIDDLESBOROUGH ASSEMBLY ROOMS CO., No. 5334, ante.*

5535. ——*Re HUDSON’S STEAM BISCUIT CO.* (1886), 2 T. L. R. 833.

5536. ——Where by the constitution of a limited co. a portion of its uncalled capital is not capable of being called up, except in the event of & for the purpose of the co. being wound up, the contract of a shareholder with his fellow-shareholders as regards such reserve capital is that the business of the co. shall be carried on with a certain amount of capital, of which he is to contribute a fixed proportion, & on the faith of the credit attaching to his liability to contribute a further proportion in the event of a winding up; but it is not a part of his contract that the business shall be carried on, notwithstanding that the original capital has been exhausted, so as in that way to bring into active operation the contingent liability to contribute in the event of a winding up. A banking co. had a capital of £24,000 in 2,400 shares of £10 each, of which £5 was paid & the other £5 was not to be called up except in the event of & for the purposes of the co. being wound up. The co. had been in existence for six years, but had never made any profit, & its business, which had commenced with a considerable staff in extensive premises, was now being carried on in small premises, attended by a single clerk. From the last balance-sheet of the co. it appeared that all the paid-up capital except £337 had been exhausted. Three months after the date to which the balance-sheet was made up a shareholder presented a petition for the winding up of the co. The petition was supported by a considerable number, but not a majority, of shareholders. No creditor appeared:—*Held*: it was impossible that the business of the co. could be carried on with any reasonable hope of success, & under the circumstances a winding-up order ought to be made.—*Re BRISTOL JOINT STOCK BANK* (1890), 44 Ch. D. 703; 59 L. J. Ch. 722; 62 L. T. 745; 38 W. R. 574; 2 Meg. 150.

5537. — Apparently advantageous to shareholders that company should be wound up.—*Re ROCK INVESTMENT TRUST, LTD.* (1891), 35 Sol. Jo. 447.

5538. ——*Re KRONAND METAL CO., LTD.* (1899), 43 Sol. Jo. 368.

5539. Creditor’s petition—Company unable to pay existing liabilities—Without further call on shareholders.—*Re INTERNATIONAL CONTRACT CO., LTD., Ex p. SPARTALI & TABOR, No. 5524, ante.*

(b) Company without Available Assets.

See 1908 Act, s. 141 (1).

5540. No realisable assets—Winding-up order made.—The creditors of an insolvent co. are

CANAL & POWER AQUEDUCT CO. (1898), 29 O. R. 358.—*CAN.*

t. — — — — —.—An order for the winding up of a co. will not be granted unless there is a reasonable possibility that the creditors will derive some benefit therefrom which they could not otherwise obtain, e.g. where there is unpaid capital which can only be made available for creditors by winding up the co.—

entitled to a winding-up order, even though there may, by reason of prior claims, be no assets coming to them, on the principle that the concern is virtually theirs, & that they ought to have the control of the management.—*Re ISLE OF WIGHT FERRY CO.* (1865), 2 Hem. & M. 597; 34 L. J. Ch. 194; 11 Jur. N. S. 279; 71 E. R. 595.

Annotation:—*Refd.* *Re Barton-upon-Humber & District Water Co.* (1889), 42 Ch. D. 585.

5541. ———.]—On a petition by a creditor who was the holder of a bill of exchange for £100, which was signed by the managing director & two other directors, the ct. made the usual winding-up order, notwithstanding the assets of the co. were only £7.—*Re LACEY & CO., LTD.* (1877), 46 L. J. Ch. 660.

5542. ——— **Investigation likely to benefit creditors.**]—If the facts of the case are such as to suggest, that an investigation under 1890 (Winding up) Act into the affairs of the co., or the issue of the debentures, or the shares, would be likely to turn out to the advantage of petitioner or the unsecured creditors, that alone would be sufficient reason for making a compulsory order to wind up.—*Re KRASNAPOLSKY RESTAURANT & WINTER GARDEN CO.*, [1892] 3 Ch. 174; 61 L. J. Ch. 593; 67 L. T. 51; 42 W. R. 639; 36 Sol. Jo. 627.

Annotations:—*Dbtd.* *Re London Health Electrical Institute* (1897), 76 L. T. 98. *Consd.* *Re Manchester & Liverpool Transport Co.* (1903), 19 T. L. R. 227. *Refd.* *Re Crigglestone Coal Co.*, [1906] 2 Ch. 327.

5543. ———.]—*Re MANCHESTER & LIVERPOOL TRANSPORT CO., LTD.* (1903), 19 T. L. R. 227.

5544. ———.]—*Re BARTITSU LIGHT CURE INSTITUTE, LTD.* (1909), *Times*, Jan. 13.

5545. ——— **Former law—Petition dismissed.**]—*Re CHAPEL HOUSE COLLIERY CO.* (1883), 24 Ch. D. 259; *Re REVOLVING BALL FILTER CO.* (1886), 2 T. L. R. 278; *Re ROYAL COURTS OF JUSTICE CHAMBERS CO.* (1888), 4 T. L. R. 517; *Re GREENWOOD & CO.*, [1900] 2 Q. B. 306.

5546. Assets covered by debentures—Winding-up order made—Court not satisfied that no surplus for unsecured creditors.]—*Re OLATHE SILVER MINING CO.*, No. 5415, *ante*.

5547. ———.]—A winding-up petition was presented by a debenture-holder of a co. which was opposed by the great majority of the other debenture-holders, on the ground that their only prospect of recovering anything on account of their security would be ruined by a winding-up order being made. The whole of the assets of the co. were covered by the debentures, & the debenture-holders practically represented its only creditors. There was evidence, which was uncontradicted, to the effect that the co. had no tangible assets. The judge, however, decided to make a winding-up order, being of opinion that there would be assets forthcoming if the co. was

ordered to be wound-up. On appeal:—*Held*: as the official receiver was not satisfied that the co. had no assets which could be reached in the winding up, the order ought not to be disturbed, notwithstanding the wishes of the great majority of the creditors.—*Re INTERNATIONAL COMMERCIAL CO., LTD.* (1897), 75 L. T. 639; 13 T. L. R. 160; 41 Sol. Jo. 208, C. A.

Annotation:—*Refd.* *Re London Health Electrical Institute* (1897), 45 W. R. 566.

5548. ———.]—A creditor's petition for a winding-up order was opposed by debenture-holders, who had a floating charge on all the property of the co., & who had obtained the appointment of a receiver in an action to enforce their security, & by the co., which was under the control of the debenture-holders, on the ground that there were no assets available for the unsecured creditors:—*Held*: the *onus* was on the respts. to prove that there was no reasonable possibility of any benefit accruing to the unsecured creditors from the winding-up, & unless that *onus* was discharged petitioner was entitled to a winding-up order in order that the unsecured creditors might be represented by the official receiver in the proceedings in the debenture-holders' action.—*Re CRIGGLESTONE COAL CO., LTD.*, [1906] 2 Ch. 327; 75 L. J. Ch. 662; 95 L. T. 510; 22 T. L. R. 585, C. A.

Annotations:—*Consd.* *Re East Kent Colliery Co.* (1914), 30 T. L. R. 659. *Refd.* *Re A Company* (1915), 31 T. L. R. 171.

5549. ——— **Reserve capital capable of being called up.**]—*IRISH CLUB CO., LTD.*, [1906] W. N. 127.

5550. ——— **"Just & equitable."**]—On a petition for a compulsory winding-up order by judgment creditors it was shown that the debenture-holders of the co. had appointed a receiver of all the assets of the co. The receiver carried on the business & incurred further liabilities. The assets were more than covered by the debentures, & it appeared that there would be no surplus assets, so that the petitioners would derive no advantage from the winding up:—*Held*: it was "just & equitable," under 1862 Act, s. 79 (5), that a winding-up order should be made.—*Re CHIC, LTD.*, [1905] 2 Ch. 345; 74 L. J. Ch. 597; 93 L. T. 301; 53 W. R. 659; 12 Mans. 342.

5551. ———.]—The ct. is not bound to exercise its discretion by refusing, at the instance of the co., to make a winding-up order merely on the ground that the order will produce nothing for the unsecured creditors.

A co. had a paid-up capital of £2,507, & a debenture debt of over £6,000. The debentures were held by three individuals. It was doubtful whether there would be assets for the payment of anything to unsecured creditors on a winding

SOUTH EAST CORPN., LTD. (1915), 31 W. L. R. 145; 8 W. W. R. 287.—**CAN.**

a. ——— **Insufficient to pay liquidation expenses—Winding-up order refused.**]—A co. will not be compulsorily wound up at the instance of unsecured creditors where it is shown that nothing can be gained by a winding up, e.g. where there would not be any assets to pay liquidation expenses.—*Re OKELL & MORRIS FRUIT PRESERVING CO.* (1902), 9 B. C. R. 153.—**CAN.**

b. ——— **Only assets abroad—Intention to appoint receiver abroad—Winding-up order made.**]—A petition having been presented by a creditor for the judicial winding up of a co., which was admittedly insolvent, & for the appointment of a liquidator,

answers were lodged by the co. & certain secured creditors stating that all its assets were in America, & that, it being the intention to have a receiver appointed there, the appointment of a liquidator in this country was unnecessary. The creditors, other than petitioner, were all either directors or concerned in the management of the co. The ct. granted the prayer of the petition.—*SMYTH & CO. v. SALEM FLOUR MILLS CO., LTD.* (1887), 14 R. (Ct. of Sess.) 441; 24 Sc. L. R. 312.—**SCOT.**

5540 i. ——— **Winding-up order made.**]—The creditor of a co. having charged for payment of his debt, & the *induciae* having expired without payment having been made, he presented a petition for a winding-up order. The application was opposed by the

creditors who held much the greater part of the debt due by the co., on the grounds that a liquidation would be injurious to the just interests of the creditors & that the petitioner would get nothing by it:—*Held*: petitioner was entitled to the order craved, resps. having failed to show that there were no assets which could be made available in the liquidation for the payment of his debt.—*GARDNER & CO. v. LINK* (1894), 21 R. (Ct. of Sess.) 967; 31 Sc. L. R. 804.—**SCOT.**

c. **Assets covered by debentures—Winding-up order made—Mortgagees in possession.**]—*Re ALEXANDER DUNBAR & SONS CO.* (1910), 9 E. L. R. 217.—**CAN.**

d. **Probability of sufficient assets to give tangible interest.**]—Before giving effect to an application for winding-up

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up. A judgment creditor presented a petition for the compulsory winding up of the co., which was opposed by the co. & neither supported nor opposed by other unsecured creditors:—*Held*: since the debenture-holders were in substance carrying on the business, using the co.'s name, the co. ought, under the "just & equitable clause of 1862 Act, s. 79, to be wound up, even if the order would produce nothing for the unsecured creditors."—*Re MELSON (ALFRED) & Co., LTD.*, [1906] 1 Ch. 841; 75 L. J. Ch. 509; 94 L. T. 641; 54 W. R. 468; 22 T. L. R. 500; 50 Sol. Jo. 464; 13 Mans. 190.

Annotation:—*Apld. Re Clandown Colliery Co.*, [1915] 1 Ch. 369.

5552. —.]—The business of a co. which to the board's knowledge was hopelessly insolvent was being carried on in the co.'s name solely for the benefit of the chairman, who held all the £10,000 debentures & was also an unsecured creditor for £10,000 out of £13,597 unsecured debts. Petitioners, who were unaware of this insolvency, were induced by the co. to supply goods on credit but when they obtained leave to sign judgment for their debt the chairman appointed a receiver, so that their judgment was fruitless. Petitioners accordingly applied for a winding-up order. They were supported by a few trade creditors in a similar position, but the petition was opposed by the chairman, & by a large majority of other unsecured creditors who gave no reasons for their opposition:—*Held*: in the special circumstances it was just & equitable that the co. should be wound up.—*Re CLANDOWN COLLIERY CO.*, [1915] 1 Ch. 369; 84 L. J. Ch. 420; 112 L. T. 1060; 59 Sol. Jo. 350; [1915] H. B. R. 93.

5553. — **Former law—Petition dismissed.**—*Re ST. THOMAS' DOCK CO.* (1876), 2 Ch. D. 116; *Re EDGBASTON BREWERY CO., LTD.* (1893), 68 L. T. 341; *Re LONDON HEALTH ELECTRICAL INSTITUTE, LTD.* (1897), 76 L. T. 98.

Petition of fully paid shareholder—Necessity for allegation & proof of.—*See Sub-sect. 3, B. (c), iii., ante.*

order & taking the matter out of the hands of the directors & of the co., a judge is right in requiring a shareholder to bring himself within the principle of the cases by showing, *inter alia*, that the co. is in such a state of solvency that there is a reasonable probability of sufficient assets being left for the shareholders to give him a tangible interest in having the co. wound up.—*Re COMPANIES WINDING-UP ACT, Re TANGIER AMALGAMATED MINING CO., LTD.* (1906), 39 N. S. R. 373.—**CAN.**

e. Assets covered by mortgage—Winding-up order made—Creditors consulted.—A co. had been formed for land-speculative purposes, & the land acquired was mortgaged to the principal creditor. Default having been made under the mtge., a petition was filed for the compulsory winding up of the co., the mortgaged land being the only asset. The mtgee. was taking steps to realise his security, & it was not probable that the realisation would result in a sum sufficient to discharge the mortgage debt. By order of the ct. a meeting of the creditors was held to consider the matter, when a majority in value of the creditors were in favour of the winding up being proceeded with, while a majority were opposed to it:—*Held*: the case was a proper one for compulsory liquidation.—*Re BELMONT LAND CO. (No. 2)* (1913), 32 N. Z. L. R. 1017.—**N.Z.**

PART III. SECT. 36, SUB-SECT. 3.—*D. (c).*

f. Petition presented mala fide—Pressure on company to repay subscription to shareholder.—An application by a shareholder for the winding up of a co. will be dismissed where it is shown that its object is to bring pressure upon the co. to repay to such shareholder money subscribed for shares.—*Re "A" CO.*, [1917] 2 W. W. R. 555; 34 D. L. R. 396.—**CAN.**

g. After voluntary assignment for benefit of creditors—Grounds for taking proceedings out of hands of assignee.—The then existing creditors of an incorporated co. in financial difficulties granted it an extension of time, but the co. subsequently executed an assignment in favour of N., who took active steps to realise the remaining assets of the co., so that at the time this application was made, there only remained to collect the balance of the purchase price of those assets & some book debts & distribute the proceeds. A petition to wind up the co. was supported by 26 creditors, with claims aggregating \$15,000 (being opposed by 42 creditors, with claims aggregating \$25,000) upon the grounds that certain directors had wrongfully withdrawn large sums of money from the co., & deposited the same in the bank of H., whereby a claim arose against the directors & the bank, & that certain persons should be made liable as con-

(c) Other Cases.

5554. More harm than good done if order made.—The ct. has a discretion to refuse to order a co. to be wound up under Joint-Stock Companies Winding-up Acts, where there is reason to believe that more harm than good would be done by the order, & that such order would not be necessary or expedient.—*Re UNION BANK OF CALCUTTA, Ex p. WATSON* (1850), 3 De G. & Sm. 253; 19 L. J. Ch. 388; 15 L. T. O. S. 389; 14 Jur. 1010; 64 E. R. 467.

Annotations:—*Folld. Re General Co. for Promotion of Land Credit* (1869), 5 Ch. App. 367, n. *Refd. Re Syria Ottoman Ry.* (1904), 20 T. L. R. 217. *Mentd. Reuss v. Bos* (1871), L. R. 5 H. L. 176.

5555. Petition for collateral purpose—In favour of third party.—Where a sufficient case for an order to wind up a joint-stock co. appears upon the face of the petition, the ct. is not at liberty to reject the petition merely because some collateral purpose may be served by it in favour of another person.—*Re DIRECT LONDON, PORTSMOUTH & CHICHESTER & DIRECT PORTSMOUTH & CHATHAM RY. CO.*, *Ex p. GOLDSMITH* (1850), 19 L. J. Ch. 235; 14 L. T. O. S. 370; 14 Jur. 734.

5556. Petition presented mala fide—Allegation of loss of capital not proved.—A shareholder in a joint-stock co. presented a petition, against the approval of the majority of the shareholders, for the winding up of the co. alleging the loss of three-fourths of its capital, under 1856 Act, s. 67, but the ct. being satisfied of the bad faith of petitioner, & not being satisfied of the loss of capital as alleged, dismissed the petition. Under sect. 72 of the above Act, the order to be made upon a petition to wind up is entirely in the discretion of the ct.—*Re METROPOLITAN SALOON OMNIBUS CO., LTD.*, *Ex p. HAWKINS* (1859), 28 L. J. Ch. 830; 33 L. T. O. S. 279; 5 Jur. N. S. 922; 7 W. R. 636, L. JJ.

5557. Petition presented with undue haste.—*Re MADRAS COFFEE CO., LTD.*, No. 7220, *post*.

5558. Vexatious petition—Company solvent.—A creditor having obtained judgment by default against a co. presented a petition without taking any steps to enforce the judgment. The co.'s

tributors:—*Held*: in the circumstances & as the petitioners had known all along of the matters alleged in the petition & had the right to proceed in respect thereof in the name of the assignee at their own expense, he having offered to facilitate petitioners in proceedings to be taken, there was no just cause shown for taking the proceedings out of the hands of the assignee.—*Re OLYMPIA CO.* (1915), 32 W. L. R. 539, 628; 9 W. W. R. 263, 405, 875.—**CAN.**

h. Voluntary liquidation pending—Insufficient grounds alleged.—At meetings of a solvent co. it was resolved that it should be wound up voluntarily. A liquidator was appointed, & he was directed to make an immediate call of £2 a share, & to take all steps necessary for winding up the co. He brought actions for the call, to which defences were taken, upon the ground that his appointment was illegal & he discontinued the action. A petition was presented by a paid-up shareholder, alleging that, after payment of the debts, £2,485 would remain, out of which he would be entitled in case the liquidation were properly carried out, to be repaid £90, & praying for a compulsory winding up; or, in the alternative, that the liquidator might be removed, & a new liquidator appointed. The petition did not state facts bringing the case within any of the first four sub-sects.

solr. had inadvertently omitted to deliver a plea. At the time the petition was presented the co. had funds to pay all the debts:—*Held*: the petition was a vexatious one & must be dismissed with costs.—*Re STOCK & SHARE AUCTION & ADVANCE CO.* (1885), 2 T. L. R. 2.

E. Procedure on Petition.

(a) *Form of Petition.*

See 1909 (Winding up) Rules, r. 25.

5559. How entitled—Petition presented before but not heard until after 1862 Act in force.—A petition was presented for the winding up of a co. after which a resolution of the co. was passed for the voluntary winding of it up. The above Act then came into operation, after which the co. was registered under it. Upon the petition, which was entitled as in *Re Joint-Stock Companies Acts, 1848 & 1849* (cc. 45 & 108), & *Joint-Stock Companies Act, 1857* (c. 14), coming on to be heard, it was objected that it ought to have been entitled in the 1862 Act:—*Held*: it was sufficiently entitled without the addition of that Act.—*Re PUBLIC LIFE ASSURANCE SOCIETY* (1862), 7 L. T. 302.

— **Incorrect name of company—Amendment.**

—*See Nos. 5583–5587, 5599, post.*

5560. Omission of material circumstances—Within petitioner's knowledge—Winding-up order discharged.—The ct. made an order, directing the winding up of a joint-stock co. under *Joint-Stock Companies Act, 1848* (c. 45), upon a petition sufficient in point of form, but omitting material circumstances within petitioner's knowledge, which ought to have been brought to the notice of the ct. This objection was taken at the first meeting before the master. Upon a petition presented promptly afterwards, the ct. discharged the order for winding up, with costs against petitioner who had obtained the winding-up order. The ct. refused to sustain the former order at the request of an independent contributory; but discharged it without prejudice to any application that might be made to wind up the co.

Qu.: whether, where an order for winding up is discharged on account of the omission of material circumstances in the petition, contributories can recover their costs of attending before the master against petitioner for winding up.—*Re IPSWICH, NORWICH & YARMOUTH RY. CO., Ex p. BARNETT*

of sect. 79 of 1862 Act. The ct. refused to make any order on the petition.—*Re CORK SHIPPING & MERCANTILE CO.* (1879), 7 L. R. Ir. 148.—*IR.*

k. Reconstruction pending—Right to challenge conveyance of property in favour of creditors.—A minority of the creditors of a co. which was unable to pay its debts presented a petition for a winding up by the ct. The petition was opposed by the co. & by a majority of the creditors, who desired a voluntary liquidation under the supervision of the ct., on the ground that the granting of the petition would prejudice a contemplated reconstruction of the co. Petitioners objected to delay, as the co. had within sixty days of the presenting of the petition granted a conveyance of part of its heritable property in favour of certain creditors, the right to challenge which petitioners wished to preserve. It was not disputed that a resolution for the voluntary winding up of the co., could not be obtained within sixty days of the date of the conveyance. The ct. granted the petition holding that it was for the interest of the creditors to grant a compulsory order in respect that reconstruction would not be

hindered by such an order; & it was questionable if the right to challenge the conveyance would be preserved if the co. were to be wound up voluntarily under a resolution to be passed by it.—*BELL'S TRUSTEES v. HOLMES' OIL CO.* (1900), 3 F. (Ct. of Sess.) 23; 38 Sc. L. R. 11; 8 S. L. T. 360.—*SCOT.*

PART III. SECT. 36, SUB-SECT. 3.—E. (a).

1. Omission of material circumstances—Interest of petitioner.—It is essential that a petition for the winding up by the ct. of a limited co. should show the interest of petitioner.—*Re PALAIS CINEMA, LTD., [1918]* V. L. R. 113.—*AUS.*

5562 i. Omission to allege sufficient case for winding up—Petition dismissed.—To the making of a winding-up order it is essential that the petition upon its face make a sufficient case for the winding up.—*Re COMPANIES' WINDING-UP ACTS & KOOTENAY BREWING, MALTING & DISTILLING CO.* (1898), 6 B. C. R. 112.—*CAN.*

5562 ii. ———.—On petition for a winding-up order, no order will be made where petitioner does not set

(1849), 1 De G. & Sm. 744; 13 L. T. O. S. 362; 13 Jur. 1043; 63 E. R. 1277.

Annotation:—*Mentd. Re Metropolitan Carriage Co., Clarke's Case* (1854), 1 K. & J. 22.

5561. Omission to allege sufficient case for winding up—Petition dismissed—Even though case proved in evidence.—A winding-up order will be refused if a sufficient case for winding up is not stated on the petition, though such a case be proved in evidence.—*Re WEAR ENGINE WORKS CO.* (1875), 10 Ch. App. 188; 44 L. J. Ch. 256; 32 L. T. 314; 23 W. R. 735, L. J. J.

Annotation:—*Refd. Re British Alliance Assce. Corp'n.* (1878), 9 Ch. D. 635.

5562. ———.—A petition for winding up a co. was presented by three shareholders. It did not allege insolvency, but stated circumstances showing that its condition was not hopeful, & that it had abandoned all but a very small part of its objects, & alleged that it was just & equitable that the co. should be wound up. The judge being satisfied on the evidence that the co. was substantially insolvent, ordered meetings of the shareholders to be held, that it might be ascertained whether they did not wish it wound up:—*Held*: as the petition did not allege any of the cases mentioned in 1862 Act, s. 79 (1–4), & did not contain allegations sufficient to make a case for interference under sub-sect. 5, a winding-up order was not authorised, & consequently no order ought to be made except to dismiss the petition.—*Re LANGHAM SKATING RINK CO.* (1877), 5 Ch. D. 669; 46 L. J. Ch. 345; 36 L. T. 605, C. A.

Annotations:—*Refd. Re Horsham Industrial & Provident Soc.* (1894), 70 L. T. 801; *Re Brinsmead*, [1897] 1 Ch. 406. *Mentd. Re Diamond Fuel Co.* (1879), 13 Ch. D. 400; *Re German Date Coffee Co.* (1882), 20 Ch. D. 169; *Re Varieties* (1893), 62 L. J. Ch. 526.

5563. ———.—*Re NEW GAS CO., No. 5362, ante.*

5564. Omission to state period for which petitioner has held shares.—(1) It is no objection to a shareholder's petition for winding up that the petition does not on the face of it state that petitioner has held his shares for the period required by 1867 Act, s. 40.

(2) The advertisement of a winding-up petition is absolutely void if any error occurs in the name of the co.

Where all classes interested are represented at the hearing of a petition, the ct. has a discretion to hear it, notwithstanding the seven clear days

out, as well as prove, facts sufficient to justify the making of the order.—*Re SUTHERLAND MANURE CO., LTD.* (1893), 11 N. Z. L. R. 460.—*N.Z.*

m. Petition need not be signed.—A petition for winding up a co. under Cos. Statute 1864 (No. 190), may be good without being signed.—*Re FEDERAL LAND CO., LTD.* (1889), 15 V. L. R. 135.—*AUS.*

n. ———.—*Authority of solicitor for petitioner to present petition.*—A petition for a winding-up order alleged various grounds in support of the application for winding up. It was contended that the petition should be dismissed on the grounds that the authority of the solr. for petitioner to present the petition must be by power of attorney, & was not proved, & that the petition was not signed by petitioner & was in fact the petition of the solr. in question:—*Held*: the question of authority could not be raised at the hearing; the statement "by the solr." merely served to indicate the fact that the party instituting proceedings was acting by a solr. & this ground of objection was overruled; & the petition need not be signed.—*Re NEW ZEALAND GUM*

Sect. 36.—Winding up by court: Sub-sect. 3, E. (a) & (b) i., ii. & iii. & (c) i.]

required by rule 2 of Feb. 11, 1862, have not elapsed since the appearance of the advertisement in the "Gazette."—*Re CITY & COUNTY BANK* (1875), 10 Ch. App. 470; 44 L. J. Ch. 716; 33 L. T. 344; 23 W. R. 936, L. J. J.

Annotations:—As to (1) *Folld. Re Glendower S.S. Co.* (1899), 43 Sol. Jo. 657. As to (2) *Refd. Re Professional & Trade Papers* (1900), 44 Sol. Jo. 740.

5565. — Company not appearing—Duty of court to be satisfied—Rectification of omission by affidavit.]—*Re GLENDOWER S.S. Co., LTD.* (1899), 43 Sol. Jo. 657.

5566. Allegation of fraud—Necessity for stating facts constituting fraud.]—*Re RICA GOLD WASHING Co., No. 5497, ante.*

Allegation of assets—Petition of fully-paid shareholder.]—See Nos. 5498, 5499, *ante.*

5567. — Creditor's petition.]—A creditor's petition for the winding up of a co. must contain an allegation that the co. has assets available for distribution in the winding up.—**WINDING-UP PETITIONS** (1902), 18 T. L. R. 503.

5568. Blanks in petition—Whether petition dismissed or adjourned for amendment.]—*Re STANDARD CONTRACT & DEBENTURE CORPN.* (1892), 8 T. L. R. 485, C. A.

(b) Advertisement of Petition. i. In General.

See 1909 (Winding up) Rules, r. 27.

5569. Necessity for—Petition for rehearing former petition—To rectify slip.]—*Re SHIELDS MARINE INSURANCE Co., [1867] W. N. 296.*

5570. — Whether court will dispense with advertisement.]—(1) Where a petition has been presented to wind up a co., & has got into the paper without ever having been advertised, contributories have no right to appear either at the hearing or on an application by the petitioner for leave to withdraw the petition, & petitioner will not be ordered to pay the costs occasioned by their so doing. This rule does not apply to the co.

(2) It is not the practice of the ct. to dispense with advertisement.—*Re UNITED STOCK EXCHANGE, LTD., Ex p. PHILP & KIDD* (1884), 28 Ch. D. 183; 54 L. J. Ch. 310; 52 L. T. 509; 33 W. R. 389; 1 T. L. R. 169.

Annotation:—As to (1) *Refd. Re Criterion Gold Mining Co.* (1889), 41 Ch. D. 146.

5571. Compliance with formalities—Necessity for.]—The advertisements of a winding-up petition must be strictly in accordance with the General Orders of Mar. 21, 1868, r. 1.—*Re MAREZZO*

MACHINES Co., LTD., [1922] N. Z. L. R. 93.—N.Z.

o. Endorsement of address for service—Effect of failure.]—As to endorsement of address, service of notice of motion signed by petitioner's solr. with the petition on the co. considered as a whole, supplied the co. with all necessary information, & the fact that the co. had appeared seemed good ground to treat the failure to endorse the name & address of the party serving on the petition or copy thereof as a mere irregularity.—*Re NELSON FORD LUMBER Co.* (1908), 8 W. L. R. 546.—CAN.

p. Joint petition—Withdrawal of one petitioner—Verification.]—When a depositor in a co. applies for the winding up of the co. & other creditors & contributories are allowed by the ct. to join with him in prosecuting the case, the petition of the depositor should be considered as a joint petition of all the persons allowed to join: & his withdrawal from the case does

not operate as a withdrawal of the whole case. If the original petition be duly signed & verified, the co-petitioners are not debarred from proceeding with the case for omission to verify their petitions.—*DACCA LOAN OFFICE Co. v. ANANDA CHANDRA ROY* (1904), 1 L. R. 31 Calc. 106.—IND.

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q. Necessity for—Contents of advertisement—Waiver of irregularity.]—An advertisement of a petition for the compulsory winding up of a co. need not state the place or the hour at which the ct. is to sit. But if the omission of such particulars from the advertisement were an irregularity, then the ct. would have power to waive the irregularity, & ought to exercise such power, when it does not appear that the parties interested are affected by the omission.—*Re GILBERT MACHINERY Co.* (No. 1) (1906), 26 N. Z. L. R. 47.—N.Z.

MARBLE Co., LTD. (1874), 43 L. J. Ch. 544; 29 L. T. 720; 22 W. R. 248.

Annotation:—*Refd. Re National Whole-Meal Bread & Biscuit Co.* (1891), 60 L. J. Ch. 350.

5572. — Certificate by registrar of proper advertisement necessary before hearing.]—*Re KERSHAW & POLE, LTD.* (1891), 36 Sol. Jo. 124.

5573. —]—PRACTICE NOTE, [1920] W. N. 357.

Effect of non-compliance.]—See Sub-sect. 3, E. (b) ii.

5574. Effect of—Whether notice of petition—Right of company & shareholders to appear on petition—Even though not served.]—The advertisement of a winding-up petition under the Orders of 1862, is of itself sufficient notice of such petition to justify the co. & shareholders who are interested in such co. in appearing on the petition, & if they are successful in opposing it, they are entitled to their costs although they may not have been served with the petition.—*Re MARLBOROUGH CLUB Co.* (1865), L. R. 1 Eq. 216; 35 L. J. Ch. 146; 13 L. T. 697; 12 Jur. N. S. 44; 14 W. R. 171.

Annotations:—*Distd. Re Times Life Assoc. & Guarantee Co.* (1869), L. R. 9 Eq. 382. *Folld. Re Patent Cocoa Fibre Co.* (1876), 1 Ch. D. 617. *Refd. Re Criterion Gold Mining Co.* (1889), 41 Ch. D. 146.

5575. —]—*Re EUROPEAN ARBITRATION, NATIONAL BANK'S CASE* (1873), *European Arbitration*, L. T. 92.

Annotation:—*Consd. Re Oriental Bank Corpn., Ex p. Guillemin* (1884), 28 Ch. D. 634.

5576. When restrained—Petition not presented bonâ fide.]—Where a winding-up petition had been presented by a person who was not a contributory, & as the evidence tended to show not *bonâ fide*, the ct., on an *ex parte* application by the co., under its inherent jurisdiction to prevent abuse of its process, restrained advertisement of the petition on terms.—*Ex p. ADVANCE BOILER Co.* (1894), 1 Mans. 151; 8 R. 235.

5577. — Uncontradicted affidavit of company's solvency—& that debt disputed.]—*Re WIZARD Co., LTD.* (1897), 41 Sol. Jo. 817.

ii. Effect of Non-Compliance with Formalities.

5578. General rule.]—PRACTICE NOTE, [1920] W. N. 357.

5579. Advertisement out of time.]—The ct. has power under r. 53 of the Orders to regulate proceedings under 1862 Act, to dispense with the advertisement of a winding-up petition required by r. 2. A petition was heard where the advertisement in the London Gazette had not been inserted seven clear days before the day for which the

5571 i. Compliance with formalities—Necessity for.]—It is a substantial objection to a winding-up order appointing a liquidator to the estate of an insolvent co. that such order has been made without notice to the creditors, contributories, shareholders or members of the co. as required by 47 Vict. c. 39, s. 24:—*Held*: an order so made should be set aside & the petition therefor should be referred back to the judge to be dealt with anew.—*SHOOLBRED v. UNION FIRE INSURANCE Co.* (1887), 14 S. C. R. 624.—CAN.

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r. Mistake—As to date—Delay in publication of Gazette.]—Where, owing to the Gazette being published a day later than usual, a winding-up petition was not advertised seven clear days before the day of hearing, the ct. will overrule an objection taken on that ground.—*Re SUTHERLAND MANURE*

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petition was answered.—*Re* LAND & SEA TELEGRAPH Co. (1870), 18 W. R. 1150.

5580. —.—.]—*Re* CITY & COUNTY BANK, No. 5584, *ante*.

5581. Mistake—In name of company.]—*Re* CITY & COUNTY BANK, No. 5584, *ante*.

5582. —.— Error corrected on following day.]—Winding-up order made, notwithstanding a mistake in the name of the co. on the first day the advertisements of the petition appeared, the correct name having been advertised on the following day.—*Re* CONSOLIDATED MINERA LEAD MINING Co., LTD. (1876), 25 W. R. 36.

5583. —.— Order made—But not drawn up.]—A winding-up order had been pronounced on a petition intituled, "In the matter of A. & N. Hotel Company, Limited." Subsequently, before the order was drawn up, petitioners discovered that the word "company" did not form part of the registered title of the co., though the co. had themselves, while carrying on business, usually adopted the word. Thereupon, on an *ex parte* application by petitioners, the ct. made an order giving leave to amend & re-advertise the petition, & directing the winding-up order to be drawn up seven days after the advertisement. A motion by the co. to discharge the *ex parte* order was dismissed with costs.—*Re* ARMY & NAVY HOTEL (1886), 31 Ch. D. 644; 55 L. J. Ch. 511; 34 W. R. 389; 2 T. L. R. 349.

*Annotation:—*Folld. *Re* London & Provincial Pure Ice Manufacturing Co. (1904), 48 Sol. Jo. 589.

5584. —.—.]—*Re* PROFESSIONAL & TRADE PAPERS, LTD. (1900), 44 Sol. Jo. 740.

5585. —.—.]—*Re* NEWCASTLE MACHINISTS Co., [1888] W. N. 246.

5586. —.— Omission of word "limited."—*Re* LONDON & PROVINCIAL PURE ICE MANUFACTURING Co., LTD. (1904), 48 Sol. Jo. 589.

5587. —.— Trifling mistake—No one misled.]—Although it is an old-standing rule that an error in the name of a co. in the winding-up advertisement renders the advertisement absolutely void, & although it is desirable that in almost every case this old-standing rule should be adhered to, there are cases where the mistake is of such a very trifling character, that no one could possibly be misled by it, & in such a case the ct. can exercise the discretion of waiving the formal defect under 1909 (Winding up) Rules, r. 217.—*Re* L'INDUSTRIE VERRIERE, LTD. (1914), 58 Sol. Jo. 611.

5588. —.— As to date—Of presentation of petition—Petition presented after first advertisement.]—Where it appeared that the advertisements required by the Orders of Nov. 11, 1862, r. 2, were duly published on the morning & evening of June 29, 1866, but the petition referred to by them was actually presented to the ct. between the times of the two publications, it was nevertheless :—*Held* : the petition was properly presented, & a winding-up order was made upon it accordingly.—*Re* CORK & YOUGHAL RY. Co. (1866), 14 L. T. 750.

Co., LTD. (1893), 11 N. Z. L. R. 460.—N.Z.

B. —.— Advertisement for legal holiday—Second petitioner with notice of first petition—Priority.]—Where the hearing of a petition for the compulsory winding up of a co. had, by inadvertence, been advertised for a legal holiday, & by direction of the ct. new advertisements were issued, the ct. refused to make an order upon the petition of an incumbrancer who with notice of the filing of the first petition issued advertisements for the hearing of a second petition, which owing to the above-mentioned mistake, obtained

priority in date to those advertising the first petition.—*Re* DUBLIN GRAINS Co., LTD., *Ex p.* BROWNE, *Ex p.* ROSSBOROUGH (1886), 17 L. R. 1r. 512.

t. —.— Single insertion instead of twice—Proceedings not vitiated.]—The ct. having ordered that a co. should be wound up in terms of Law No. 19, 1866, for the benefit of the creditors thereof, directed that notice, of the usual application under sect. 14 of that law should be given by publication twice in the Gazette & twice in certain other newspapers. On the return date of the order it appeared

that by an oversight on the part of the govt. printer the notice had only been inserted once in the Gazette, the other publications were in order :—*Held* : the provisions of sect. 14 were directory merely & not imperative; the non-publication would not vitiate the proceedings & the ct. could deal with the application.—*Re* AGRICULTURAL CO-OPERATIVE UNION, LTD. (1922), 43 N. L. R. 365.—S. AF.

PART III. SECT. 36, SUB-SECT. 3.—E. (c) i.

a. Time—Calculation.]—By Winding-up Act, R. S. C., c. 129, s. 8,

5589. —.—.]—*Re* BULL, BEVAN & Co. [1891] W. N. 170.

5590. —.— Of hearing.]—An advertisement under the Joint Stock Companies Act, 1849 (c. 108), stated, that the petition would be heard on "Saturday Dec. 20." The 20th being on a Thursday, the ct. would not hear the petition, but required fresh notices to be given.—*Re* JOINT STOCK COMPANIES WINDING UP Act (1849), 13 Beav. 434; 51 E. R. 167.

5591. Footnote—Omission of.]—*Re* MONTE DE PIÉTÉ OF ENGLAND, LTD. (1892), 37 Sol. Jo. 48.

5592. —.—.]—*Re* HILLE INDIA RUBBER Co., [1897] W. N. 6.

5593. —.— Error in—As to last date for service of notice of intention to appear—No one misled.]—*Re* BROADS PATENT NIGHT LIGHT Co., [1892] W. N. 5.

*Annotation:—*Apld. *Re* Moss (1906), 50 Sol. Jo. 575.

5594. —.—.]—*Re* MOSS (SAUL) & SONS, LTD. (1906), 50 Sol. Jo. 575.

5595. Petition asking alternatively for compulsory or supervision order—Advertised only as petition for compulsory order.]—*Re* NEW MORGAN GOLD MINING Co., LTD. (1893), 37 Sol. Jo. 441.

iii. Readvertisement.

5596. Whether ordered—After amendment—Of incorrect name of company in petition.]—*Re* ARMY & NAVY HOTEL, No. 5583, *ante*.

5597. —.—.]—*Re* NEWCASTLE MACHINISTS Co., [1888] W. N. 246.

5598. —.—.]—*Re* PROFESSIONAL & TRADE PAPERS, LTD. (1900), 44 Sol. Jo. 740.

5599. —.—.]—*Re* BIRCH (SAMUEL) Co., LTD., [1907] W. N. 31.

5600. —.— Asking for compulsory order instead of supervision order.]—Where a petition praying that the voluntary winding up of a co. might be continued under the supervision of the ct. was subsequently amended by praying in the alternative for a compulsory winding-up order :—*Held* : the petition must be readvertised.—*Re* NATIONAL WHOLE MEAL BREAD & BISCUIT Co., [1891] 2 Ch. 151; 60 L. J. Ch. 350; 64 L. T. 285; 39 W. R. 380; 7 T. L. R. 359.

—.— Asking for supervision order instead of compulsory order.]—*See* Nos. 7253, 7305, *post*.

—.— Addition of alternative prayer asking for supervision order.]—*See* No. 7304, *post*.

5601. —.— After first advertisement restrained—Expiration of injunction.]—*Re* WIZARD Co., LTD. (1897), 41 Sol. Jo. 817.

—.— After supervision order made by court instead of compulsory order.]—*See* Sect. 38, subsect. 4, B., *post*.

(c) Service of Petition.

i. In General.

Sec 1909 (Winding up) Rules, r. 28.

5602. Whether rule directory or imperative.]—A petition for winding up a co. had not been

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served at the registered office of the co., but service had been accepted by a solr. on its behalf, & he had been instructed to take proceedings with reference to it at a meeting attended by all the directors:—*Held*: (1) as the solr. had been duly authorised to act for the co., his acceptance of service rendered it unnecessary to serve the petition at the registered office; (2) General Orders of Nov. 1862, r. 3, which provided for service of a petition at the registered office of the co., was not imperative, but was merely directory.—*Re* REGENT UNITED SERVICE STORES (1878), 8 Ch. D. 75; 38 L. T. 84; 26 W. R. 425, C. A.

5603. Acceptance by duly authorised officer on behalf of company—Whether sufficient.—*Re* REGENT UNITED SERVICE STORES, No. 5602, *ante*.

5604. Service out of jurisdiction.—R. S. C., Ord. 11, constitutes a complete code of the practice of the High Ct. of Justice as to service out of the jurisdiction, & as it applies in terms only to a writ of summons, service out of the jurisdiction of an originating summons cannot be allowed by the ct.

Qu.: whether service out of the jurisdiction of winding-up petitions can now be allowed.—*Re* BUSFIELD, WHALEY *v.* BUSFIELD (1886), 32 Ch. D. 123; 55 L. J. Ch. 467; 54 L. T. 220; 34 W. R. 372; 2 T. L. R. 373, C. A.

Annotations:—*Refd.* *Re* Anglo-African S.S. Co. (1886), 32 Ch. D. 348. *Mentd.* Dubout *v.* Macpherson (1889), 23 Q. B. D. 340; Hume *v.* Somerton (1890), 25 Q. B. D. 239; *Re* Compagnie Générale d'Eaux Minérales et de Bains de Mer, [1891] 3 Ch. 451; *Re* King's Trade-Mk., [1892] 2 Ch. 462; *Re* Cliff, Edwards *v.* Brown, [1895] 2 Ch. 21; Fox *v.* Star Newspaper Co., [1898] 1 Q. B. 636; Rasch *v.* Wulfert (1903), 73 L. J. K. B. 20; *Re* It., [1906] 1 Ch. 730; The Craighall, [1910] P. 207.

See, now, R. S. C., Ord. 11, r. 8 a.

5605. Defunct company—Struck off register—Whether statutory provisions as to service applicable—Necessity for obtaining special directions.—

Where the Registrar of Joint Stock Companies has struck the name of a defunct co. off the register under Companies Act, 1880 (c. 19), s. 7, the proper remedy of a creditor is to petition for a winding-up order. In such a case neither the provisions as to service of the petition contained in 1890 (Winding up) Rules, nor the provisions as to service contained in the above Act, apply, but special directions as to service must be obtained.—*Re* ANGLO-AMERICAN EXPLORATION & DEVELOPMENT CO., [1898] 1 Ch. 100; 67 L. J. Ch. 45; 4 Mans. 389.

Annotation:—*Refd.* *Re* Grosvenor House Property Acquisition & Investment Bldg. Soc. (1902), 71 L. J. Ch. 748.

5606. Effect of improper service—Petition ordered to stand over for proper service.—*Re* MANCHESTER & SOUTHAMPTON RY. Co. (1850), 16 L. T. O. S. 257.

ii. Company having no Registered Office or Place of Business.

5607. On chairman—& two officers of company.—*Ex p.* AXHOLME, GAINSBOROUGH, GOOLE & YORK & NORTH MIDLAND RY. Co. (1849), 13 L. T. O. S. 399.

5608. — & general manager.—The ct., on

'a creditor may, after four days' notice of the application to the co., apply by petition for a winding-up order':—*Held*: the petition was properly lodged when notice of the application was served on Nov. 4 for Nov. 8.—*Re* ARNOLD CHEMICAL CO. (1901), 2 O. L. R. 471; 21 C. L. T. 594.—CAN.

b. — — —.—Under Winding-up Act, c. 129, s. 8, which directs that a creditor may, after four days' notice of the application to the co., apply by petition for a winding-up order, a notice given on the 1st of the month for a hearing on the 5th is sufficient.—*Re* MARITIME WRAPPER CO., *Re* DOMINION COTTON MILLS CO. (1902), 35

an *ex parte* application, directed the winding-up petition to be served on the chairman & general manager only of a co. proposed to be wound up, & which had no known place of business.—*Re* NATIONAL CREDIT & EXCHANGE CO., LTD. (1862), 7 L. T. 817; 11 W. R. 161.

5609. On subscribers to memorandum—& few principal shareholders.—(1) Where a co. had ceased to carry on business, & had no registered office at the time a petition for winding up was presented, the ct. ordered service of the petition on the subscribers to the memorandum of assocn., who had acted as the directors of the co., & also upon a few of the principal shareholders.

(2) A co. was in course of voluntary winding up. The liquidator disputing a certain claim, claimant brought an action for the amount against the liquidator, who then informed claimant that, if he proceeded with the action, application to the Ct. of Ch. would be made to restrain him from so doing. Claimant then presented a winding-up petition:—*Held*: as the question between the parties was whether or not a certain debt had been incurred, the petition was improperly presented, but it was retained to abide the result of the action; if petitioner failed to establish his claim, the petition to be dismissed with costs; if petitioner established his claim, the petition also to be dismissed, but without costs, in consequence of the threat of the liquidator.—*Re* INVENTORS' ASSOCN., LTD. (1865), 2 Drew. & Sm. 553; 12 L. T. 840; 11 Jur. N. S. 872; 13 W. R. 1015, 1033; 62 E. R. 730; *sub nom.* *Re* INVENTORS' ASSOCN., LTD., *Ex p.* CHIFFERIEL, 6 New Rep. 349.

5610. — No list of shareholders available.—A petition presented for winding up a co. having neither a registered office nor a list of shareholders must be served upon the subscribers of the memorandum of assocn.—*Re* GREAT CWMYSYTOY SILVER LEAD CO. (1868), 17 L. T. 463; 16 W. R. 270.

5611. On secretary—& two principal shareholders—Letters informing them of petition to be sent to other shareholders.—Where a petition was presented by two creditors & two shareholders for the winding up of a co. which had no registered office or place of business, & which had only eight shareholders altogether, on an *ex parte* application for directions how to serve the petition:—*Held*: the petition should be served on the secretary & two principal shareholders, & letters should be sent to the other shareholders, not being also petitioners, informing them of the petition.—*Re* KESWICK OLD BREWERY CO., LTD. (1886), 55 L. T. 486

5612. At office of solicitors.—Where a petition is presented for winding up a co., & it has no office or known officer, the ct., under the orders of 1862 Act, r. 3, will allow service of the petition at the office of the solrs.—*Re* SOUTH ESSEX ESTUARY & RECLAMATION CO., LTD. (1868), 18 L. T. 178.

iii. Office of Company Deserted or Removed.

5613. Office shut up & vacated—Copy of petition to be put into letter-box—Copies of petition to be served on solicitor & director.—Where the

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c. *Dispensed with—Consent by directors.*—The service of a winding-up petition may be dispensed with where the directors unanimously agreed that counsel should appear & consent to the order.—*Re* CONSUMERS' COAL CO., LTD., [1917] 2 W. W. R. 143.—CAN.

registered office of a joint-stock co. was found to be shut up & vacated, the ct. directed a copy of a petition for winding up the co. to be dropped into the letter-box of the office, & to be served on the solr. & one of the directors of the co.—*Re LONDON & WESTMINSTER WINE CO., LTD.* (1863), 3 New Rep. 26; 9 L. T. 321; 9 Jur. N. S. 1102; 12 W. R. 6.

5614. — Business transferred—Service ordered on any five directors.]—The ct. ordered a winding-up petition to be served on any five of the directors of a co. which had shut up its office & transferred its business to another office.—*Re UNITY GENERAL ASSURANCE ASSOCN.* (1863), 8 L. T. 160; 11 W. R. 355.

5615. — Company in voluntary liquidation—Service on liquidation sufficient.]—*Re STEWART & BROTHER*, [1880] W. N. 15.

5616. Inability to discover temporary place of business—Service ordered on subscribers to memorandum.]—Service on the subscribers to the memorandum of assocn. allowed where the temporary place of business stated in the prospectus could not be discovered.—*VELLETRI & TERRACINA CO., LTD.* (1868), 18 L. T. 350.

5617. Business of company transferred several years previously—Service at old place of business insufficient—Service ordered on members, officers, or servants.]—A petition to wind up a co. which has transferred its business & been dissolved eight years ago must be served upon some of the members, officers, or servants of the co., & the ct. refused to make any order upon a petition which had only been served at the place where the co. carried on business eight years before.—*Re MANCHESTER & LONDON LIFE ASSURANCE & LOAN ASSOCN.* (1870), L. R. 9 Eq. 643; *sub nom. Re MANCHESTER & LONDON LIFE ASSURANCE & LOAN ASSOCN., Ex p. PIKE, Ex p. THOMPSON*, 39 L. J. Ch. 595; *affd. on other grounds*, 5 Ch. App. 640, L. C.

Annotations:—Mentd. Re Medical, Invalid, & General Life Assee. Soc., Spencer's Case (1870), 23 L. T. 765; *Re National Provincial Life Assee. Soc., Fleming's Case* (1870), 23 L. T. 770.

5618. Registered office pulled down—Present office or place of business unregistered—Service ordered on secretary & two directors at present place of business.]—*Re FORTUNE COPPER MINING CO.*, No. 5630, *post*.

5619. — Service order on secretary & company's solicitors.]—*Re VRON SLATE CO.*, [1878] W. N. 70.

iv. Affidavit of Service.

5620. Contents—That original petition was produced & shown.]—*Re GREAT WELSH JUNCTION RY. CO.* (1850), 14 L. T. O. S. 462.

5621. — That person served was member,

officer, or servant of company.]—The affidavit of service of a petition to wind up a co. under the Winding Up Acts must state or show that the person on whom it has been served is a member, officer, or servant of the co.; & it is not sufficient to state that he is a member of the provisional committee.—*Re LONDON & DUBLIN APPROXIMATION RY. CO.* (1850), 3 De G. & Sm. 208; 64 E. R. 447.

5622. — —.]—*Re CHELTENHAM, OXFORD & LONDON JUNCTION RY. CO.* (1850), 15 L. T. O. S. 84.

5623. — That petition “duly sealed with seal of court”—No seal of court in existence.]—*Re COURT BUREAU, LTD.*, [1891] W. N. 9.

5624. — That fiat altering date of hearing was endorsed on petition—Further affidavit ordered to be sworn.]—*Re BUCKRIDGE, LTD.* (1892), 36 Sol. Jo. 830.

5625. — No member, officer, or servant could be found at registered office—“That no officer or servant could be found” not sufficient.]—1909 (Winding up) Rules, r. 28, ought to be strictly complied with, & therefore where no “member, officer, or servant of the co.” can be found at the registered office & a winding-up petition is consequently served by merely leaving it at the office, the affidavit of service ought to state not merely that no officer or servant but also no member of the co. could be found there.—*Re HATCHAM MOTOR GARAGE CO., LTD.* (1916), 32 T. L. R. 399; 60 Sol. Jo. 429; [1917] H. B. R. 288.

(d) Affidavits in support of Petition.

i. In General.

See 1909 (Winding up) Rules, r. 29.

5626. At what time sworn—Before presentation of petition.]—An affidavit in support of a petition to wind up sworn before the presentation of the petition is ineffectual, & it must be re-sworn before an order can be made on the petition.—*WESTERN BENEFIT BUILDING SOCIETY* (1864), 33 Beav. 368; 33 L. J. Ch. 179; 55 E. R. 409.

5627. Imperfect affidavit—Whether court may waive—Delay in filing affidavit.]—The ct. will, under proper circumstances, order the winding up of a co., although the affidavit in support of the petition was not filed within the four days required by the General Orders of Nov. 1862; & it will also allow the order which it has made to be advertised, although the twelve days which Order 6 limits for that purpose may have expired.—*Re EAST CAMBRIAN GOLD MINING CO., LTD.* (1865), 12 L. T. 587.

5628. — Affidavit made by wrong person.]—*Re CHARTERLAND STORES & TRADING CO.*, No. 5629, *post*.

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5628 i. At what time sworn—Before presentation of petition.]—Where a verifying affidavit is sworn before, instead of after, the petition is filed, the ct. would probably get over the difficulty if that were the only ground of objection.—*Re SUTHERLAND MANURE CO., LTD.* (1893), 11 N. Z. L. R. 460.—N.Z.

d. Imperfect affidavit—Waiver—Omission of word “limited.”]—The omission of the word “limited” in the body of the affidavit, which was properly entitled in the ct. & cause is an irregularity only & is cured by failure to take advantage of it promptly after knowledge of its existence.—

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DALHOUSIE LUMBER CO. v. WALKER (1916), 44 N. B. R. 81.—CAN.

e. Based wholly on information & belief—Whether affidavit essential—Rules directory not imperative.]—Upon the petition for a winding-up order, it appeared that the application was made by a creditor who had given the co. an extension of time, not yet expired, for payment of the debt. The affidavit in support of the petition was made by a person who deposed upon information & belief, & upon cross-examination thereon it appeared that he had no personal knowledge of the matters deposed to:—*Held*: the affidavit must be treated as a nullity; all Winding-up Act requires as essential to a winding-up order, is a petition setting forth sufficient facts; &

although the rules require a verifying affidavit, the rules are not to be treated as imperative, but directory only.—*Re ATLAS CANNING CO.* (1897), 5 B. C. R. 661.—CAN.

f. —.]—Affidavits based wholly on information & belief are inadmissible in support of an application for a winding-up order.—*Re COLONIAL INVESTMENT CO. OF WINNIPEG* (1913), 25 W. L. R. 843.—CAN.

g. At what time filed—Before presentation of petition.]—The petition for a winding-up order should be supported by a sufficient affidavit filed before its presentation.—*Re COMPANIES' WINDING-UP ACTS & KOOTENAY BREWING, MALTING & DISTILLING CO.* (1898), 6 B. C. R. 112.—CAN.

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ii. By Whom made.

5629. General rule.]—Where a petition for winding up is presented by an individual & not by a co., the affidavit in support, referred to in 1890 (Winding up) Rules, r. 36, cannot be made by petitioner's manager; & non-compliance with the rule by filing only an affidavit by a person not by the rule authorised to make the affidavit cannot be waived by the ct. as a "formal defect" or an "irregularity" within the meaning of r. 177 (1).—*Re CHARTERLAND STORES & TRADING Co.*, [1900] 2 Ch. 870; 69 L. J. Ch. 861; 83 L. T. 674; 49 W. R. 75; 45 Sol. Jo. 11; 8 Mans. 94.
Annotation:—N.F. Re African Farms, [1906] 1 Ch. 640.

5630. Petitioner abroad—Power of attorney to solicitor in England—Affidavit by petitioner's solicitor.]—Where a winding-up petition was presented under a power of attorney executed by petitioners resident in a colony to a solr. in this country, it being impossible to comply with the Order of Nov. 1862, r. 4, the ct. made the order upon verification of the petition by an affidavit of the solr., deposing of his own knowledge to the facts stated in the petition.

Where the registered offices of a co. had been pulled down, & their present place of business was unregistered, the ct. ordered the petition to wind up the co. to be served upon the secretary & two of the directors of the co. at their present place of business, although unregistered.—*Re FORTUNE COPPER MINING Co.* (1870), L. R. 10 Eq. 390; 40 L. J. Ch. 43; 22 L. T. 650.

5631. — Affidavit by clerk to petitioner's solicitor—Full knowledge of judgment debt due to petitioner.]—*Re CARRARA MARBLE Co.*, [1896] W. N. 87.

5632. — Affidavit by petitioner's attorney or agent—Knowing facts better than petitioner.]—1903 (Winding up) Rules, r. 29, providing that a petition for winding up a co. shall be verified by an affidavit made by petitioner, is merely directory as to the kind of affidavit to be accepted as *prima facie* evidence of the statements in the petition. The ct. will, therefore, in a proper case, accept the affidavit of petitioner's attorney or agent, particularly where it is satisfied that the material facts are more within the knowledge of the deponent than of petitioner himself.—*Re AFRICAN FARMS, LTD.*, [1906] 1 Ch. 640; 75 L. J. Ch. 378; 95 L. T. 403; 54 W. R. 490; 50 Sol. Jo. 343; 13 Mans. 123.

5633. Petition by company—Affidavit by general manager.]—Where a petition was presented by one co. for winding up another co., the ct. gave leave for the affidavit verifying the petition to be made by the general manager of the petitioning co.

Qu.: whether it was necessary to obtain such leave.—*Re CAKEMORE CAUSEWAY GREEN & LOWER HOLT UNITED BRICKWORKS & COLLIERY Co., LTD.* (1880), 28 W. R. 299.

5634. — Affidavit by secretary.]—*Re BIRMINGHAM CONCERT HALLS, LTD.*, [1890] W. N. 91.

5635. — In liquidation—Affidavit by liquidator being also manager of receiver.]—*Re REVIEW PUBLISHING Co., LTD.* (1893), 37 Sol. Jo. 176.

5636. Petition by Attorney-General—Petition on ground of inability to recover income-tax—Affidavit by Solicitor of Inland Revenue.]—Where the A.-G., on behalf of the Crown, presents a petition to wind up a co., the statutory affidavit in support

of the petition need not be made by the A.-G., but may be made by some fit & proper person; for instance, in a petition to wind up on the ground that the Crown has been unable to recover income-tax due by the co., the Solr. of Inland Revenue may make the affidavit.—*Re BRANDY DISTILLERS Co.* (1901), 17 T. L. R. 272, C. A.

iii. Contents.

5637. Whether statutory affidavit sufficient.]—Notwithstanding R. S. C. 1875, Ord. 37, r. 3, the common affidavit by a petitioner verifying a petition according to the General Order of Nov. 1862, r. 4, & schedule 3, form 2, is sufficient, although some of the allegations in the affidavits are only as to belief, & although there are other affidavits in support of the petition, which show the source of petitioner's belief.

Semble: the ct. will not now consider the question whether a rule of the Order of Nov. 1862 made under 1862 Act is *ultra vires*.—*Re NEW CALLAO, LTD.* (1882), 47 L. T. 175; 30 W. R. 647, C. A.

5638. — Fraud alleged.]—If a petition charges fraud against directors, the statutory affidavit in verification is not enough.—*Re SOUTH STAFFORDSHIRE TRAMWAYS Co.* (1894), 1 Mans. 292; 8 R. 288.

5639. — Necessity for stating facts constituting fraud.]—*Re LONDON & HULL SOAP WORKS, LTD.*, [1907] W. N. 251.

iv. Filing.

5640. Time for filing—Extension—Power of court to order.]—The ct. has power to enlarge the time for the filing of an affidavit in support of a winding-up petition.—*Re KENTISH ROYAL HOTEL Co.* (1865), 5 New Rep. 423; 13 W. R. 448.

5641. — Under 1867 Act, s. 41, the ct., to save expense, will refer a winding-up petition to chambers for the purpose of referring it thence to the county ct. It will also enlarge the time for filing the affidavit under 1862 Act, r. 73.]—*Re LONDON & WESTMINSTER CO-OPERATIVE STORE Co.* (1868), 17 L. T. 558.

5642. — When ordered—Delay due to absence in country.]—*Re PATENT SCREWED BOOT & SHOE Co.* (1863), 32 Beav. 142; 55 E. R. 56.

5643. — Petitioner abroad.]—Where a person who had made an affidavit in support of an application for winding up a co., resided in Dantzic, the ct. extended the time allowed for filing from four days to ten days.—*Re ANGLO-DANISH STEAM NAVIGATION Co.* (1866), 15 L. T. 406; 15 W. R. 105.

— Failure to file within prescribed period—Waiver.]—*See No. 5627, ante.*

5644. — Computation—Sunday not reckoned.]—In the computation of the time within which an affidavit verifying a petition to wind up a co. must be filed under Companies Rules of 1862, r. 4, Sunday is not to be reckoned.—*Re YEOLAND CONSOLS, LTD.* (1888), 58 L. T. 108; 4 T. L. R. 364.

5645. Notice of filing—Necessity—Statutory affidavit.]—*Re NEW WEIGHING MACHINE Co.*, [1896] W. N. 48.

Annotation:—Expld. Re British Cycle Manufacturing Co. (1898), 77 L. T. 683.

5646. — Supplemental affidavits.]—It is not necessary to give notice of the filing of the statutory affidavit in support of a winding-up

petition, but such notice should be given in respect of the filing of additional or supplemental affidavits to avoid unnecessary adjournments being made in order to answer such affidavits.—*Re BRITISH CYCLE MANUFACTURING CO., LTD.* (1898), 77 L. T. 683; 4 Mans. 383.

(e) *Attendance to Satisfy Registrar that Rules complied with.*

See 1909 (Winding up) Rules, r. 32.

5647. Whether rule imperative or directory—Effect of non-compliance.]—*Re LANG (J.) & Co., LTD.* (1892), 36 Sol. Jo. 271.

*(f) Notice of Intention to Appear on Hearing
of Petition.*

See 1909 (Winding up) Rules, rr. 33, 34.

5648. By whom given—"Committee of creditors"—Notice treated as given on behalf of individuals.]—*Re* MID KENT FRUIT CO. (1892), 36 Sol. Jo. 398.

5649. Contents—Whether parties intend to support or oppose.]—*Re* GREEN, MCALLAN & FEILDEN LTD., [1891] W. N. 127.

5650. — What parties intend to support—
Compulsory or supervising order.]—*Re* WOODROW,
HOOPER & Co., LTD. (1893), 37 Sol. Jo. 286.

5651. — Names & addresses of persons appearing—Address of solicitor signing notice insufficient.]—*Re* DESCOURS, PARRY & CO., LTD., [1909] W. N. 50.

5652. — No intention to appear—Necessity for statement to that effect.]—*Re* AUSTRALASIAN ALKALINE REDUCTION & SMELTING SYNDICATE, LTD. (1891), 36 Sol. Jo. 139.

5653. ——— ——— ———.]—*Re* LUCIGEN LIGHT CO., LTD. (1892), 36 Sol. Jo. 540.

5654. ——— ——— ———.]—PRACTICE DIRECTION,
[1906] W. N. 127.

(g) *Affidavits in Opposition to Petition.*

5655. Time for filing—Failure to file within prescribed time—Affidavit not admissible.]—*Re* UNIQUIA, UNIVERSAL SPORTS & RECREATION SOCIETY, LTD. (1896), 40 Sol. Jo. 621.

(h) *Hearing of Petition.*

5656. Who may appear—Secured creditors—Without electing between resting on or giving up securities.]—*Re* CARMARTHENSHIRE ANTHRACITE COAL & IRON CO., No. 6486, *post*.

5657. — **Provisional liquidator—Appointed prior to hearing.**—Upon a petition to wind up a co., a provisional liquidator was appointed prior to its being heard:—*Held*: the provisional liquidator was not entitled to appear at the hearing, though served, & his costs were refused.—*Re* GENERAL INTERNATIONAL AGENCY Co., LTD. (1865), 36 Beav. 1; 5 New Rep. 265; 34 L. J. Ch.

PART III. SECT. 36, SUB-SECT. 3.—
E. (f).

k. At proceedings prior to petition being dealt with—"Appearance book."—A shareholder in the co. applied for a winding-up order; the petition, which was dismissed with costs, was opposed by the co., & also by certain debenture-holders & creditors, who appeared by separate counsel. Rule 56 of Winding-up Rules, 1896, provided that "no contributory or creditor shall be entitled to attend any proceeding

before the ct., unless he is entered in a book called the "appearance book." The debenture-holders & creditors had not entered an appearance:—*Held*: the rule applied to proceedings before the petition had been dealt with, as well as to proceedings subsequent to a winding-up order, & so the creditors who had not entered an appearance were not entitled to costs. The fact that their counsel was heard, without objection by petitioner's counsel, made no difference.—*Re ALBION IRONWORKS Co.*, 24 C. L. T. 300.—CAN.

337; 11 L. T. 700; 13 W. R. 363; 55 E. R.
1056.

5658. — Persons other than creditors or shareholders—Winding up of canal company—Appearance of company owning adjoining canal.]—No person has a right to be heard against a petition for winding up a co., except creditors & contributories, & although the ct. may reasonably hear other persons who have an interest in the property of the co. as *amici curiæ*, yet such persons cannot appeal against the decision. Upon a petition to wind up a canal co., presented by the co., another canal co., whose canal communicated with that of petitioning co., were heard in opposition to the petition:—*Held*: the opposing co. had no *locus standi* to appeal against the winding-up order.

A winding-up order does not in the slightest degree derogate from any right whatever which a third person, a stranger, has in the property of the co. to be wound up.—*Re BRADFORD NAVIGATION Co.* (1870), 5 Ch. App. 600; 39 L. J. Ch. 733; 23 L. T. 487; 18 W. R. 1093, L. J.

Annotations:—Mentd. *Re Exmouth Docks Co.* (1873), L. R. 17 Eq. 181; *Re Barton-upon-Humber & District Water Co.* (1889), 42 Ch. D. 585; *Re Woking Urban Council (Basingstoke Canal) Act*, 1911, [1914] 1 Ch. 300.

5659. Unopposed petition.]—A petition to wind up a co. will be called on in its turn in the list of petitions, instead of being treated as an opposed petition; & if, when the petition is called, the co. appear & consent, & no one appears to oppose, the petition will be taken as unopposed, & the order made thereon accordingly.—*Re BEDWAS & LANTWIK COAL CO.* (1874), 29 L. T. 828.

5660. ———.]—*Re* INMAN & Co. (1891), 36 Sol. Jo. 124.

5661. Powers of court—To direct meetings of shareholders—Court will not direct meeting unless *prima facie* case for winding up—Company solvent.] —*Re* JOINT-STOCK COAL CO., *Re* GREEN, *Re* COPELAND, No. 5382, *ante*.

5662. — To decide validity of transfer of business—Adjournment until question properly tried.]—The ct. has not power, under its winding-up jurisdiction, to decide as to the validity of the transfer of the business of a joint-stock co. A petition to wind up a co. which was mainly based on an allegation that a transfer of its business which had been effected was *ultra vires* & surrounded by circumstances of fraud, was ordered to stand over until the question as to the transfer should have been decided in a suit properly instituted for that purpose, with liberty to petitioner or other interested parties to apply at chambers for leave to file a bill.—*Re INTERNATIONAL LIFE ASSURANCE SOCIETY* (1868), 20 L. T. 433.

— **To adjourn hearing of petition.**—*See* subsect. 3, E. (i), *post*.

— To amend.]—See Sub-sect. 3, E. (l), *post*.

—— To make or refuse winding-up order.]—
See Sub-sect. 3, E. (i) ii, *post*.

—— To transfer proceedings to other courts.]—
See Sub-sect. 14, A., *post*.

PART III. SECT. 36, SUB-SECT. 3.—
E. (h).

1. Powers of court — To decide whether petitioner is creditor—No dispute as to material facts.]—Where there is no dispute as to the material facts the ct. will on a petition to compulsorily wind up a co. already in voluntary liquidation, decide the contested legal point, whether petitioner is or is not a creditor.—*Re NEWCASTLE PERMANENT INVESTMENT & BUILDING SOCIETY* (1897), 18 N. S. W. Eq. 76.—AUS.

Sect. 36.—Winding up by court: Sub-sect. 3, E. (i)
ii. & . . .

(i) *Adjournment of Hearing and Stay of Proceedings.*

i. In General.

5663. Adjournment on terms—What terms imposed—St. Thomas' Dock Order.]—A co. was formed to repair & work a floating dock in the West Indies. The dock was not finished until Dec. 1875. At that time the whole capital of the co. had been paid up in full, & debentures issued to the amount of £89,000, secured by a charge on the dock & certain concessions, constituting the only assets of the co. The interest on these debentures having fallen into arrear, a holder of a small amount served, in Dec. 1875, the statutory notice to pay the interest, & then presented a petition to wind up the co. The petition was opposed by the co., by debenture holders to the amount of upwards of £70,000, & by the principal unsecured creditor, whose debt amounted to £5,000; & there was no evidence that the sale of the dock & concessions would produce any surplus beyond the amount of the debentures:—*Held*: petition must stand over for six months, upon the co. undertaking not to consent to a winding-up order on another petition, or to wind up voluntarily, to give petitioner notice of the presentation of any other petition, & not to raise any objection to the petition being brought or in case any other petition should be presented.—*Re St. Thomas' Dock Co.* (1876), 2 Ch. D. 116; 45 L. J. Ch. 304; 34 L. T. 228; 24 W. R. 544.

Annotations:—Folld. Re International Cable Co. (1890), 2 Meg. 183; *Re Bull* (1892), 36 Sol. Jo. 557; *Re Scott & Jackson* (1893), 38 Sol. Jo. 59; *Re St. Neots Water Co.* (1905), 93 L. T. 788. *Refd. Re Chapel House Colliery Co.* (1883), 24 Ch. D. 259. *Mentd. Re Crigglestone Coal Co.*, [1906] 2 Ch. 327; *Re Melson*, [1906] 1 Ch. 841.

5664. ———.]—Where a petition to wind up a co. is ordered to stand over by consent on the terms of what is known as "St. Thomas' Dock Order," the undertaking by the co. should not be that it will not consent to an order on another petition & will not wind up voluntarily, but should follow the wording of the judgment of Jessel, M.R., in *Re St. Thomas' Dock Co.*, No. 5663, *ante*, & be an undertaking that the co. will not consent to a winding-up order on the petition of another person, or to a voluntary winding up. *Semble*: a corpn. cannot validly undertake not to wind up voluntarily.—*Re St. Neots Water Co.* (1905), 93 L. T. 788; 50 Sol. Jo. 111.

—— *Security for costs.]—See No. 5814, post.*

ii. Grounds for Granting or Refusing.

5665. General rule.]—*Re METROPOLITAN RAILWAY WAREHOUSING Co., LTD.*, No. 5329, *ante*.

5666. ———.]—A petition for the compulsory winding up of a co. was dismissed by the ct. on the ground that it was opposed by nearly all the creditors & that a reconstruction scheme was in course of preparation & an order for the petition to stand over might interfere with the co.'s chances of obtaining the capital it required.—*Re EAST KENT COLLIERY Co., LTD.* (1914), 30 T. L. R. 659.

PART III. SECT. 36, SUB-SECT. 3.—
E. (i) i.

m. Powers of court—Company having committed act of insolvency.]—The ct. may postpone an application for a winding-up order against a co. even where the co. may have committed an act of insolvency. Where such application was opposed by other creditors of the co. & the ct. was not satisfied that it was desirable in the interests of the parties not to grant

a winding-up order forthwith, the application was ordered to be postponed for a period of four months.—*IRON CONCRETE ENGINEERING Co., LTD. v. NATAL ASBESTOS, LTD.* (1922), 43 N. L. R. 195.—S. AF.

PART III. SECT. 36, SUB-SECT. 3.—
E. (i) ii.

n. To enable creditor to establish his debt.]—No adjournment allowed.]—In

5667. Examination of accounts.]—An allottee of thirty shares in a projected railway co., had paid £5 5s. per share deposit. The scheme was abandoned, & £3 10s. per share was returned to the allottee on account of his deposit, & he thereupon signed a memorandum expressing his concurrence in the settlement of the affairs of the co., & his consent to receive the £3 10s. per share; & the directors certified that he was entitled to a *pro rata* division of the funds, after payment of all debts, etc., but no accounts were shown to him. A further sum of 10s. per share was afterwards offered to him, upon his signing a release, but he refused. He then presented a petition praying the dissolution of the co., & the winding up of its affairs; but the ct. ordered the petition to stand over, resps. permitting him to examine the accounts, with liberty to bring the matter again before the ct., if need be.—*Re DIRECT LONDON & MANCHESTER RY. Co., Ex p. POCOCK* (1849), 1 De G. & Sm. 731; 5 Ry. & Can. Cas. 607; 13 L. T. O. S. 230; 63 E. R. 1271; *sub nom. Re LONDON & MANCHESTER RY. Co. (RASTRICK'S LINE), Ex p. POCOCK*, 13 Jur. 598.

Annotation:—Mentd. Re Great North of England, Yorkshire & Glasgow Union Ry., Carrick's Case (1851), 1 Sim. N. S. 505.

5668. Payment of debt—Debt admitted.]—*Re GENERAL ROLLING STOCK Co., LTD.*, No. 5504, *ante*.

5669. ———.]—The ct. is not bound *ex debito justitiæ* to make an immediate order to wind up a co. upon the petition of a creditor whose debt is admitted & not paid, but may, under 1862 Act, ss. 86, 91, order the petition to stand over to enable the co. to make arrangements for the payment of its debts, & the carrying on of its business, & will make such order where there is a reasonable hope of such arrangements being made.—*Re BRIGHTON HOTEL Co.* (1868), L. R. 6 Eq. 339; 37 L. J. Ch. 915; 18 L. T. 741.

Annotations:—Distd. Re Tumacacori Mining Co. (1874), L. R. 17 Eq. 534. *Refd. Re Langley Mill Steel & Iron Works Co.* (1871), L. R. 12 Eq. 26; *Re St. Thomas Dock Co.* (1875), 24 W. R. 544; *Re Chapel House Colliery Co.* (1883), 24 Ch. D. 259.

5670. ——— Reasonable chance of payment.]—*Re WESTERN OF CANADA OIL, LANDS & WORKS Co., No. 5342, ante.*

5671. Petition alleging misfeasance by directors—Requiring investigation.]—A shareholder, who had presented a petition for the winding up of a co., & had in the petition made certain allegations as to the conduct of the directors, which in the opinion of the ct. required investigation, asked at the hearing that the petition might stand over in order that resolutions might be passed for a voluntary winding up:—*Held*: there must be a compulsory order, & another shareholder, who appeared in support of the petition, must have the carriage of the order.—*Re BERLIN GREAT MARKET & ABATTOIRS Co.* (1871), 24 L. T. 773; 19 W. R. 793.

5672. Scheme to enable company to continue business.]—*Re MARGATE HOTEL Co.*, [1888] W. N. 73.

5673. Scheme for settlement of dispute—Winding-

view of the provision of Winding-up Act, 1906, c. 144, s. 5, that the winding up shall be deemed to commence at the time of the service of the notice of presentation of the petition for winding up, the petition should not be allowed to stand until after it had been determined whether the claim was or was not a valid one. The ct. has no power, under sect. 14 of the Act, to prevent the retroactive effect of a winding-up order, upon the adjournment of a

up order opposed by debenture-holders.]—*Re BULL (JOSEPH), SONS & Co. (1892), 36 Sol. Jo. 557.*

5674. ——— Opportunity given to debenture-holders to provide for petitioner's debt.]—*Re BAKER TUCKER & Co. (1894), 38 Sol. Jo. 274.*

5675. Arrangement between parties for stay.]—*Re ARGENTINE LOAN & MERCANTILE AGENCY Co., LTD. (1892), 36 Sol. Jo. 541.*

5676. Submission to shareholders of scheme for employment of company's capital.]—On the presentation of a petition for the compulsory winding up of a co. on the ground that the substratum of the co. was gone, the ct. ordered the petition to stand over in order that a proposed scheme for the employment of the capital of the co. might be submitted to the shareholders.—*Re STRATTON'S INDEPENDENCE, LTD. (1916), 33 T. L. R. 98; [1917] H. B. R. 275.*

—— **Appeal against judgment pending.]—*See Nos. 5421–5423, ante.***

Petition by judgment creditor—Impeachment of judgment.]—*See Nos. 5419, 5420, ante.*

Substitution of petitioner.]—*See Nos. 5700, 5714, post.*

Question to be tried as to validity of transfer of business.]—*See No. 5662, ante.*

Company in voluntary liquidation.] — *See Sect. 37, post.*

(j) *Presentation of Several Petitions.*

5677. Priority—Whether date of presentation or of advertisement.]—Where two or more petitions are presented for winding up a co., they will have priority according to their dates of advertisement, not of presentation.—*Re UNITED PORTS & GENERAL INSURANCE Co. (1869), 39 L. J. Ch. 146.*
Annotation:—N.F. Re Bldg. Socs. Trust (1890), 44 Ch. D. 140.

5678. ———.]—Three petitions having been presented to wind up a co., it was resolved to wind up voluntarily. One order was made on the three petitions, the first of which was for a compulsory winding up, & the others for an order, directing the winding up to be continued under supervision, & the carriage of the order was given to a petitioner, whose petition had been presented before, though advertised after one of the other two.—*Re LONDON & AUSTRALIAN AGENCY CORPN., LTD. (1873), 29 L. T. 417; 22 W. R. 45.*
Annotation:—Re Bldg. Socs. Trust (1890), 44 Ch. D. 140.

5679. ———.]—*Re TRADES BANK Co., [1877] W. N. 268.*

Annotation:—Expld. Re Bldg. Socs. Trust (1890), 44 Ch. D. 140.

petition.—*Re MEAFORD MANUFACTURING Co. (1919), 46 O. L. R. 282.—CAN.*

o. ——— Petitioner sisted.]—In a petition at the instance of creditors for winding up a co., the co. lodged answers in which they denied certain of the averments of petitioners with regard to the existence of the debt & moved the ct. to dismiss the petition. The ct. in respect that it was doubtful whether there was a *bonâ fide* dispute between the parties as to the indebtedness of the co. sisted the petition to enable petitioners to constitute their debt.—*LANDAUER & Co. v. ALEXANDER & Co., [1919] S. C. 492; 56 Sc. L. R. 467; 25 L. T.—SCOT.*

PART III. SECT. 36, SUB-SECT. 3.—
E. (j).

p. Priority — Whether date of presentation or of advertisement—Second petition presented after notice of first—Costs.]—A winding-up petition was presented by A. on June 24, & another for winding up the same co. by B. on

June 25. The hearing of both was fixed for July 10. The advertisements of both appeared in the Gazette, & other newspapers, on the same day, those of B. being first on the page & having been received first at the publishing office. A's petition was, on June 26 set down for hearing, the *præcipe* being insufficiently stamped, but rectified before the hearing. B's petition was set down on June 27:—*Held: A's petition was entitled to be heard before B's petition for winding up the same co., the hearing of which was fixed for the same day, take precedence according to the day of their presentation, & not from the time of advertisement.* The ct. would hear them all, & then decide which should have priority, & the carriage of the order. Where a second petition for winding up the same co. is presented & set down after notice of the first, the ct. will not follow the usual practice & make an order in both, giving the carriage of it to one & costs to both. Where one petition sought

5680. ———.]—Two petitions were presented for winding up a co., the first by the co., the second by a creditor. The second petition was advertised before the co.'s petition. It was stated at the hearing that, according to the present practice, a second petition to wind up a co. is always set down before the same judge as the first, & notice is given to the person presenting the petition that a petition has already been presented: *Held: this practice put an end to the grounds on which priority of advertisement has been held to give priority to a second petition, & the second petition having been persisted in after notice of the first must be dismissed with costs.* If a second petitioner chooses to proceed with his petition for fear the co. should let a petition drop, he must do so at his own risk.—*Re STANDARD PORTLAND CEMENT Co. (1890), 59 L. J. Ch. 408; 62 L. T. 822.*

5681. ———.]—A creditor, presenting a winding-up petition, with notice that another creditor has already presented a petition with the same object, does so at his own risk as to costs, & must prove, not merely that he has reason to suspect that the first petition was not *bonâ fide* presented, but that *mala fides* or collusion actually exists. Where two or more petitions are presented, they will, in the absence of *mala fides*, take priority according to their dates of presentation, not according to their dates of advertisement.—*Re BUILDING SOCIETIES' TRUST, LTD. (1890), 44 Ch. D. 140; 59 L. J. Ch. 638; 2 Meg. 81; sub nom. Re BUILDING SOCIETIES TRUST, LTD., Ex p. LAUGHTON, Ex p. POOLEY, 62 L. T. 360; 38 W. R. 458.*

Annotations:—Folld. Re Hobbs (1892), 36 Sol. Jo. 777; Re Sheringham Development Co. (1893), 37 Sol. Jo. 175.

5682. ———.]—*Re HOBBS (J. W.) & Co. (1892), 36 Sol. Jo. 777.*

5683. When one order made on two or more petitions—Proceedings stayed in second petition.]—*Re OUNDLE UNION BREWERY Co. (1850), 15 L. T. O. S. 201.*

5684. Carriage of order—To whom given—Petition abandoned by first petitioner—Death of second petitioner.]—Where a winding-up order had been obtained by a petitioner, who abandoned it, before carrying it into the master's office, the ct. gave the prosecution of the order to a second petitioner; &, on the death of such second petitioner before he had taken any further step in the matter, the ct., upon an *ex p.* motion, gave the carriage of the order to another shareholder.—*LARNE, BELFAST & BALLYMENA RY. Co.,*

a winding-up order, & the other a winding-up order or a supervision order, & a winding-up order was made under the former petition, no costs were allowed on the latter, for its uncertainty.—*Re PROVINCIAL & SUBURBAN BANK, LTD. (1879), 5 V. L. R. 159.—AUS.*

5677 i. ———.]—Where there were rival petitions for the winding up of a co. the judge gave preference to that of a creditor which was first in point of time over that of a shareholder.—*Re CANADIAN FIBRE WOOD & MANUFACTURING Co., LTD. (1913), 24 O. W. R. 635.—CAN.*

q. ——— Collusion.]—In the absence of collusion or other circumstances which would make it more desirable that the conduct of the proceedings should be given to the second petitioner for a winding-up order, the person who files his petition first should have the conduct of the proceedings, even where he is absent on active service.—*Re SIMPSON & HUNTER*

Sect. 36.—Winding up by court: Sub-sect. 3, E. (j),

Ex p. BAKER (1850), 3 De G. & Sm. 242; 64 E. R. 462; *sub nom. Re LARNE, BELFAST & BALLYMENA RY. CO.*, 15 L. T. O. S. 326, 410; 14 Jur. 996.

5685. — — — Petitions by paid-up shareholder & holder of shares not fully paid.]—Two petitions were presented for a winding-up order, one by a paid-up shareholder the other by a shareholder who had only paid the deposit on application. It did not appear that the co. was insolvent. An order was made on both petitions, but it was:—*Held*: the paid-up shareholder was entitled to the conduct of the winding up.—*Re CONSTANTINOPIE & ALEXANDRIA HOTELS CO., LTD.* (1865), 13 W. R. 851.

5686. — — — Petitions by creditor & contributories—Creditor's debt disputed.]—Where a winding-up petition was presented by a creditor of a co. & a subsequent petition was presented by contributories, which disputed the debt of the first petitioners, & contained charges of misconduct against them in reference to the co., the ct. directed a winding-up order on both petitions, & gave the carriage of the proceedings to second petitioner.—*Re LUNDY GRANITE CO.* (1868), 17 W. R. 91.

5687. — — —.]—*Re LONDON & AUSTRALIAN AGENCY CORPN., LTD.*, No. 5678, *ante*.

5688. — — —.]—*Re TRADES BANK CO.*, No. 5679, *ante*.

5689. — — — Petitions advertised in same number of London Gazette.]—When a winding-up order is made upon two petitions, the advertisements of which appear in the same number of the *London Gazette*, petitioner whose petition has been first presented is entitled to the carriage of the order.—*Re STORFORTH LANE COLLIERY CO.* (1879), 10 Ch. D. 487; 48 L. J. Ch. 416; 27 W. R. 615.

5690. — — — Discretion of court—Meeting directed to ascertain choice.]—Although, as a general rule, where two petitions are presented for the winding up of a co., & an order for winding up is made on both petitions, the carriage of the order is given to the first petitioner, the rule does not bind the judge before whom the rival petitions come; but he has a discretion as to which petitioner shall have the carriage, & he may, under 1862 Act, s. 91, direct a meeting of contributories to be held to take their opinion as to which petitioner shall have the carriage.—*Re CUNNINGHAM (R. N.) & CO., LTD.* (1883), 53 L. J. Ch. 246; 50 L. T. 246, C. A.

(1916), 34 W. L. R. 850; 10 W. W. R. 922.—**CAN.**

r. — — — Special grounds.]—Where several petitions for the winding up of a co. have been presented in different cts., unless some very special grounds exist, the winding-up order will be made upon the petition first presented. A hostile attitude on the part of petitioners towards other unsecured creditors would amount to such special grounds.—*Re BAMFORD, LTD.*, [1910] 1 I. R. 390.—**IR.**

s. Priority—Second petitioner with notice of first—Delay by mistake in advertisement of first petition.]—*Re DUBLIN GRAINS CO., LTD.*, *Ex p. BROWNE*, *Ex p. ROSSBOROUGH* (1886), 17 L. R. Ir. 512.—**IR.**

t. When one order made on two or more petitions—Conduct of proceedings—Given to later petitioner—Being personally more suitable.]—When there were two petitions for an order for the winding up of a co., the order was made under both petitions, but the

conduct of the proceedings was given to the later petitioner, a creditor for money paid, in preference to the earlier one, who was shown to be an employee of & in close touch with the co., & the belief was expressed that he would not take the same interest in the prosecution of the winding up as the other.—*Re ESTATES, LTD. & WINDING-UP ACT* (1904), 8 O. L. R. 564; 24 C. L. T. 400; 4 O. W. R. 199.—**CAN.**

5693 i. Prior petition pending in another branch of court—Order made on second petition—Coming on to be heard first.]—Where there were, in different cts., two concurrent petitions for winding up a co., & the petition which had been presented last came on to be heard first, an application that it might be transferred to the other ct., to be heard with the first presented petition, was refused, & an order made to wind up the co. It is duty of the judge who first comes in contact with a petition to make the order to wind up.—*Re OFFICIAL CO-OPERATIVE SOCIETY* (1888), 21 L. R. Ir. 385.—**IR.**

5691. After order made—Can only be dealt with in presence of all parties.]—Where several petitions have been presented for winding up a co., & the order made, but subsequent attempts at an arrangement by reason of which the order was not drawn up, have failed, the ct. will not deal with the question of the carriage of the order, or post-dating the order, except in the presence of all parties.—*Re DISDERI & CO., LTD.* (1868), 18 L. T. 870.

5692. First order supposed to be invalid—Second petition should not be presented until validity of first ascertained.]—One of the seven persons who signed the memorandum of assocn. of a limited co. was an infant; but the memorandum was registered, & a certificate of incorporation given by the registrar in ignorance of that fact. A compulsory winding-up order was made twenty months afterwards. The infant attained 21 about four months after the incorporation of the co., & accepted & held shares; & he took no steps to have his name removed till six months after the winding-up order. A second petition for a winding-up order having been presented, on the ground that the registration & all subsequent proceedings (including the winding up) were invalid because the memorandum was not signed by the statutory number of persons *sui juris*:—*Held*: the registrar's certificate of incorporation was, under 1862 Act, s. 18, conclusive evidence that all requisites of registration, including the due execution of the memorandum of assocn., had been complied with; & registration was valid, the co. duly incorporated, & the former winding-up order good. *Semble*: a second petition ought not to have been presented until the opinion of the judge had been taken as to the validity of the prior order.—*Re NASSAU PHOSPHATE CO.* (1876), 2 Ch. D. 610; 45 L. J. Ch. 584; 24 W. R. 692.

Annotations:—Consd. Re National Debenture & Assets Corpn., [1891] 2 Ch. 505. *Folld. Re Laxon*, [1892] 3 Ch. 555. *Refd. Hill v. Hill* (1886), 55 L. T. 769. *Mentd. Dennison v. Jeffs*, [1896] 1 Ch. 611.

5693. Prior petition pending in another branch of court—Order made on second petition—Coming on to be heard first.]—*Re BRITISH & FOREIGN GENERATING APPARATUS CO., LTD.*, No. 5766, *post*.

5694. — — — Company insolvent—Motion for transfer pending.]—Where it is clear that a co. cannot continue to carry on business, an order for winding up will be made upon petition, notwithstanding that a prior petition is pending in another branch of the ct., & that there is a motion for transfer pending under ord. 51, provided that the later petition was presented *bonâ fide* without

a. Winding-up orders made in two jurisdictions—Mutual recognition of liquidators.]—A co. registered in the Transvaal was placed under compulsory liquidation in that province, & provisional liquidators were appointed. An order was then granted placing the co. under provisional liquidation in the Cape Province, & on the return day of the rule *nisi* the Transvaal liquidators applied for recognition in the Cape Province & opposed the making final of the provisional order of liquidation:—*Held*: as there were creditors to a substantial amount & also substantial assets in the Cape Province, the provisional order should be made final; & as the Transvaal liquidators were only provisional liquidators it would be premature for this ct. to grant their recognition or to appoint them as liquidators in this Province, but leave should be reserved to apply to have any person, who might be appointed official liquidator in the Transvaal, joined with the liquidator in this Province.—*SHAGAM & WALT*,

knowledge of the prior petition.—*Re* WYNAAD GORDDU LEAD MINING Co. (1882), 31 W. R. 226.

Costs.—See Sub-sect. 3, F. (d), *post*.

(k) *Withdrawal of Petition.*

5695. Right to withdraw—After petition presented & advertised.]—A creditor who has presented & advertised a petition to wind up a co. is entitled to withdraw the petition, & if he brings the petition to a hearing after an offer to pay his debt & costs, he will not be allowed costs incurred after such offer.—*Re* TIMES LIFE ASSURANCE & GUARANTEE Co. (1869), L. R. 9 Eq. 382.

Annotations :—**Folld.** *Re* Home Assce. Asscn. (1871), L. R. 12 Eq. 59. **Refd.** *Re* Criterion Gold Mining Co. (1889), 41 Ch. D. 146.

5696. ———.]—A creditor of a co. who had presented a petition for a winding-up order, & duly advertised it:—*Held*: entitled to dismiss his petition with costs, notwithstanding the objection of another creditor appearing on it; but the costs of the objecting creditor were included in the order.—*Re HOME ASSURANCE ASSOCN.* (1871), L. R. 12 Eq. 59; 41 L. J. Ch. 110; 24 L. T. 613; 19 W. R. 817.

Annotations :—*Folld. Re* Hereford & South Wales Waggon & Engineering Co. (1874), L. R. 17 Eq. 423. *Appld. Re* Patent Cocoa Fibre Co. (1876), 1 Ch. D. 617. *Consd. Re* Chepstow Bobbin Mills Co. (1887), 36 Ch. D. 563. *Refd. Re* Criterion Gold Mining Co. (1889), 41 Ch. D. 146.

5697. — — — On payment of debt.] — A creditor who has presented a petition for winding up, being *dominus litis*, is entitled, on receiving payment of his debt, to dismiss his petition at the hearing; but creditors who have appeared in consequence of the advertisement of the petition are entitled to their costs.—*Re HEREFORD & SOUTH WALES WAGGON & ENGINEERING CO.* (1874), 1. R. 17 Eq. 423; 29 L. T. 881; 22 W. R. 314.

Annotations:—*Appld. Re Patent Fibre Cocoa Co.* (1876),
1 Ch. D. 617. *Refd. Re Criterion Gold Mining Co.* (1889),
41 Ch. D. 146.

5698. How effected—After petition advertised & set down.]—Where a petition has been presented for compulsory winding up, & after advertisements have been issued & the petition set down, it is arranged to withdraw it, that can only be done by the petition coming on in the ordinary course, & being then withdrawn, if no one objects.—*Re MID WALES HOTEL CO., LTD.* (1868), 17 L. T. 597.

5699. ———.]—After a winding up petition has been presented & advertised & directed to be heard the ct. will not, although petitioner's debt be satisfied & he be entitled to withdraw his petition, allow the petition to be struck out of the list so as not to appear in the ct. paper of the day fixed for the hearing.—*Re AN INSURANCE Co.* (1875), 33 L. T. 49.

Costs.—See Sub-sect. 3, F. (c), *post*.

**LTD. v. S. A. I. F. CO-OPERATIVE
DEVELOPMENT Co., LTD., [1922]
C. P. D. 275,—S. AF.**

PART III. SECT. 38, SUB-SECT. 3.—
E. (k).

b. Right to withdraw — Creditors petition—Substitution.]—In an application for a winding-up order petitioners may discontinue proceedings on settlement of their claims; & creditors, other than petitioners, who have not themselves petitioned, are not entitled to be substituted for such petitioners for the purpose of continuing the proceedings.—**DOYLE v. ATLAS CANNING Co. (1897), 5 B. C. R. 279.—CAN.**

PART III. SECT. 36, SUB-SECT. 3.—
E. (1).

c. For what purpose allowed—*Incorrect name of company—Effect on liquidator's title to assets.*—Pltf. in an action to recover a debt from an assocn. in course of winding up under the control of the ct., applied for payment out of ct. of garnished moneys to pltf., in preference to the liquidator, on the ground that the winding-up proceedings were intitled with the wrong title of the assocn.:—*Held*: the moneys should be paid to the liquidator, & on a subsequent motion on behalf of the liquidator, a *nunc pro tunc* order was made.—**SWIFT CANADIAN CO., LTD. v. ISLAND CREAMERY ASSOCN., LTD.**

(l) *Amendment of Petition.*

5700. At what time allowed—At hearing of appeal.]—Amendment of petition at hearing of appeal.—*Re* QUEEN'S BENEFIT BUILDING SOCIETY (1871), 6 Ch. App. 815; 40 L. J. Ch. 381; 24 L. T. 346; 19 W. R. 762, L. J.J.

Annotations.—**Refd.** *Re Blackburn & District Benefit Bldg. Soc.* (1883), 24 Ch. D. 421; *Re Horsham Industrial & Provident Soc.* (1894), 70 L. T. 801.

5701. — After evidence gone into—Duty to object before evidence gone into.]—Where after a petition to wind up a co. had been opened, & evidence gone into, resp. raised the point that the petition was demurrable, the ct. gave leave to amend the petition on the ground that it is the duty of resp. to be prompt with a demurrer, & that he should have insisted upon the ct. giving a decision upon the demurrer before the evidence was gone into.—*Re WHITE STAR CONSOLIDATED GOLD MINING Co.* (1883), 48 L. T. 815.

5702. For what purposes allowed—Incorrect name of company.]—*Re* ARMY & NAVY HOTEL, No. 5583, *ante*.

5703. — — —.]—*Re* NEWCASTLE MACHINISTS Co., [1888] W. N. 246.

5704. — — —.]—*Re* PROFESSIONAL & TRADE PAPERS, LTD. (1900), 44 Sol. Jo. 740.

5705. ———.]—*Re* BIRCH (SAMUEL) Co.,
LTD., [1907] W. N. 31.

5706. — No allegation of assets.]—WINDING-UP PETITIONS (1902), 18 T. L. R. 503.

— **Petition for compulsory order—Subsequent petition for supervision order.**—*See* No. 7299, *post*.
 — **Supervision order made instead of compulsory order.**—*See* Sect. 38, sub-sect. 4, *post*.

5707. — **Substitution of petitioner—Creditor appearing without notice—On shareholder's petition.**—A shareholders' petition for the compulsory winding up of a co. made out no case for an order. A creditor appeared, without notice to the co., in support of the petition, having the day before the hearing filed an affidavit proving a debt which would have entitled him to a compulsory order if he had presented a petition:—*Held*: no order could be made on the petition in favour of the creditor, on the ground that the co. had not notice of the fresh case made against them by the creditor.—*Re SPENCE'S PATENT NON-CONDUCTING COMPOSITION & CEMENT CO.* (1869), L. R. 9 Eq. 9; 39 L. J. Ch. 79; 21 L. T. 413; 18 W. R. 82.

5708. — — — — — Petition stood over for substituted petitioner to make affidavit in support.] —*Re INVICTA WORKS, LTD.* (1894), 38 Sol. Jo. 290.

5709. ——— Original petitioner asking leave to withdraw—Adjournment to see if any one wished to be substituted.]—Where a petition to wind up a co. in voluntary liquidation charged various irregularities, & at the hearing the petitioner asked leave to withdraw, the ct. adjourned the petition for a month to see if any creditor or shareholder—

CANADIAN PACIFIC RY. CO., GARNISHEE
(1912). 17 B. C. R. 475.—CAN.

5702 i. ———.] — A co. was named in the memorandum of assocn. & in the arts. of assocn. "The Cork Constitution, Ltd." & it was registered in that name. The name of the co. had not been changed. The M. Bank presented a petition intituled "In the matter of "the Cork Constitution Co., Ltd." for the compulsory winding up of the co. Other orders were made "In the matter of the Cos. Acts, 1862 & 1867, & in the matter of the Cork Constitution Co., Ltd." An order was made to amend the petition & all orders in the matter by striking out the word "Co." after the words

Sect. 36.—Winding up by court: Sub-sect. 3, E. (l),

no one had appeared on the petition—desired to be substituted as petitioner under 1893 (Winding up) Rules, r. 2.—*Re WELSH MANUFACTURING & WOOLSTAPLING CO.* (1894), 1 Mans. 533; 13 R. 55.

5710. ——— Only if original petition founded on valid subsisting debt—Good reason for original petitioner being unable to proceed.]—*Re CHARLES, LTD.* (1906), 51 Sol. Jo. 101.

5711. ——— Original petitioner not appearing.]—Where upon a petition for winding up a co. petitioner does not appear at the hearing, the ct. has no power, under 1903 (Winding up) Rules, r. 36, to substitute as petitioner a creditor or contributory.—*Re VANGUARD MOTORBUS CO., LTD.* (1908), 24 T. L. R. 526.

5712. ——— Addition of petitioner—Shareholder who has purchased petitioning creditor's debt.]—*Re PARIS SKATING RINK CO.*, No. 5461, *ante*.

5713. ——— Death of petitioner—Petition continued by personal representative.]—*Re DYNEVOR DUFFRYN COLLIERIES CO.*, [1878] W. N. 199.

5714. ——— ———.]—*Re COMMERCIAL BANK OF LONDON*, [1888] W. N. 214.

(m) *Order on Petition.*

5715. Form of order—Two companies cannot be included in one order—Even though separate lists of contributories are made out.]—Two cos. cannot be included in one winding-up order, even though separate lists of contributories are made out for each co.—*Re SHIELDS MARINE INSURANCE CO., LEE & MOOR'S CASE* (1867), 17 L. T. 308; 16 W. R. 69.

5716. ——— Limited order—Such proceedings as necessary to obtain statement of affairs.]—*Re NEW IMPERIAL ELECTRIC LAMP CO., LTD.* (1903), *Times*, Feb. 19.

5717. ——— ———.]—PRACTICE NOTE (1903), 20 T. L. R. 73; *sub nom. Re INDIA RUBBER MANUFACTURING CO., LTD.*, 48 Sol. Jo. 84.

5718. Advertisement of order—Advertisement out of time — Order post-dated.]—*Re DONCASTER PERMANENT BENEFIT BUILDING & INVESTMENT SOCIETY* (1863), 11 W. R. 459.

5719. ——— Extension of time.]—*Re EAST CAMBRIAN GOLD MINING CO., LTD.*, No. 5627, *ante*.

5720. Re-advertisement of order—Order amended.]—*Re FOEL (CLYNNOG) SLATE QUARRIES* (1893), 38 Sol. Jo. 81.

5721. Amendment of order—Mistake in name of company.]—*Re FOEL (CLYNNOG) SLATE QUARRIES*, No. 5720, *ante*.

5722. ——— Before order drawn up—Jurisdiction

of court to vary order.]—*Re CROWN BANK*, No. 5370, *ante*.

5723. Suspension of order—By Court of Appeal—To enable views of shareholders to be ascertained—Company with prospect of ultimate success.]—*Re FACTAGE PARISIEN, LTD.*, No. 5522, *ante*.

5724. Discharge of order.—By court of first instance.]—*Re HEMP & FLAX MANUFACTURING CO.* (1851), 17 L. T. O. S. 240.

5725. ——— After delay.]—A petition to discharge a winding-up order dismissed, with costs, on account of delay in presenting it.—*Re CHEPSTOW, GLOUCESTER & FOREST OF DEAN RY. CO.* (1851), 2 Sim. N. S. 11; 18 L. T. O. S. 70; 61 E. R. 243.

5726. ——— ———.]—The ct. has jurisdiction to discharge an order made in the winding up of a co., notwithstanding that more than three weeks have elapsed since the order was made.—*Re ESTATES INVESTMENT CO., Ex p. TURNLEY & OLIVER* (1869), L. R. 8 Eq. 227.

5727. ——— Petitioner's debt paid.]—Where a co. is ordered to be wound up on a petition on which no creditors other than petitioning creditor appear, & his debt is afterwards paid by the co., the winding-up order may be discharged under Ord. 29, r. 14, as in the nature of a judgment by default.—*Re ASTON HULL COAL & BRICK CO., LTD.* (1882), 45 L. T. 676; 30 W. R. 245.

5728. ——— After order passed & entered—Order obtained under mistake.]—*Re LYRIC SYNDICATE, LTD.* (1900), 17 T. L. R. 162.

5729. ——— By Court of Appeal—Petitioner's debt paid.]—*Re BETZOLD (ALFRED) & CO.* (No. 2) (1892), 37 Sol. Jo. 65, C. A.

5730. ——— Dismissal of petition to discharge order—Costs.]—*Re NATIONAL SAVINGS BANK ASSOCN.*, No. 5493, *ante*.

Effect of order.]—*See* Sub-sect. 4, B., *post*.

5731. Carriage of order—To whom given—Debenture-holders—Whose interest in arrears.]—*Re STOCKTON & DARLINGTON STEAM TRAMS CO., LTD.* (1888), 4 T. L. R. 716.

5732. ——— Petitioner employing company's solicitor instead of his usual solicitor.]—*Re LENNOX PUBLISHING CO., LTD.* (1889), 61 L. T. 787.

——— Presentation of several petitions.]—*See* Nos. 5684–5691, *ante*.

(n) *Appeals.*

See Sub-sect. 18, *post*.

“Cork Constitution,” such amendment to be without prejudice to the advertisements & proceedings in the matter.—*Re CORK CONSTITUTION* (1882), 9 L. R. Ir. 163.—IR.

d. ——— Additional allegation — *y—Lost capital.*]—When a petition for a winding-up order, under the Winding-up Act, R. S. C. 1906, c. 144, alleges that the co. is insolvent & that its capital stock is impaired to the full value thereof, amendments, if asked for should be allowed, under sects. 128 & 129 of the Act to set up facts which would bring the co. within sub-sects. (a), (d) & (f) of sect. 3, from which the co. could be deemed to be insolvent; to add an allegation that the lost capital will probably not be restored within one year, & allegations of fact as to the business actually carried on by the co.; when such amendments could not occasion any surprise, prejudice, or injustice to the

co., & would not set up any new ground for invoking the statute not already stated in the petition.—*Re CANADIAN GENERAL SERVICE CORPN.* (No. 2) (1914), 27 W. L. R. 105.—CAN.

PART III. SECT. 36, SUB-SECT. 3.—E. (m).

e. Form of order — Must name permanent liquidator.]—A winding-up order must name the permanent liquidator & can therefore only be made after notice to creditors, contributories, etc.—*Re STEEL CO. OF CANADA, LTD.* (1884), 5 R. & G. 49.—CAN.

f. ——— ———.]—MERCHANTS' BANK OF HALIFAX v. GILLESPIE (1884), 10 S. C. R. 312.—CAN.

g. ——— Order of the court — Though made in chambers.]—An order under the Dominion Winding-up Act

take the form of a ct. order although made by way of chamber summons or motion in chambers.—*Re WINDING-UP ACT, Re BANK OF VANCOUVER*, [1920] 1 W. W. R. 816.—CAN.

h. ——— Need not direct winding up of company's business.]—An order made under Winding-up Act, c. 129, directing winding up of a co., instead of the business of a co., is good.—*Re CUSHING SULPHITE FIBRE CO.* (1906), 37 N. B. R. 254.—CAN.

k. Nature of—Final order.]—An order of the county ct. approving of the sale of the assets is a “final order,” as nothing further remains to be done under it & therefore is the subject of appeal.—*Re JONES (D. A.) CO.* (1892), 19 A. R. 63.—CAN.

l. ——— ———.]—*Re FLORIDA MINING CO., LTD.* (1902), 8 B. C. R. 388.—CAN.

*F. Costs.**(a) Right to Costs.**i. Creditors.*

5733. Appearing on petition—General rule—Not entitled to costs as of right—Must show reasonable ground for appearing.]—A creditor appearing on a winding-up petition is not entitled to his costs as a matter of right: to entitle him to them he must show a reasonable ground for appearing; & if he appears merely to ask for them, & nothing more, they will be refused.—*Re HULL & COUNTY BANK* (1878), 10 Ch. D. 130; 27 W. R. 377.

5734. — Petition dismissed for non-appearance of petitioner.]—*Re ANGLO-VIRGINIAN FREEHOLD LAND CO.*, [1880] W. N. 155.

5735. — Notice of intention to appear not stating whether intention of party to support or oppose.]—*Re GREEN, McALLAN & FEILDEN, LTD.*, [1891] W. N. 127.

5736. — Notice of intention to appear not stating what order party intends to support.]—*Re WOODROW, HOOPER, & CO., LTD.* (1893), 37 Sol. Jo. 286.

5737. Opposing petition—Company insolvent.]—Costs were given to a creditor who opposed a petition by a paid-up shareholder to wind up an insolvent co.—*Re CARNARVONSHIRE SLATE CO., LTD.* (1879), 40 L. T. 35.

5738. — Although not served.]—The general rule of the ct. as to costs, where a winding-up petition is dismissed, is, that shareholders not served who appear & oppose will have one set of costs, & creditors not served who appear & oppose, another set of costs. But this rule is not inflexible, & the ct. will, in each case, be guided by the particular circumstances.—*Re ANGLO-EGYPTIAN NAVIGATION CO.* (1869), L. R. 8 Eq. 660; 21 L. T. 19.

Creditor petitioner—On making of order.]—*See* Sub-sect. 3, *F. (b), post.*

5739. — Tender of debt by company—& costs—Refused by petitioner.]—*Re IMPERIAL GUARDIAN LIFE ASSURANCE SOCIETY*, No. 5445, *ante.*

5740. — — — — —.]—*Re TIMES LIFE ASSURANCE & GUARANTEE CO.*, No. 5695, *ante.*

5741. — — — — Without costs—Whether petitioner bound to accept.]—Where, after a petition to wind up a co., petitioning creditor's debt was tendered minus the costs incurred by him in respect of his petition, the ct. put the co. upon terms either to pay the costs of the petitioner

within a fortnight or to be wound up.—*Re ST. JOHN'S UNITED COPPER & LEAD MINING CO., NEWFOUNDLAND, LTD.*, *Ex p. MACKRILL* (1861), 4 L. T. 260.

ii. Contributories.

5742. Appearing although not served—& although not liable as a contributory.]—In 1845 a co. was projected & was provisionally registered, but, the allottees of shares not having paid any deposits, the undertaking was abandoned. The solr. had given the members a guarantee against any expenses incurred in the formation of the co., but to avoid litigation each of the members paid a sum sufficient to liquidate all liabilities, except the solr.'s bill. The brother of the solr. then presented a petition for winding up the co. under the acts:—*Held*: (1) although it has been decided that unformed cos. came within the meaning of the winding-up acts, the ct. was bound to regard the inconvenience likely to arise in such cases, where each member was only liable for the debts which he had expressly authorised, &, as there were no liabilities proved, which would not be covered by the guarantee, this was not a case for a winding-up order; (2) although resp. had opposed the petition without being liable as a contributory, & without being served with the petition, he was entitled to his costs. Petition dismissed, with costs.—*Re NARBOROUGH & WATLINGTON RY. CO.*, *Ex p. JAMES* (1850), 1 Sim. N. S. 140; 20 L. J. Ch. 275; 61 E. R. 55.

5743. — To oppose adoption by court of proceedings in voluntary winding up.]—Where a co., formed & registered under 1856 Act, was not registered under 1862 Act, & after the latter Act came into operation a resolution was passed for voluntary winding up, & a petition was presented asking for a winding up under order of the ct., but adopting the proceedings in the voluntary winding up, the ct. made the common winding-up order only, it being doubtful whether it had jurisdiction to adopt the voluntary proceedings. An opposing shareholder, who was not served with the petition, but who appeared & successfully opposed the adoption of the voluntary proceedings, was allowed his costs.—*Re MINIMA ORGAN CO., LTD.* (1863), 8 L. T. 109; 11 W. R. 530.

5744. — — — — —.]—*Re ANGLO-EGYPTIAN NAVIGATION CO.*, No. 5738, *ante.*

5745. Opposing compulsory order—Present at meeting at which voluntary winding-up resolution passed.]—A party who has been present at a

PART III. SECT. 36, SUB-SECT. 3.—*F. (a) i.*

m. Appearing on petition—General rule—Allowed unless appearance clearly unnecessary.]—In winding-up proceedings the costs of the appearance of a creditor's representative should be allowed, whenever such appearance is not clearly unnecessary, & the mere fact that the interests of the creditors & official liquidator are identical is not a sufficient reason for refusing costs.—*Re LAKE WINNIPEG TRANSPORTATION, LUMBER & TRADING CO.* (1891), 7 Man. L. R. 605.—CAN.

n. — Solicitor appointed by referee to represent general body of creditors—Not favoured by courts.]—Upon a reference for the winding up of a co., the referee appointed a firm of solrs. to represent the general body of creditors, & ordered that they should be notified to attend whenever he so directed, & that their costs as between solr. & client, should be paid out of the assets:—*Held*: this class of order

& liability was not favoured by the cts., & should be invoked & attendance thereunder had only when there was any special question on which the appearance of some one to represent the creditors was desirable; attendances & services should not be paid for out of the assets except where contemporaneously approved of by the referee; & it was not proper practice to extend this at the close of the proceedings by obtaining a certificate from him that, had he been applied to from time to time, he might have provided for other attendances & services.—*Re DRURY NICKEL CO.* (1895), 16 P. R. 525.—CAN.

o. — No appearance entered—No costs allowed—Although no objection taken at hearing.]—Creditors & debenture-holders who neglected to enter an appearance to a winding-up petition as required by rule 56 of Winding-up Rules, 1896, but who appeared by counsel on the return of the petition which was dismissed with costs:—*Held*: not entitled to costs. The fact

that their counsel was heard without objection by petitioner's counsel made no difference.—*Re WINDING-UP ACT, Re ALBION IRON WORKS CO., LTD.* (1904), 10 B. C. R. 351.—CAN.

p. Creditor petitioner—Costs first charge on assets—Subject to prior liens.]—A petitioning creditor is entitled to his costs as a first charge on the assets of the co., subject to any prior liens on the estate.—*Re NAHOR HABI TEA CO.* (1849), 3 B. L. R. App. 11.—IND.

PART III. SECT. 36, SUB-SECT. 3.—*F. (a) ii.*

q. Costs incurred prior to presenting of petition—No power to allow.]—In proceedings under Winding-up Act, the ct. has no power to award to the solr. for the shareholders costs incurred prior to the presenting of the petition for the winding-up order.—*Re PRUDENTIAL LIFE INSURANCE CO.*, [1919] 3 W. W. R. 69; 47 D. L. R. 706.—CAN.

Sect. 36.—Winding up by court: Sub-sect. 3, F. (a)
“(b), (c) & (d) i. & ii.]

meeting at which a resolution was passed to wind up the affairs of a co., but who subsequently opposed a petition for an order to wind them up under the winding-up acts, will not be allowed the costs of his opposition, the master having reported that it was expedient to wind up the co.—*Re ARIGNA IRON & COAL CO.* (1852), 19 L. T. O. S. 8.

5746. Appearing separately—Interest fully represented by company.]—A creditor's petition for winding up a co. was dismissed with costs. Some of the shareholders appeared separately:—*Held*: they could not have their costs, as their interests were fully represented by the co.—*Re GENERAL EXCHANGE BANK, LTD.* (1866), as reported in 14 W. R. 826.

iii. Other Persons.

Provisional liquidator.]—See No. 5657, ante.

(b) On Making of Winding-up Order.

5747. General rule—What costs will be ordered to be paid out of estate.]—Where a petition to wind up a co. is dismissed, petitioner will, as a general rule, be ordered to pay the costs of the co. opposing the petition, & of every person against whom a personal charge is made by the petition & who appears & disproves such charge & is otherwise free from blame; but no other person appearing either to support or oppose the petition will be allowed any costs. Where the winding up is made, petitioner & the co. will have their costs out of the estate, & shareholders & creditors, who appear to support the petition, will have out of the estate one set of costs between them.—*Re HUMBER IRONWORKS CO.* (1866), L. R. 2 Eq. 15; 35 Beav. 346; 14 L. T. 216; 12 Jur. N. S. 265; 55 E. R. 929.

Annotations:—Folld. Re Star & Garter Hotel Co. (1873), 28 L. T. 258. *Refd. Re Times Life Assce. & Guarantee Co.* (1869), L. R. 9 Eq. 382; *Re Criterion Gold Mining Co.* (1889), 41 Ch. D. 146.

5748. Petitioner's costs constitute first charge on assets.]—The costs of a petitioner upon whose petition an order to wind up a co. has been made, are a first charge upon the assets of the co.—*Re AUDLEY HALL COTTON SPINNING CO.* (1868), L. R. 6 Eq. 245; 37 L. J. Ch. 904.

Annotations:—Consd. Re Trueman, Hooke v. Piper (1872), 41 L. J. Ch. 585. *Refd. Re New York Exchange Co.*, [1893] 1 Ch. 371.

5749. Costs of unsuccessful opposition—Borne by parties occasioning them.]—If the right to an order to wind up a co. is established, the costs of intervening proceedings arising out of an opposition to the order must be borne by resps.—*Re BOSWORTHON MINING CO.* (1857), 26 L. J. Ch. 612; 28 L. T. O. S. 352.

5750. Payment of costs by official liquidator—Whether entitled to set off costs—Against calls.]—A winding-up order was made on the petition of a shareholder in a co., & the costs of the order were directed to be taxed, & paid by the official liquidator to petitioner & some of resps., out of the assets of the co. A call asked for before, but made payable after, the winding-up order was pronounced, had since become due:—*Held*: the official liquidator could not set off the taxed costs of the petition & order against the call, but must

pay such costs forthwith.—*Re GENERAL EXCHANGE BANK* (1867), L. R. 4 Eq. 138; 16 L. T. 338.

Annotations:—Apld. Re Equestrian & Public Buildings Co. (1888), 1 Meg. 115. *Mentd. Re Beer, Brewer & Bowman* (1915), 113 L. T. 990.

5751. ——— Against debt due from petitioner—Petitioner insolvent.]—Re EQUESTRIAN & PUBLIC BUILDING CO. (1888), 1 Meg. 115.

(c) On Dismissal of Petition.

5752. Whether petition dismissed with or without costs.]—Re ASHBURTON UNITED MINING CO. (1851), 17 L. T. O. S. 88.

5753. ——— Petition on ground of insolvency & inability to pay debts—Failure of petitioner to prove allegations.]—Where, in a petition by a contributory to wind up a co. in bkpcy., on the ground of insolvency & inability to pay its debts & also that there is an unsatisfied judgment against the co., petitioner fails in proving default, the petition will be dismissed with costs.—*Re OSOM'S HILL MINING CO., LTD., Ex p. ROGERS* (1858), 31 L. T. O. S. 172.

5754. ——— No justification for petition—Costs of all parties appearing.]—The ct., on a petition for winding up a co. presented by a shareholder under circumstances which in no way justified the prayer, dismissed the petition with costs, & ordered the costs of all parties appearing to be paid by petitioner.—*Re ALBION BANK, LTD.* (1866), 15 L. T. 346; 15 W. R. 148.

Annotation:—Apld. Re Anglo-Egyptian Navigation Co. (1869), L. R. 8 Eq. 660.

5755. ——— Bonâ fide case at time of presenting petition.]—Re GREAT NORTHERN COPPER MINING CO., LTD., No. 5523, ante.

5756. ———.]—Re TYNESIDE PERMANENT BENEFIT BUILDING SOCIETY (1885), 20 L. J. N. C. 130.

5757. ——— “Professional” petition—One set of costs each to contributories & creditors.]—Re DIAMOND FUEL CO., No. 5377, ante.

——— Debt bonâ fide disputed.]—See Nos. 5425, 5454, ante.

——— Debt less than £50.]—See Nos. 5352, 5406, ante.

——— Petition by shareholder in arrear with calls.]—See Nos. 5485, 5490, ante.

——— Petition by fully paid shareholder.]—See No. 5501, ante.

5758. For what costs petitioner liable.]—Re HUMBER IRONWORKS CO., No. 5747, ante.

5759. ——— Personal charges against director.]—Re ANGLO-GREEK STEAM CO., No. 5396, ante.

5760. ——— Costs of shareholders & creditors not served.]—Re ANGLO-EGYPTIAN NAVIGATION CO., No. 5738, ante.

———.]—See, further, Nos. 5742, 5743, ante.

5761. ——— Costs of taking copies of evidence filed by petitioner & company—Containing charges of fraud against contributories.]—The common order dismissing a winding-up petition & giving to contributories opposing one set of costs does not include the usual charges consequent on taking copies of evidence filed by petitioner & the co., even though serious charges of fraud are made in the petition against contributories; if these extra costs are to be allowed, sufficient & special grounds must be shown at the time the petition is dismissed, & a special direction must be given

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r. Whether petition dismissed with or without costs—Company already in assignment—Petitioner's knowledge of opposition—One set of costs each to

company, creditors & contributories.]—Where petitioners, knowing their application will be opposed by a large majority of the creditors, apply for an order for the winding up of a co. already in assignment, & it is refused,

they must pay one set of costs to the co. or its assignee, one to the creditors' & a third set to the contributories, if any.—*Re OLYMPIA CO.* (1915), 32 W. L. R. 539, 628; 9 W. W. R. 263, 405, 875.—CAN.

in the order.—*Re IBO INVESTMENT TRUST, LTD.*, [1904] 1 Ch. 26; 73 L. J. Ch. 71; 90 L. T. 373; 11 Mans. 105.

(d) *On Presentation of Several Petitions.*

i. *In General.*

5762. Whether company liable for costs of more than one petition.]—In a joint-stock co., projected to consist of 120,000 shares, with a deposit of £2 a share, 53,000 shares were subscribed for, & the deposits were paid upon them, prior to February, 1846. The promoters obtained from the Spanish Govt. a right to construct a railway in Spain, & deposited £30,000 as a guarantee for the formation of the railway, subject to forfeiture if the works were not proceeded with. The preliminary surveys were made, but litigation having arisen among the shareholders no further progress was made in the undertaking, & the deposits of the Spanish shareholders were returned to them by the directors in Spain, upon an agreement to re-advance them when wanted:—*Held*: a proper case for ordering the co. to be wound up. *Semble*: a co. ought not to be charged with the costs of more than one petition for an order to wind up its affairs.—*Re MADRID & VALENCIA RY. CO.*, *Ex p. TURNER*, *Ex p. JAMES* (1849), 3 De G. & Sm. 127; 14 L. T. O. S. 268; 14 Jur. 55; 64 E. R. 410; *on appeal* (1850), 2 Mac. & G. 169, L. C.

Annotations:—*Mentd.* *Re Dendro Valley Ry. & Canal Co.*, *Ex p. Moss* (1850), 19 L. J. Ch. 474; *Parbury v. Chadwick* (1850), 19 L. J. Ch. 562; *Carron Iron Co. v. MacLaren* (1855), 5 H. L. Cas. 416; *Re Bank of Gibraltar & Malta* (1865), 34 Beav. 556; *Re General Co. for Promotion of Land Credit* (1869), 5 Ch. App. 367, n.; *Re Matheson* (1884), 27 Ch. D. 225.

5763. — Circumstances of each petition treated separately.]—Where several petitions are presented for winding up a co., the ct. will consider the circumstances of each petition as if it were a separate one. Where a petitioner was a creditor of a banking co. for only £65, & the debt was attached in the Lord Mayor's Ct., the petition was, under the circumstances, dismissed with costs. Where a petition is dismissed, shareholders who oppose will have one set of costs, & creditors who oppose, another set of costs.—*Re EUROPEAN BANKING CO.*, *Ex p. BAYLIS* (1866), L. R. 2 Eq. 521; 35 L. J. Ch. 690; 15 L. T. 310; 12 Jur. N. S. 615.

Annotations:—*Consd.* *Re Accidental & Marine Insee.*, *Ex p. Rasch* (1866), 36 L. J. Ch. 75. *Refd.* *Re Star & Garter Hotel Co.* (1873), 28 L. T. 258. *Mentd.* *Re Combined Weighing & Advertising Machine Co.* (1889), 43 Ch. D. 99.

5764. Dismissal of first petition by agreement—Order made on second petition—Costs of creditor appearing to support dismissed petition.]—A petitioner, whose debt had been paid, agreed to dismiss his petition upon certain terms as to costs between himself & the co. Two other petitions were in the paper for hearing on the same day, upon one of which a compulsory winding-up order was made:—*Held*: a creditor appearing to support the first petition through petitioner's solr. was not entitled to costs as against that petitioner.—*Re BRITISH GUARDIAN LIFE ASSURANCE SOCIETY* (1876), 24 W. R. 637.

ii. *Effect of Notice of Prior Petition.*

5765. Petitioner in ignorance of prior petition—Whether entitled to costs—Special circumstances.]—Where three petitions were presented for winding up a co., the ct. made one order upon the three petitions, but allowed the costs of the first & second only; the costs of the second being allowed in consequence of the special circum-

stances. The ct. will only allow the costs of one petition in these cases, unless special circumstances can be shown justifying more than one.—*Re GENERAL INDEMNITY ASSURANCE CO.*, *Ex p. EDWARDS* (1857), 28 L. T. O. S. 354; 5 W. R. 465.

5766. — — —.]—There being two concurrent petitions for winding up a co., & the one presented last coming on to be heard first, an application for the transfer of the latter to the same ct. as that in which the former was presented was refused. But upon the hearing of the first presented petition, which had been transferred to the same ct. as the second petition, an order was made directing payment of the costs of the first petition out of the assets of the co.

A demand, under 1862 Act, s. 80, may be made by a creditor for the payment of his debt at a co.'s unregistered office, where the co. has no registered office.—*Re BRITISH & FOREIGN GENERATING APPARATUS CO., LTD.* (1865), 12 L. T. 368; 11 Jur. N. S. 559; 13 W. R. 649.

5767. — — —.]—(1) Where a creditor presented a petition for winding up a co. the day after a similar petition by another creditor had been advertised in the public papers, & five days after the same petition had been announced in the Gazette:—*Held*: as second petitioner had presented his petition so soon after the advertisement of the prior petition, it must be assumed, in absence of evidence to the contrary, that he had no notice of its presentation, & was therefore entitled to his costs.

(2) Where directors, after a resolution, presented a petition for winding up a co., with full notice of prior petitions having been presented by creditors & contributories for the same purpose, the ct. refused to allow them their costs. *Semble*: a creditor who presents a winding-up petition after due notice of a prior petition having been presented by another creditor for the same object will not be allowed his costs.—*Re EMPIRE ASSURANCE CORPN., LTD.* (1867), 16 L. T. 341.

5768. — — — One set of costs on all petitions.]—Where successive petitions were presented for winding up a co., in ignorance of prior petitions, the ct. in making the order allowed one set of costs on all petitions.—*Re OWEN'S PATENT WHEEL, TIRE & AXLE CO., LTD.* (1873), 29 L. T. 672; *sub nom.* *Re OWEN'S WHEEL & TIRE CO., LTD.*, *Ex p. BROWN & CO.*, *Ex p. MITCHELL & CO.*, *Ex p. NORTHFIELD CO., LTD.*, *Ex p. DERBYSHIRE SILKSTONE COAL CO., LTD.*, 22 W. R. 151.

Annotation:—*Mentd.* *Re Simon's Reef Consolidated Gold Mining Co.* (1882), 31 W. R. 238.

5769. — — —.]—Six months after the presentation of a creditor's petition to wind up a co., which it was arranged should stand over generally, pending a voluntary winding up, another creditor, without notice of the first petition, presented a winding-up petition in another branch of the ct. The first petition was first heard, & a supervision order made thereon, & subsequently the second petition was transferred to the ct. in which the order was made:—*Held*: petitioner was entitled to his costs.—*Re MARRON BANK PAPER MILL CO., LTD.* (1878), 38 L. T. 140.

5770. — — — Up to time of receiving notice of prior petition.]—A creditor who presents a petition for winding up in ignorance of a prior petition, is entitled to his costs up to the time when he has notice of the prior petition, but if he then proceeds, he will not be allowed his further costs; unless he has good reason to suppose that the other petition is not *bonâ fide*, in which case he is justified in proceeding & may be allowed his costs.—*Re*

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GENERAL FINANCIAL BANK (1882), 20 Ch. D. 276 ; 51 L. J. Ch. 490 ; 47 L. T. 1 ; 30 W. R. 417, C. A.
Annotation:—Folld. Re Bldg. Socs.' Trust (1890), 44 Ch. D. 140.

5771. — — — — —.]—*Re BROOKE (G. F.) & Co.*, [1888] W. N. 213.

5772. — — — — —.]—*Re LONDON & GENERAL BANK, LTD.* (1892), 36 Sol. Jo. 768.

5773. — — — — —.]—*Re SHERINGHAM DEVELOPMENT CO., LTD.* (1893), 37 Sol. Jo. 175.

5774. Petitioner with notice of prior petition—Whether liable for costs.—A petitioner presented a petition to wind up a co., after another petition for the same purpose had been advertised:—*Held*: he must pay the costs.—*Re ACCIDENTAL & MARINE INSURANCE CO., LTD.*, *Ex p. RASCH* (1866), 36 L. J. Ch. 75 ; 15 L. T. 173 ; 15 W. R. 84.

5775. — — — — — **Petition advertised first.**—*Re STANDARD PORTLAND CEMENT CO.*, No. 5680, *ante*.

5776. — — — — — **Whether entitled to costs—Suspicion that petition not likely to be prosecuted.**—(1) A petition for winding up a co. should not also pray for the appointment of a particular person as official liquidator. The ct. has power to appoint one at the hearing of the petition if the parties consent ; otherwise the matter must be settled in chambers.

(2) Considering that, after the presentation of the first petition, petitioner accepted the office of official liquidator, I think that second petitioner had sufficient reason to suspect that there was a probability of the first petition not being duly prosecuted. I therefore think that there was sufficient justification for his presenting the second petition, & although I shall make but one order I give the carriage of it to first petitioner. I think second petitioner should be allowed his costs (SIR JOHN ROMILLY, M.R.).—*Re COMMERCIAL DISCOUNT CO., LTD.* (1863), 32 Beav. 198 ; 7 L. T. 816 ; 11 W. R. 353 ; 55 E. R. 36 ; *sub nom. Re COMMERCIAL DISCOUNT CO., LTD., COOPER'S CASE*, 1 New Rep. 416.

Annotation:—As to (1) Refd. Re General Financial Bank (1882), 47 L. T. 1.

5777. — — — — — **Suspicion that petition not presented bonâ fide—Necessity for proof of mala fides or collusion.**—A creditor, presenting a winding-up petition, with notice that another creditor has presented a petition with the same object, does so at the risk of having his petition dismissed with costs, unless he can prove not merely that he has reason to suspect that first petitioner is in collusion with the co., but that such collusion actually exists.—*Re NORTON IRON CO.* (1877), 47 L. J. Ch. 9 ; *sub nom. Re NORTON IRON CO., LLOYDS' BANKING CO.'S PETITION, PEASE (J. W.) & Co.'s PETITION*, 26 W. R. 92.

Annotation:—Folld. Re Bldg. Socs.' Trust (1890), 44 Ch. D. 140.

5778. — — — — —.]—*Re BUILDING SOCIETIES' TRUST, LTD.*, No. 5681, *ante*.

5779. — — — — —.]—*Re EMPIRE ASSURANCE CORPN., LTD.*, No. 5767, *ante*.

5780. — — — — — **Petition presented on independent grounds.**—*Re DORÉ GALLERY, LTD.*, [1891] W. N. 98.

5781. — — — — — **Stay of first petition—On St. Thomas Dock undertaking.**—*Re SCOTT & JACKSON, LTD.* (1893), 38 Sol. Jo. 59.

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F. (d) ii.

5777 i. Petitioner with notice of prior petition—Whether entitled to costs—

Necessity for proof of mala fides or collusion.—A creditor presenting a winding-up petition, with notice of a former one, does so at his own risk as to costs, & can recover costs subse-

(c) On Withdrawal of Petition.

5782. General rule.—As a general rule a petitioner who withdraws his petition for the winding up of a co. will be ordered to pay the costs of the parties appearing. But the rule is not an inflexible one, & the ct. will have regard to the circumstances of each case.—*Re DISTRICT BANK OF LONDON* (1887), 35 Ch. D. 576 ; 56 L. J. Ch. 774 ; 57 L. T. 475 ; 35 W. R. 664 ; 3 T. L. R. 292.

Annotation:—Refd. Re Criterion Gold Mining Co. (1889), 41 Ch. D. 146.

5783. — — — — —.]—*Re CRITERION GOLD MINING CO.*, No. 5795, *post*.

5784. — — — — —.]—*Re ADJUSTABLE HORSE SHOE SYNDICATE, LTD.*, [1890] W. N. 157.

5785. Costs of shareholders—Appearing to oppose petition.—A petition which had been presented for the winding up of a co. was withdrawn:—*Held*: the shareholders who had appeared to oppose the petition were, as well as the co. entitled to their costs.—*Re LONDON & SUBURBAN BANK* (1870), 23 L. T. 447 ; 19 W. R. 88.

5786. — — — — — **Withdrawal of petition before advertisement.**—*Re UNITED STOCK EXCHANGE, LTD.*, *Ex p. PHILP & KIDD*, No. 5570, *ante*.

5787. — — — — — **Appearing to support petition.**—When a petition to wind up a co. is withdrawn at the hearing, shareholders who have appeared to support the petition are not entitled to any costs.—*Re JABLOCHKOFF ELECTRIC LIGHT & POWER CO., LTD.* (1883), 49 L. T. 566 ; 32 W. R. 168.

Annotation:—Distd. Re Nacupai Gold Mining Co. (1884), 28 Ch. D. 65.

5788. Costs of creditors—Appearing to support petition.—*Re HOME ASSURANCE ASSOCN.*, No. 5696, *ante*.

5789. — — — — — **One creditor partly paid & another not paid anything.**—A creditor's winding-up petition having by arrangement stood over, it was ultimately, at the request of petitioner, dismissed with costs as against the co., the co. having paid petitioner's debt & costs. One of two creditors who appeared separately to support the winding up had, since the petition stood over, been paid part of his debt, but the other had not received anything:—*Held*: the proper order was to give one set of costs, but to give such costs entirely to the creditor who had gained nothing by the proceedings, to the exclusion of the creditor who had been paid his debt in part.—*Re PECKHAM, ETC. TRAMWAYS CO.* (1888), 57 L. J. Ch. 462 ; 58 L. T. 876.

Annotation:—Consd. Re Criterion Gold Mining Co. (1889), 41 Ch. D. 146.

5790. — — — — — **Appearing in consequence of advertisement.**—*Re HEREFORD & SOUTH WALES WAGGON & ENGINEERING CO.*, No. 5697, *ante*.

5791. — — — — — **Appearing to oppose—Even though not served.**—Where a creditor who has presented a winding-up petition dismisses his petition at the hearing, creditors who have not been served appearing to oppose the petition are entitled to their costs of appearance.—*Re PATENT COCOA FIBRE CO.* (1876), 1 Ch. D. 617 ; 45 L. J. Ch. 207.

Annotations:—Distd. Re Jablochkoff Electric Light & Power Co. (1883), 49 L. T. 566. *Appld. Re British Electric Street Tramways*, [1903] 1 Ch. 725. *Refd. Re Paper Bottle Co.* (1888), 40 Ch. D. 52.

5792. Costs of shareholders & creditors—Appearing either to support or oppose.—Where a winding-up petition is dismissed on the application

quently incurred, only if he can show that the first petition was presented *mala fide* or collusively.—*Re MANITOBA MILLING, ETC. CO.* (1891), 8 Man. L. R. 426.—CAN.

of petitioner, shareholders & creditors appearing either to oppose or support the petition are entitled to their costs.—*Re NACUPAI GOLD MINING CO.* (1884), 28 Ch. D. 65 ; 54 L. J. Ch. 109 ; 51 L. T. 900 ; 33 W. R. 117.

Annotation :—*Refd. Re Paper Bottle Co.* (1888), 40 Ch. D. 52.

5793. — Separate sets of costs.—Where at the hearing of a winding-up petition petitioner elects to withdraw his petition, & have it dismissed with costs, shareholders & creditors, whether appearing to support or oppose the petition, are entitled to separate sets of costs.—*Re NORTH BRAZILIAN SUGAR FACTORIES, LTD.* (1886), 56 L. T. 229.

Annotations :—*Fold. Re Paper Bottle Co.* (1888), 40 Ch. D. 52. *Expld. Re Peckham, etc. Tram. Co.* (1888), 57 L. J. Ch. 462. *Refd. Re Criterion Gold Mining Co.* (1889), 41 Ch. D. 146.

5794. — Petition presented by company itself.—When a petition for the winding up of a co. by the ct. is withdrawn by petitioner, each set of shareholders & each set of creditors appearing, whether to support or to oppose the petition, is as a general rule entitled to a separate set of costs, & this rule applies even when petition is presented by the co. itself.—*Re PAPER BOTTLE CO.* (1888), 40 Ch. D. 52 ; 58 L. J. Ch. 82 ; 60 L. T. 354 ; 37 W. R. 214.

Annotation :—*Refd. Re Criterion Gold Mining Co.* (1889), 41 Ch. D. 146.

5795. — Discretion of court.—There is no general rule that when a petition for the winding up of a co. is withdrawn by petitioner, shareholders & creditors appearing, whether to support or oppose the petition, are entitled to separate sets of costs. The ct., in the exercise of its discretion, will have regard to the circumstances of each particular case. Where a winding-up petition was withdrawn by petitioners, in consequence of an arrangement made between them & the co. for securing payment of petitioners' debt, shareholders appearing to oppose were allowed one set of costs only.—*Re CRITERION GOLD MINING CO.* (1889), 41 Ch. D. 146 ; 58 L. J. Ch. 277 ; 60 L. T. 218 ; 37 W. R. 348 ; 5 T. L. R. 313 ; 1 Meg. 166.

5796. ——When petitioner for a winding-up order elects at the hearing to withdraw his petition, he will be ordered to pay the costs of those persons who have given notice, within the time limited by 1892 (Winding up) Rules, r. 20, of their intention to appear, one set of costs to those supporting, & another set to those opposing.—*Re BRITISH ELECTRIC STREET TRAMWAYS*, [1903] 1 Ch. 725 ; 72 L. J. Ch. 386 ; 10 Mans. 195.

(f) Separate Sets of Costs.

5797. When allowed—Shareholders or creditors supporting successful petition.—*Re HUMBER IRONWORKS CO.*, No. 5747, *ante*.

5798. — Shareholders or creditors opposing unsuccessful petition.—*Re EUROPEAN BANKING CO., Ex p. BAYLIS*, No. 5763, *ante*.

5799. — Shareholders not served & appearing to oppose—Creditors not served & appearing to

oppose.—*Re ANGLO-EGYPTIAN NAVIGATION CO.*, No. 5738, *ante*.

5800. — Separate counsel instructed—For respondent creditors & contributories—No opposition.—Where upon an unopposed petition for winding up, petitioners' solrs. instructed separate counsel to appear for resp. creditors & contributories, it not appearing that there had been any reasonable assurance of opposition, these resp. were not allowed their costs.—*Re MILITARY & GENERAL TAILORING CO., LTD.* (1877), 47 L. J. Ch. 141 ; 26 W. R. 75.

5801. — For creditors or contributories.—Creditors or contributories supporting or opposing a petition to wind up, & appearing by solrs. who are instructed by petitioner or the co., are not entitled to a separate set of costs.—*Re BRIGHTON MARINE PALACE & PIER CO., LTD.* (1897), 13 T. L. R. 202 ; 41 Sol. Jo. 257.

Annotations :—*Appl. Re Silberhütte Supply Co.*, [1910] W. N. 81. *Refd. Re Ibo Investment Trust* (1903), 90 L. T. 373.

5802. — Discretion of taxing master to allow costs of separate counsel.—*Re SILBERHÜTTE SUPPLY CO., LTD.*, [1910] W. N. 81.

5803. — Shareholders & creditors opposing "professional" petition.—*Re DIAMOND FUEL CO.*, [1878] W. N. 11 ; *subsequent proceedings* (1879), 13 Ch. D. 400, C. A.

Shareholders & creditors appearing to support or oppose withdrawn petition.—*See Subsect. 3, F. (e), ante*.

(g) Appeals as to Costs.

5804. Court of Appeal will not re-open decision—Merely on question of costs.—*Re NEW GAS CO.*, No. 5362, *ante*.

See, further, Subsect. 18, C., post.

(h) Security for Costs.

5805. When ordered—Petitioner—Resident out of jurisdiction.—A petition for winding up a co. was presented by a petitioner who was resident out of the jurisdiction :—*Held* : he was liable to give security for costs, as in the case of a pltf. in a suit resident out of the jurisdiction.—*Re ROYAL BANK OF AUSTRALIA, Ex p. LATTA* (1850), 3 De G. & Sm. 186 ; 19 L. J. Ch. 163 ; 14 L. T. O. S. 462 ; 14 Jur. 908 ; 64 E. R. 437.

Annotations :—*Refd. Atkins v. Cook* (1857), 5 W. R. 381 ; *Re Home Assce. Asscn. (No. 2)* (1871), L. R. 12 Eq. 112.

5806. — After affidavits filed in answer to petition.—Petitioner, an unsatisfied judgment creditor, residing out of the jurisdiction, asking for an order for the compulsory winding up of an asscn., was, on the application of resps., ordered to give security for costs to the amount of £100 :—*Held* : filing affidavits after taking out a summons for security was not a waiver.—*Re HOME ASSURANCE ASSCN. (No. 2)* (1871), L. R. 12 Eq. 112 ; 25 L. T. 199 ; 19 W. R. 947.

5807. — Resident in Scotland.—Petitioners in chancery who reside in Scotland are still liable to give security for costs.—*Re EAST LLANGYNOG LEAD MINING CO.* (1875), 23 W. R. 587.

Annotation :—*Refd. Re Howe Machine Co., Fontaine's Case* (1889), 41 Ch. D. 118.

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F. (f).

s. When allowed—Not to include costs of contest.—As to the costs of a contest :—*Held* : one set of costs should be allowed to the shareholders & one to the creditors appearing on the petition, not including any costs occasioned by the contest.—*Re COMMERCIAL BANK OF MANITOBA* (1893), 9 Man. L. R. 342.—CAN.

PART III. SECT. 36, SUB-SECT. 3.—
F. (h).

t. When ordered—Petition to set aside winding-up order—Man of straw—Nominee of other undisclosed shareholders.—A contributory of the co., petitioning to set aside a winding-up order, was required to give security for the costs of the co., & a creditor opposing the petition, where it appeared that the contributory, al-

though he had a nominal interest as the holder of stock upon which nothing was paid, was not in such a position that anything would be made out of him upon execution, & was petitioning merely in the interest of other persons, who lived out of the jurisdiction, & who had indemnified him as to costs.—*Re RAINY LAKE LUMBER CO.* (1886), 11 P. R. 314.—CAN.

Sect. 36.—Winding up by court: Sub-sect. 3, F. (h); sub-sect. 4, A. & B. (a).]

5808. Judgment obtained by creditor in undefended action against company.]—A co. against whom a winding-up petition had been presented applied that petitioner, who was resident abroad, might be ordered to give security for costs. Petitioner had obtained judgment in an undefended action against the co.:—*Held*: no security need be given.—*Re CONTRACT & AGENCY CORPN., LTD.* (1887), 57 L. J. Ch. 5; 4 T. L. R. 141.

Annotations:—*Apld.* *Crozat v. Brogden* (1894), 63 L. J. Q. B. 325. *Distd.* *Re Alabama Portland Cement Co.* (1909), 25 T. L. R. 691.

5809. — All co-petitioners foreigners—One resident within jurisdiction.]—*Re BRITISH EMPIRE FILTER CO.* (1850), 15 L. T. O. S. 410.

5810. — Foreign company—Debt admitted.]—A foreign co. presented a petition for the compulsory winding up of an English co. which was in voluntary liquidation & the whole of whose assets had been taken possession of by debenture-holders:—*Held*: although the debt to petitioners was admitted they must give security for costs.—*Re ALABAMA PORTLAND CEMENT CO., LTD.* (1909), 25 T. L. R. 691.

5811. — Bankrupt.]—After the presentation & before the hearing of a winding-up petition, petitioner filed a petition for the liquidation of his own affairs under Bkpcy. Act, 1869 (c. 71), ss. 125, 126:—*Held*: he must give security for costs in the winding-up petition.—*Re CARTA PARA MINING CO.* (1881), 19 Ch. D. 457; 51 L. J. Ch. 191; 46 L. T. 406; 30 W. R. 117.

Annotations:—*Refd.* *Cowell v. Taylor* (1885), 31 Ch. D. 34; *Rhodes v. Dawson* (1886), 16 Q. B. D. 548.

5812. — Unable to be found at address given—Solicitor unable to state private address.]—A petitioner for the winding up of a co., who has given a business address at which he cannot be found, & whose solr. is unable to state his private address, will be ordered to give security for costs.—*Re STURGIS (BRITISH) MOTOR POWER SYNDICATE, LTD.* (1885), 53 L. T. 715; 34 W. R. 163.

Annotation:—*Refd.* *Chellew v. Brown*, [1923] 2 K. B. 844.

5813. — Party opposing—Contributory—Resident out of jurisdiction.]—A shareholder of a co. who resides out of the jurisdiction, & appears to oppose a petition for winding up the co. cannot be required to give security for costs.—*Re PERCY & KELLY NICKEL, COBALT, & CHROME IRON MINING CO.* (1876), 2 Ch. D. 531; 45 L. J. Ch. 526; 24 W. R. 1057; 3 Char. Pr. Cas. 408.

Annotations:—*Refd.* *Crozat v. Brogden*, [1894] 2 Q. B. 30; *Maatschappij Voor Fondsenbezi v. Shell Transport & Trading Co.*, [1923] 2 K. B. 166.

5814. — Company—On application for adjournment pending appeal in reference to judgment debt to House of Lords.]—*Re BRITISH LIQUID AIR CO.* (1908), 126 L. T. Jo. 77, C. A.

— **On appeal against order.]—***See* Sub-sect. 18, H., *post*.

PART III. SECT. 36, SUB-SECT. 4.— B. (a).

a. On right to carry on business—Only in case of necessity.]—The power to carry on the business after winding-up proceedings have been commenced, & thus to postpone the final winding up, is one which is not to be exercised unless a strong case of necessity for doing so exists. That the mtgees. of the co.'s works, who have foreclosed their mtge., will be enabled to dispose of the works to greater advantage, & that by affording facilities for procuring repairs to the purchasers of the machinery manufactured by the co., the chances of obtaining payment of

outstanding purchase notes will be improved, are not sufficient grounds to justify the carrying on of the business.—*Re HAGGERT BROTHERS MANUFACTURING CO.* (1893), 20 A. R. 597.—**CAN.**

b. Company's activities at an end.]—The authority to carry on a co.'s business given by the Winding-up Act, R. S. C. 1906, c. 144, s. 34, does not empower the liquidator to part with the co.'s right of retainer as exor. Once a winding-up order is made, all the co.'s activities are under control of the ct., & acts such as parting with the co.'s right of retainer as exor. must have the express sanction

SUB-SECT. 4.—THE WINDING-UP ORDER.

A. In General.

Form of order.]—*See* Nos. 5715–5717, *ante*.

Amendment of order.]—*See* Nos. 5370, 5720, *ante*.

Advertisement of order.]—*See* Nos. 5627, 5718, *ante*.

Suspension & discharge of order.]—*See* Nos. 5493, 5522, 5724–5729, *ante*.

Carriage of order.]—*See* Nos. 5684, 5691, 5731, 5732, *ante*.

B. Effect of Order.

(a) In General.

5815. Not same as adjudication in bankruptcy.]—(1) An order to wind up a joint-stock co. is not in the nature of, nor has it the same effect as, an adjudication in bkpcy.

(2) Where a creditor, in an action against a co. registered under 1862 Act, had, before a petition for winding up the co. was presented, recovered judgment, & sued out a writ of execution, which was in the sheriff's hand, & would have been executed but for resistance made to the sheriff's officer, the ct., after making the winding-up order, in the exercise of its discretion, dissolved an injunction, restraining the execution, which had been obtained on motion *ex p.* by the petitioning creditor immediately after the presentation of the petition, & gave leave to put in force the execution.—*Re LONDON COTTON CO.* (1866), L. R. 2 Eq. 53; 14 L. T. 135; 12 Jur. N. S. 133; 14 W. R. 575; 10 Sol. Jo. 416; *sub nom.* *Re LONDON COTTON MANUFACTURING CO.*, 35 L. J. Ch. 425.

Annotations:—*As to* (2) *Consd.* *Re Bastow* (1867), L. R. 4 Eq. 681; *Re Vron Colliery Co.* (1882), 20 Ch. D. 442. *Refd.* *Re Imperial Steam & Household Coal Co.* (1868), 37 L. J. Ch. 517; *Re Progress Assee., Ex p. Liverpool Exchange Co.* (1870), L. R. 9 Eq. 370; *Re Taylor, Re Williams, Ex p. Ry. Steel & Plant Co.* (1878), 8 Ch. D. 183; *Rudow v. Great Britain Mutual Life Assee. Soc.* (1881), 44 L. T. 688; *Armorduct Manufacturing Co. v. General Incandescent Co.*, [1911] 2 K. B. 143. *Generally, Refd.* *Re London & Devon Biscuit Co.* (1871), L. R. 12 Eq. 190.

5816. Not execution.]—An order for compulsory winding up is not an execution within Courts (Emergency Powers) Act, 1914 (c. 78), s. 1 (1) (a).—*Re WORLD OF GOLF, LTD.* (1914), 59 Sol. Jo. 7.

Compare No. 5399, *ante*.

5817. On date of commencement of winding up.]—A winding-up petition was presented by some shareholders on Sept. 25. On Oct. 8 another shareholder filed a bill praying to be struck off the register, on the ground that he had been induced to become a shareholder by fraud. On Oct. 18 a creditor's winding-up petition was presented, & a winding-up order was subsequently made upon both the petitions:—*Held*: the winding-up order dated from the presentation of the shareholder's petition; & therefore, pltf. was precluded from the relief prayed.—*KENT v. FREEHOLD LAND & BRICK-MAKING CO.* (1868), 3

of the ct. under Winding-up Act, s. 36.—*Re ARNOLD, WILLIAMS v. DOMINION TRUST CO.*, [1917] 1 W. W. R. 664; 23 B. C. R. 461.—**CAN.**

c. On position of directors—Directors' power to purchase from company.]—When a co. is placed in liquidation, under the directions of the ct., the powers & duties of the directors are at an end, & the reasons which stand in the way of directors purchasing the co.'s assets while actively concerned in the management of its concerns no longer exist.—*Re MABOU COAL & GYPSUM CO.* (1894), 27 N. S. R. 305.—**CAN.**

d. Company's entity not lost.]—

Ch. App. 493; 37 L. J. Ch. 653; 32 J. P. 742; 16 W. R. 990, L. O.

Annotations:—**Reid**. *Re London & County General Agency Asscn.*, Hare's Case (1869), 4 Ch. App. 503; *Reese River Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64; *Peck v. Gurney* (1871), L. R. 13 Eq. 79; *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413; *Re Lennox Publishing Co.*, *Ex p. Storey* (1890), 62 L. T. 791; *Re Preservation Syndicate*, [1895] 2 Ch. 768; *Re General Ry. Syndicate*, *Whiteley's Case*, [1899] 1 Ch. 770. **Mentd.** *Henderson v. Lacon* (1867), L. R. 5 Eq. 249; *Re Massey*, *Re Freehold Land & Brickmaking Co.* (1870), L. R. 9 Eq. 367; *Re Meter Cabs*, [1911] 2 Ch. 557; *First National Reinsurance v. Greenfield*, [1921] 2 K. B. 260.

5818. — **Compulsory order made after voluntary winding up.**—Five months after the commencement of the voluntary winding up of a co. two petitions were presented, the one for the continuation of the voluntary winding up under the supervision of the ct., the other for a compulsory winding up; the ct. being of opinion that the winding up ought to be compulsory, but not desiring to alter the date of its commencement, made an order on the first petition for the continuation of the voluntary winding up under supervision, & an order dated on the following day on the second petition for a compulsory winding up.—*Re UNITED SERVICE Co.* (1868), L. R. 7 Eq. 76.

Annotations:—**Consd.** *Re Taurine Co.* (1883), 25 Ch. D. 118. **Reid**. *Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250.

See, now, 1908 Act, s. 200.

5819. — **Where a co. had been in course of liquidation pursuant to a resolution for voluntary winding up, & an order for compulsory winding up was afterwards made:**—**Held**: the words "the commencement of the winding up" in 1862 Act, s. 38 (1), referred to the presentation of the winding-up petition, & not to the passing of the resolution for voluntary winding up, & therefore persons who had ceased to be members for more than a year prior to the petition, but not a year prior to the resolution, were not liable to contribute to the assets of the co.—*Re TAURINE Co.* (1883), 25 Ch. D. 118; 53 L. J. Ch. 271; 32 W. R. 129; *sub nom. Re TAURINE Co., LTD., BECKWITH & ROBINSON'S CASE*, 49 L. T. 514, C. A.

Annotations:—**Reid**. *Re Russell Hunting Record Co.*, [1910] 2 Ch. 78; *Re Havana Exploration Co.*, [1916] Nathan's Claim, 1 Ch. 8.

—**Compare** No. 6681, *post*.

On right to repudiate shares—Misrepresentation in prospectus.—*See* Sect. 8, sub-sect. 3, E. (c), *ante*.

On right to inspect register of shareholders.—*See* No. 1299, *ante*.

5820. On proceedings under previous voluntary winding up.—It is not the effect of a compulsory winding-up order to nullify proceedings which have been taken under a previous voluntary winding up.—*CLEVE v. FINANCIAL CORPN., WILLIAMS v. FINANCIAL CORPN.* (1873), L. R. 16 Eq. 363; 43 L. J. Ch. 54; 29 L. T. 89; 21 W. R. 839.

Annotations:—**Reid**. *Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250. **Mentd.** *Thomas v. Henderson's Transvaal Estates*, [1908] 1 Ch. 765.

5821. — **THOMAS v. PATENT LIONITE CO.**, No. 6650, *post*.

5822. Whether Statute of Limitations prevented

When a co. goes into liquidation its entity is not lost. It preserves it to the end. A liquidator is appointed under the ct.'s authority to look after its affairs, but the co. is in existence during the whole time of its liquidation & it is not until the liquidator has made his final statement & has given the required notice in the Official Gazette that a co. has ceased to exist.—*GLICKMAN v. STEVENSON, STEVENSON*

v. McPHAIL (1907), E. L. R. 128.—**CAN.**

e. Conclusive against shareholders.—A winding-up order made against a co., after appearance & contestation by it of the petition, is *res judicata* & conclusive against the shareholders.—*GREAT NORTHERN CONSTRUCTION Co. v. HYDE* (1908), Q. R. 34 S. C.—**CAN.**

1. Constitutes forum for determina-

tion of all incidental questions.—*Re ROYAL BANK OF AUSTRALIA, Ex p. FOREST*, No. 6398, *post*.

5823. Whether "insolvency" within Friendly Societies Act, 1875 (c. 60), s. 15 (7).—A winding up is not an insolvency within above sub-sect.—*Re WEST OF ENGLAND & SOUTH WALES DISTRICT BANK, Ex p. SWANSEA FRIENDLY SOCIETY* (1879), 11 Ch. D. 768; 48 L. J. Ch. 577; 40 L. T. 551; 43 J. P. 637; 27 W. R. 596.

5824. On landlord's right to re-enter—On company being "wound up"—When right arises.—*GENERAL SHARE & TRUST Co. v. WETLEY BRICK & POTTERY Co.*, No. 6681, *post*.

5825. On lien—In existence when petition presented—Solicitor's lien.—An order having been made for winding up a co., applications were made by the official liquidator against B., a solr. employed by the co. before the winding up, that B. might be ordered to deliver up the following documents: (a) the share register & minute book, which were in B.'s hands before the commencement of the winding up; (b) other documents which came to B.'s hands after the presentation of the winding-up petition, but before the winding-up order; (c) documents relating to allotments of shares which had come to B.'s hands before the presentation of the petition. B. resisted the applications on the ground that he claimed a lien.

On appeal against an order that all the documents should be delivered to the liquidator subject to the lien, if any, of B.:—**Held**: (1) the order was right as regarded the share register & minute book, for the directors had no power to create any lien on them which could interfere with their being used for the purposes of the co.; (2) the order was right as to (b), for a solr. could not assert against documents which came to his hands pending the winding up any such lien as would interfere with the prosecution of the winding up; (3) the order for delivery of (c) must be discharged, for the winding-up order could not defeat any valid lien existing at the time when the winding-up petition was presented.—*Re CAPITAL FIRE INSURANCE ASSOCN.* (1883), 24 Ch. D. 408; 49 L. T. 697; 32 W. R. 260; *sub nom. Re CAPITAL FIRE INSURANCE ASSOCN., LTD., Ex p. BEAIL*, 53 L. J. Ch. 71, C. A.

Annotations:—**As to** (2) **Appld.** *Re Anglo-Maltese Hydraulic Dock Co.* (1885), 54 L. J. Ch. 730. **Consd.** *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96. **Reid**. *Re Caudery*, London Joint Stock Bank v. Wightman (1910), 54 Sol. Jo. 444; *Dessau v. Peters, Rushton*, [1922] 1 Ch. 1. **As to** (3) **Appld.** *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96. **Generally**, **Reid**. *Boden v. Hensby*, [1892] 1 Ch. 101; *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1. **Mentd.** *Re Kent Coalfields Syndicate*, [1898] 1 Q. B. 754.

5826. On rights of third parties.—Where the owner of the reversion of a theatre having by an order in a winding up of a co. obtained the lease & property of the theatre, the lessee of property boxes & stalls brought an action, asking for an injunction to restrain reversioner from preventing pltf. from having access to his boxes & stalls:—**Held**: the order in the winding up did not affect the rights of third parties; deft. could only exclude pltf. by action for the recovery of land where third parties would have notice & an

tion of all incidental questions.—An order for the winding up of a banking or other co. establishes a forum for the determination of all questions incident to the liquidation & the adjustment of the rights of all interested in the due winding up, including the distribution of the assets, & to this forum all claiming under the liquidation must report.—*Re ONTARIO BANK* (1917), 38 O. L. R. 242.—**CAN.**

Sect. 36.—Winding up by court: Sub-sect. 4, B. (a) & (b) i. & ii., (c) & (d).]

opportunity of appearing.—*LEADER v. HAYES* (1886), 54 L. T. 204.

5827. Whether judgment in rem.]—A winding-up order is not a judgment *in rem*, & if made improperly, is not binding on strangers.—*Re BOWLING & WELBY'S CONTRACT*, [1895] 1 Ch. 663; 64 L. J. Ch. 427; 72 L. T. 411; 43 W. R. 417; 39 Sol. Jo. 345; 2 Mans. 257; 12 R. 218, C. A.

Annotations:—Mentd. *James v. Buena Ventura Nitrate Grounds Syndicate* (1895), 11 T. L. R. 568; *New York & Continental Line* (1909), 54 Sol. Jo. 117; *Llewellyn v. Kasintoe Rubber Estates*, [1914] 2 Ch. 670.

5828. On liability to be assessed to rateable value of premises occupied.]—Even though rates may not be recoverable by distress against the liquidator of a co., the assessment sessions will fix the true gross & rateable values without regard to the liquidator's position.—*MACKAY v. STRAND UNION* (1886), Ryde Rat. App. (1886–90) 163.

See, generally, RATES & RATING.

(b) *On Property of Company.*

i. *In General.*

5829. General rule—Property becomes affected with trust for creditors.]—(1) When a co. has in this country been ordered to be wound up, judgment creditors who are in this country, & have proved under the winding up, will not be allowed to attach property in India belonging to the co.

An English creditor carrying on business in India, who issues execution against property in India of an English co., subsequently to the commencement of the winding up by virtue of a judgment obtained in India prior thereto, cannot retain the proceeds of his execution in satisfaction of his debt, but must hand them over to the official liquidator for the benefit of English creditors generally.

(2) The English Act of Parliament has enacted that in the case of a winding up the assets of the co. so wound up are to be collected & applied in discharge of its liabilities. That makes the property of the co. clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be beneficially the property of the co.; & being so, it has ceased to be liable to be seized by the execution creditors of the co. (*SIR W. M. JAMES, L.J.*).

(3) It appears to me that that [the provisions of 1862 Act, s. 95] constitutes a trust for the benefit of all the creditors, & as far as this ct. has jurisdiction, no one creditor can be allowed to have a larger share of the assets than any other creditor (*SIR G. MELLISH, L.J.*).—*Re ORIENTAL INLAND STEAM CO., Ex p. SCINDE RY. CO.* (1874), 9 Ch. App. 557; 43 L. J. Ch. 699; 31 L. T. 5; 22 W. R. 810, L. J.J.).

Annotations:—As to (1) Folld. Re Central Sugar Factories of Brazil, Flack's Case, [1894] 1 Ch. 369. *Reid. Re North Carolina Estate Co.* (1889), 5 T. L. R. 328; *Re Thurso New Gas Co.* (1889), 61 L. T. 351; *Minna Craig S.S. Co. v. Chartered Mercantile Bank of India, London & China*, [1897] 1 Q. B. 460. *As to (2) Consd. Knowles v. Scott*, [1891] 1 Ch. 717.

5830. ———.]—*Re CENTRAL SUGAR FACTORIES OF BRAZIL, FLACK'S CASE*, No. 6578, *post*.

PART III. SECT. 36, SUB-SECT. 4.—
B. (b) ii.

g. Payment — Of bonâ fide debt previously due—Liability of director paying with knowledge of winding up.]—The directors of S. Bank resolved before winding up, to obtain further accommodation. B. Co. indorsed a

promissory note to be protected as first charge on the bank assets. There were no assets to meet when due & next day the bank suspended payment. Subsequently C. by cheque drawn by A. & D., another director, upon assets of the bank paid the note. A petition for winding up had been presented on

5831. On property held by third party as security.]—In 1876 an agreement was entered into between a coal co. & a railway co., by which coals consigned by the coal co. were carried to a "ledger account," one condition of which was, that the goods & waggons belonging to or sent by the person having a ledger account should be subject to a general lien in favour of the railway co. for all moneys due to them, etc., from such person on any account, such lien to take effect immediately after the failure of payment on demand of any sums appearing to be due on the ledger account; "in case of bkpey., insolvency, or stoppage of payment, such lien to take effect immediately for any sum appearing due in the books of the co.," with a right to sell such goods & waggons, & out of the proceeds to retain the sums due. The coal co. became insolvent, & on Dec. 16, 1885, a petition was presented for winding up, & in Feb. 1886, an order to wind up was made, & on Jan. 20 following a provisional liquidator was appointed. When the petition was presented the coal co. was indebted to the railway co. in respect of charges for freight. Of the fifteen waggons in use by the coal co., & employed in carrying coal over the railway co.'s line, nine had been received by the railway co. prior to presentation of the winding-up petition & had been detained by them ever since; four in the possession of the railway co. when the petition was presented had travelled up & down the line since, but returned into the possession of the railway co. before the date of the winding-up order; two did not come into the possession of the railway co. until between the presentation of the petition & the winding-up order. The liquidator claimed delivery up by the railway co. of the fifteen waggons which the co. claimed to retain in satisfaction of the general lien under the agreement:—*Held*: the lien given to the railway co. by the agreement, which was made for the ordinary purposes of the coal co.'s business, was good & valid, & took effect upon the insolvency of that co., & had not been displaced by anything that had taken place in the winding-up proceedings.—*Re LLANGENNECH COAL CO.* (1887), 56 L. T. 475.

5832. ———.]—Where proceedings *in rem* are taken under Admiralty Court Act, 1861 (c. 10), ss. 4, 5, the ship, from the moment of her arrest by the ct., is held as a security for the amount for which judgment is afterwards recovered in the action. The security, therefore, is not affected by the liquidation of the owners, a limited co., after the commencement of the action but before judgment.—*THE CELLA* (1888), 13 P. D. 82; 57 L. J. P. 55; 59 L. T. 125; 36 W. R. 540; 6 Asp. M. L. C. 293, C. A.

Annotations:—Refd. The Africano, [1894] P. 141. *Mentd. The James W. Elwell*, [1921] P. 351.

5833. On property in which third party has rights.]—*Re BRADFORD NAVIGATION CO.*, No. 5658, *ante*.

Property available for distribution & distribution of assets.]—*See Sub-sects. 10. & 12, post.*

ii. *Dispositions of Property.*

See 1908 Act, s. 205 (2).

5834. Bonâ fide dispositions in ordinary course of trade.]—In the case of a trading co. the ct. will,

the previous day & an order afterwards made. Upon summons by liquidators, A. C. & D. were ordered to repay amount of cheque with interest.—*Re PROVINCIAL & SUBURBAN BANK, LTD.* (1879), 5 V. L. R. 343.—*AUS.*

h. ———.]—G., the auditor & accountant of a limited

under the discretion given to it by 1862 Act, s. 153, support dispositions of property which have in the ordinary course of trade been *bonâ fide* made between the presentation of a petition & the order to wind up. Where, however, contracts have been entered into, but no disposition of property completed in pursuance of such contracts, sect. 153 has no application.—*Re WILTSHIRE IRON CO., Ex p. PEARSON* (1868), 3 Ch. App. 443; 37 L. J. Ch. 554; 18 L. T. 423; 16 W. R. 682, L. J.

Annotations:—**Consd.** *Re International Life Assce. Soc., Gibbs & West's Case* (1870), L. R. 10 Eq. 312; *Re Oriental Bank Corpn., Ex p. Guillemin* (1884), 28 Ch. D. 634. **Refd.** *Re Liverpool Civil Service Supply Asscn., Ex p. Greenwood* (1874), 22 W. R. 636; *Re Canadian Pacific Colonization Corpn.* (1891), 40 W. R. 40; *Re Répertoire Opera Co.* (1895), 2 Mans. 314. **Mentd.** *Re Coal Economising Gas Co., Gover's Case* (1875), 24 W. R. 125; *Hoare v. G. W. Ry.* (1877), *De Colyar's County Court Cases*, 192; *Re Brazilian Rubber Plantations & Estates* (1911), 103 L. T. 882.

5835. Payment—Of part of petitioner's debt.]—*Re LIVERPOOL CIVIL SERVICE ASSOCN., Ex p. GREENWOOD*, No. 5403, *ante*.

5836. — Without notice of winding-up proceedings.]—In consideration of moneys paid in at a distant foreign branch of a banking co. whose head office was in London, drafts on the head office were given after presentation of a petition to wind up the co., & appointment of a provisional liquidator in England, but before, from want of direct telegraphic communication, any notice of the stoppage of the bank in London had been received at the foreign branch, & before the date of the winding-up order:—*Held*: the contract which was entered into by the officers of the foreign branch on behalf of the co. without any notice of the winding-up proceedings, & therefore before revocation of their authority, was not invalidated by 1862 Act, s. 153; & accordingly the creditors in respect of such transaction were not entitled to have their money refunded as on the footing of a void transaction, but merely to prove for the amount under the winding up *pari passu* with the other creditors.

As between the holders for value of the drafts & the persons by whom the consideration was paid:—*Held*: the holders were entitled to prove.—*Re ORIENTAL BANK CORPN., Ex p. GUILLEMIN* (1884), 28 Ch. D. 634; 54 L. J. Ch. 322; 52 L. T. 167; 1 T. L. R. 9.

Annotations:—**Refd.** *Re Art Engraving Co.* (1889), 60 L. T. 381. **Mentd.** *Ewart v. Fryer*, [1901] 1 Ch. 499.

5837. — Not in ordinary course of business.]—*Re NEATH HARBOUR SMELTING & ROLLING WORKS*, No. 6175, *post*.

5838. — Of bonâ fide debt previously due.]—Payment by a co., after the commencement of the winding up, of a debt previously due is not, even in the case of a perfectly *bonâ fide* debt of the co., a transaction to which the ct. will, in the exercise of its discretion under 1862 Act, s. 153, give validity.

On the same day on which a petition for winding up a co. was presented, the co. agreed to pay a trade creditor, who was ignorant of the presentation of a petition, a sum of £175, being part of a debt of £320 previously due to him, on condition that he should continue to supply the co. with

goods for cash payment. The £175 was paid after the presentation of the petition, & also £13 for goods supplied. A winding-up order having been made, the payment of the £13 was allowed, but the £175 was ordered to be repaid.—*Re CIVIL SERVICE & GENERAL STORE, LTD.* (1887), 57 L. J. Ch. 119; 58 L. T. 220; 4 T. L. R. 168.

Annotations:—**Refd.** *Re Ilkley Hotel Co.* (1893), 68 L. T. 164; *Re Répertoire Opera Co.* (1895), 2 Mans. 314.

5839. — Court guided by bankruptcy principles.]—In determining whether a payment made by directors pending a winding-up petition is to be validated by the ct. under 1862 Act, s. 153, the ct. will be guided by the analogy presented by the protective sects. in bkpcy.; it being desirable that the two systems of insolvent administrations in bkpcy. & winding up should as far as possible be assimilated.—*Re REPertoire OPERA CO., LTD.* (1895), 39 Sol. Jo. 505; 2 Mans. 314.

5840. Transaction for benefit of all possible parties—Leases acquired & handed to trustees for debenture-holders.]—In an action by debenture-holders of a co. to enforce their security, followed by a petition for winding up not yet heard, the ct., being satisfied that the transaction was one for the benefit of all possible parties, made an order both in the action & in the winding up authorising pltf's. & defts. to do all necessary acts for acquiring certain leases, & that the leases be handed to the trustees for the debenture-holders notwithstanding 1862 Act, s. 153.—*CARDEN v. ALBERT PALACE ASSOCN.* (1886), 56 L. J. Ch. 166; *sub nom. Re ALBERT PALACE ASSOCN., LTD., CARDEN v. ALBERT PALACE ASSOCN., LTD.*, 55 L. T. 831.

5841. Deed carrying out agreements for issue of debentures—For money lent to company before winding up.]—*Re HANSARD PUBLISHING UNION, LTD.* (1892), 8 T. L. R. 280, C. A.

(c) On Transfers of Shares.

See Sect. 13, sub-sect. 5, & Sect. 23, sub-sects. 1 & 2, C. (c), *ante*.

(d) On Alteration in Status of Members.

See 1908 Act, s. 205 (2).

5842. Arrangement for shareholders to make advances to company—Advances to be treated as loans or payments on account of calls.]—The directors of a co. proposed to a meeting of shareholders that the shareholders should make advances to the co. which should be treated either as loans if the co. went on, or as payments on account of the amounts unpaid on the shares if the co. were wound up. A petition for winding up the co. was presented the same day:—*Held*: the proposed arrangement amounted to an "alteration of status of the members" under 1862 Act, s. 153, & a payment made on the above footing by a shareholder who knew that the petition was presented could not be treated as part-payment on a subsequent call.—*Re ORIENTAL COMMERCIAL BANK, BARGE'S CASE* (1868), L. R. 5 Eq. 420; 18 L. T. 227.

Annotations:—**Refd.** *Re London Suburban Bank* (1872), L. R. 15 Eq. 274; *Re National Bank of Wales, Taylor, Phillips & Rickards' Cases*, [1897] 1 Ch. 298.

liability co., at the pressing instance of its secretary, on Feb. 9, advanced £1,500 to the co., to enable it to meet urgent liabilities, on the personal undertaking of the secretary that the sum advanced should be paid on Mar. 4 following, when it was expected that a meeting of the shareholders would have authorised additional capital to be raised by unissued debentures, which would enable the co. to pay G., & carry on its business. No security

was asked for, or given, though G. was aware of the embarrassment of the co. The shareholders, at their meeting on Mar. 3, refused to authorise the further issue of debentures, & passed a resolution to wind up the co., & a petition for voluntary winding up was presented on Mar. 6, & an order for winding up was made on Mar. 19. On Mar. 7, 10 & 13, the secretary, with the sanction of the directors, repaid, out of the assets of the co., the £1,500,

in three sums, which were entered in the cash book, as payments on Mar. 3:—*Held*: the transaction was a fraudulent preference of G., under the Bkpcy. (Ireland) Act, 1872 (c. 58), s. 53; & also void, under 1862 Act, s. 153, as the payments to G. were made after the petition for winding up had been presented; & on the application of the official liquidator, G. was ordered to repay the money.—*Re DALY & Co.* (1886), 19 L. R. Ir. 83.—**IR.**

Sect. 36.—Winding up by court: Sub-sect. 4, B. (e), (f) & (g); sub-sect. 5, A. (a) i., ii., iii. & iv.,

On Directors.

Whether directors continue to be "officers"—Within Common Law Procedure Act, 1854 (c. 125), s. 51.]—See No. 5969, *post*.

Whether order amounts to wrongful dismissal of managing director.]—See No. 3494, *ante*.

On right to remuneration.]—See Sect. 28, sub-sect. 3, B., *ante*.

On power to make calls.]—See No. 4597, *ante*.

Directors generally.]—See Sect. 28, *ante*.

(f) On Secretary and Other Officers.

Whether order operates as discharge.]—See Sect. 29, sub-sect. 1, B., *ante*.

(g) On Contracts.

5843. Company's option to pay for work in shares—Whether exerciseable after winding up.]—A co. stipulated with a contractor that he should accept part-payment for his work, if & when required, in paid-up shares of the co.:—*Held*: they could not force him to accept shares in such part-payment after a winding-up order had been made, as they had not exercised their option to do so previously to the winding up.—*Re ALEXANDRA PARK CO., SHARON'S CLAIM* (1866), 12 Jur. N. S. 482; 14 W. R. 855.

5844. General lien under agreement—Made before winding up—Dealings continued after winding up.]—Where a joint-stock co. has been wound up under 1862 Act, & the business is duly carried on by the official liquidator, a creditor who has continued his dealings with the co. cannot exercise a general lien on its goods for the whole amount due to him by virtue of an agreement made between him & the co. previous to the winding up.

A joint-stock co. was wound up under 1862 Act, & the business carried on by the official liquidator according to the Act. Previous to the winding up the co. had made an agreement with depts. for the carriage of goods, upon the terms that goods belonging to or sent by them should be subject to a general lien in favour of depts., to take effect, at their option, at any time after failure of payment of any sums due, or in case of bkpcy., insolvency or stoppage of payment:—*Held*: depts. could not enforce this lien upon goods which they had received after the winding up, to be carried for the new business.—*WILTSHIRE IRON CO. v. GREAT WESTERN RY. CO.* (1871), L. R. 6 Q. B.

PART III. SECT. 36, SUB-SECT. 4.—B. (g).

k. Pending contract to purchase ship—Payment by instalments—Property in incomplete ship.]—In the course of liquidation of C. Co., H. Co. claimed possession of a partly finished steamer being built for them by C. Co. under a contract & in respect of which two bills of sale had been given them as the work progressed. The liquidator disputed their claim, taking the position that the bills of sale were invalid as against him. Under the contract for the construction of the steamer, payment up to 80 per cent of the cost of construction was to be made by the purchasers every two months, & after the first payment, ownership in the partially completed steamer & all materials, etc., used in the construction, was to pass from time to time to the purchasers, C. Co. covenanting to execute & deliver to

the purchasers such bills of sale or other assurances as were necessary to vest title in them:—*Held*: under the contract, the ownership in the unfurnished steamer passed in equity to the purchasers after the making of the first payment, & a liquidator, not being a creditor nor a purchaser for valuable consideration, cannot invoke the Bills of Sale Act, 1897, c. 148.—*Re CANADIAN SHIPBUILDING CO.* (1912), 22 O. W. R. 585; 3 O. W. N. 1476; 16 O. L. R. 564.—**CAN.**

l. Money given trust co. for investment—Contract to pay interest.]—The D. Trust Co. undertook to invest certain moneys of appct. in mortgage security, & the security was taken in the name of the co. in trust for appct. & provided for payment of interest at 7 per cent. The trust co., in consideration of guaranteeing to appct. 4½ per cent on her investment, was to receive the remaining 2½ per cent. as its re-

776; 40 L. J. Q. B. 308; 19 W. R. 935, Ex. Oh.

Annotation:—Reid. Sankey Brook Coal Co. v. Marsh (1871), L. R. 6 Exch. 185.

5845. Agreement to pay for shares by instalments.]—*Re CORDOVA UNION GOLD CO.*, No. 6298, *post*.

5846. Agreement by creditor to surrender security—On fresh security being given—Winding-up order after surrender but before fresh security given—Whether creditor entitled.]—A Scottish co., which was indebted to a bank, entered into an arrangement with the bank whereby it was agreed that, on the bank surrendering certain goods of the co. which the bank held in security, the co. should obtain a debenture from an English co., which was indebted to it, & should assign the debenture to the bank in lieu of the surrendered security. The goods were surrendered & the debenture was obtained from the English co., but before it has been assigned to the bank the Scottish co. went into liquidation. The bank claimed the debenture on the ground that the co. held it for its behoof:—*Held*: the contractual obligation of the co. to assign the debenture did not constitute a trust in favour of the bank & the co. was the party beneficially interested in the debenture at the date of the liquidation.—*BANK OF SCOTLAND v. MACLEOD*, [1914] A. C. 311; 83 L. J. P. C. 250; 110 L. T. 946, H. L.

Contracts of companies generally.]—See Sect. 31, sub-sect. 5, *ante*.

SUB-SECT. 5.—PROVISIONAL LIQUIDATOR AND SPECIAL MANAGER.

A. Provisional Liquidator before Winding-up Order.

(a) Appointment.

i. Grounds for Appointment.

5847. Prima facie ground for winding up—Admitted by company's own petition—Or some other admission.]—The ct. will only appoint a provisional liquidator in a winding-up matter where either the co. has presented the petition or in some way admitted that it must be wound up.—*Re RAILWAY FINANCE CO., LTD.* (1866), 35 Beav. 473; 14 L. T. 507; 14 W. R. 754; 55 E. R. 979; *subsequent proceedings*, 14 W. R. 956, L. J.J.

5848. — Petitioner other than company—Court to be satisfied that petition unopposed.]—A provisional liquidator will not in general be appointed before the hearing of a winding-up

muneration. The co. became insolvent, & went into liquidation. On an application by the investor to have the security transferred to her:—*Held*: the liquidator who was carrying on the business of the co., was entitled to resist the demand, he having a substantial interest in the mtge. he was bound to protect & make the most of.—*Re DOMINION TRUST CO., HARPER'S CASE* (1915), 32 W. L. R. 832; 24 D. L. R. 670; 9 W. W. R. 503; 22 B. C. R. 337.—**CAN.**

m. Executory contracts—Two contracts with same party—Power of Company to adopt one only.]—ASPHALTIC LIMESTONE CONCRETE CO. v. GLASGOW CORPN., [1907] S. C. 463.—**SCOT.**

PART III. SECT. 36, SUB-SECT. 5.—A. (a) i.

n. Assets situated abroad—Powers authorised.]—*Re WILSON* (1912), 50 Sc. L. R. 161.—SCOT.****

petition not presented by the co., unless the ct. is satisfied that the petition is unopposed.—*Re CILFODEN BENEFIT BUILDING SOCIETY* (1868), 3 Ch. App. 462, L. JJ.

Annotations :—*Folld. Re West Worthing Waterworks, Baths, & Assembly Rooms Co.* (1868), 18 L. T. 849; *Re London & Manchester Industrial Assocn.* (1875), 1 Ch. D. 466.

5849. — Company supporting petition.—Two petitions being consecutively presented in different branches of the ct., for the winding up of the same co., & the second petition containing a statement of the absolute necessity for the appointment of a provisional liquidator, on application by motion on the first petition, the co. appearing & supporting, a provisional liquidator appointed.—*Re WEST WORTHING WATERWORKS, BATHS, & ASSEMBLY ROOMS Co., LTD.* (1868), 18 L. T. 849.

5850. — Ex parte application.—The ct. will not, upon the *ex p.* application of petitioner, appoint a provisional liquidator before the hearing of a winding-up petition presented under Life Assurance Companies Act, 1870 (c. 61), s. 21.—*Re LONDON & MANCHESTER INDUSTRIAL ASSOCN.* (1875), 1 Ch. D. 466; 45 L. J. Ch. 170; 33 L. T. 685; 24 W. R. 386.

5851. Jeopardy to assets.—*Re MARSEILLES EXTENSION RAILWAY & LAND Co.*, [1867] W. N. 68.

5852. — Wishes of company against appointment.—The ct. will, in case of urgency, appoint a provisional liquidator, without the consent of the co., to take possession of & protect the assets, but not to distribute them until further order, upon his undertaking to give security forthwith, & producing an affidavit of fitness to the registrar.—*Re HAMMERSMITH TOWN HALL Co.* (1877), 6 Ch. D. 112.

ii. Who may be Appointed.

5853. Official receiver.—*Re MERCANTILE BANK OF AUSTRALIA*, No. 5862, *post*.

5854. ——*Re BOUND & Co., LTD.* (1893), 37 Sol. Jo. 250.

5855. — Power of court to appoint person other than official receiver.—*Re UNIONIST CLUB, LTD.*, [1891] W. N. 64.

Annotation :—*Mentd. Re Mercantile Bank of Australia* (1892), 61 L. J. Ch. 417.

iii. Effect of Appointment.

5856. On authority of company's officers—To carry on business.—*Re ORIENTAL BANK CORPN., Ex p. GUILLEMIN*, No. 5836, *ante*.

5857. On distress for rates—Levied after appointment—Without leave of court.—After the appointment, & during the continuance of the possession, of a provisional liquidator, rates were assessed in respect of premises belonging to the co., & a distress was levied by the overseers without having applied to the ct. for leave, though aware of the existence of the provisional liquidator. A few days afterwards a resolution was passed for the voluntary winding up of the co., which was continued under supervision, & official liquidators were appointed. On an application, by the liquidators in the winding up, to restrain the overseers from selling the chattels distrained on :—*Held* : on appeal, the fact of the existence of a

provisional liquidator ought not to be allowed to prejudice the right of the overseers to obtain payment in full by means of a distress put in prior to the commencement of the winding up; & though, by reason of the existence of the provisional liquidator, the overseers should not have distrained without having made an application to the ct. for leave to do so, yet they did not lose their right by not having so applied; & therefore, the liquidators in the winding up were not entitled to restrain the overseers from selling, except on condition of paying the rates in full.—*Re DRY DOCKS CORPN. OF LONDON* (1888), 39 Ch. D. 306; 58 L. J. Ch. 33; 59 L. T. 763; 37 W. R. 18; 1 Meg. 86; *sub nom. Re DRY DOCKS CORPN. OF LONDON, Ex p. ST. ANNE LIMEHOUSE OVERSEERS*, 4 T. L. R. 737, C. A.

Annotation :—*Consd. Re Marriage, Neave, North of England Trustee, Debenture & Assets Corpn. v. Marriage, Neave* (1896), 75 L. T. 169.

iv. Practice on Appointment.

5858. Adjournment to chambers for completion of order—R. S. C. Ord. 50, r. 17.—The provisions of above rule, with respect to the appointment of receivers, are applicable to the appointment of provisional liquidators; so that when an order has been made for the appointment of a provisional liquidator, it may be at once adjourned to chambers & there completed.—*Re HOYLAND SILKSTONE COLLIERY Co., LTD.* (1883), 53 L. J. Ch. 352; 49 L. T. 567.

5859. Provisional liquidator ordered to give security.—*Re MARSEILLES EXTENSION RAILWAY & LAND Co.*, [1867] W. N. 68.

5860. ——*Re HAMMERSMITH TOWN HALL Co.*, No. 5852, *ante*.

5861. ——*Re BANK OF EGYPT* (1887), 3 T. L. R. 460.

5862. ——(1) *Qu.* : whether the ct. has power under 1890 (Winding up) Act, s. 4, to appoint, as provisional liquidator before the making of a winding-up order, some person other than the official liquidator.

But assuming that there is a power to appoint another person, as a general rule the official receiver will be appointed.

(2) Under 1890 (Winding up) Rules, r. 67, the Board of Trade has power to fix the security to be given by a liquidator before as well as after the making of a winding-up order.—*Re MERCANTILE BANK OF AUSTRALIA*, [1892] 2 Ch. 204; 61 L. J. Ch. 417; 67 L. T. 159; 40 W. R. 440; 36 Sol. Jo. 363.

(b) Powers.

5863. To appear on winding-up petition—Whether entitled to costs of appearance.—*Re GENERAL INTERNATIONAL AGENCY Co., LTD.*, No. 5857, *ante*.

5864. To distribute assets—By leave of court.—*Re MARSEILLES EXTENSION RAILWAY & LAND Co.*, [1867] W. N. 68.

5865. ——*Re HAMMERSMITH TOWN HALL Co.*, No. 5852, *ante*.

5866. To preserve assets—To seal documents for such purpose.—Pending a petition for winding up a co., & after the appointment of a provisional

PART III. SECT. 36, SUB-SECT. 5— A. (a) ii.

o. Additional liquidator—To act with provisional liquidator—Not appointed—Unless exceptional circumstances.—Where a provisional liquidator has been appointed in an order for winding up a co. the ct. will not, on the

application of intervening creditors, appoint an additional liquidator to act with him unless there is a conflict of interests or exceptional circumstances which make a joint appointment desirable.—*EATON ROBINS, LTD. v. UNION BOOT & TANNERY Co.*, [1921] C. P. D. 110.—S. AF.

PART III. SECT. 36, SUB-SECT. 5.— A. (b).

p. To carry on company's business—To accept etc. bills of exchange—To borrow money—To defend actions.—*Re WILSON* (1912), 50 Sc. L. R. 161. SCOT.

. 36.—*Winding up by court: Sub-sect. 5, A. (b), B. & C.; sub-sect. 6, A., B., C., D., E., F. & G.*

liquidator, the ct. on the application of debenture-holders who had brought an action for the purpose of enforcing their securities, made an order in the winding up & in the action—the provisional liquidator & petitioning creditor not opposing—that, notwithstanding 1862 Act, s. 153, the provisional liquidator should affix the seal of the co. to certain deeds for the purpose, in effect, of preserving the property comprised therein from forfeiture.—*CARDEN v. ALBERT PALACE ASSOCN.* (1886), 56 L. J. Ch. 166; *sub nom. Re ALBERT PALACE ASSOCN., LTD., CARDEN v. ALBERT PALACE ASSOCN., LTD.*, 55 L. T. 831.

5867. To borrow money—By leave of court—Money to be first charge on undertaking.]—POTTERIES, SHREWSBURY & NORTH WALES RY. CO. (1884), cited in 61 L. T. at p. 325.

Annotation:—Folld. Re Alexandra Palace & Park Co. (1889), 61 L. T. 325.

5868. ———.]—On the application of creditors, who had presented a petition to wind up the co., a provisional liquidator was appointed, “to carry on the business of the co. as now carried on.” Counsel for petitioners said that the registrar, in drawing up the order, wished to add the words “but not making any new arrangements.” Also power had been given to the provisional liquidator to borrow £500, but the registrar refused to insert the words in the order that the money borrowed should be “a first charge on the assets.” On motion *ex p.* on behalf of petitioners for further directions:—*Held*: (1) the liquidator was only to carry out arrangements actually made; not to carry on new business of any kind without the leave of the ct.; (2) money borrowed for carrying on the co.’s business pending the hearing of the petition should be “a first charge on the undertaking,” but if the money was not properly expended it would not be allowed.—*Re ALEXANDRA PALACE & PARK CO., LTD.* (1889), 61 L. T. 325.

5869. To carry on company’s business—& do all things incidental thereto—Reconstruction of solvent company by winding-up order.]—*Re BANK OF EGYPT* (1887), 3 T. L. R. 460.

5870. To carry on new business—By leave of court.]—*Re ALEXANDRA PALACE & PARK CO., LTD.*, No. 5868, *ante*.

5871. When restricted to making applications for appointment of special manager.]—*Re BOUND & Co., LTD.* (1893), 37 Sol. Jo. 250.

B. Special Manager.

Appointment—Power of provisional liquidator to apply for.]—*See* No. 5854, *ante*.

C. Provisional Liquidator after Winding-up Order.

5872. Who may be appointed—Only official receiver.]—After an order for the winding up of a co. has been made, the ct. has no power to appoint a provisional liquidator other than the official receiver.—*Re NORTH WALES GUNPOWDER CO.*, [1892] 2 Q. B. 220; 61 L. J. Q. B. 625; 67 L. T. 178; 8 T. L. R. 631; 36 Sol. Jo. 554; *sub nom. Re NORTH WALES GUNPOWDER CO., Ex p. OFFICIAL RECEIVER*, 40 W. R. 561, C. A.

Annotation:—Folld. Re Reid, [1900] 2 Q. B. 634.

5873. ———.]—*Re REID (JOHN) & SONS, LTD.*, No. 5886, *post*.

5874. When appointment made.]—*Re MADRID & VALENCIA RY. CO.* (1850), 15 L. T. O. S. 84.

Powers & duties of official receiver when acting as provisional liquidator.]—*See* Sub-sect. 6, B., *post*.

SUB-SECT. 6.—OFFICIAL RECEIVERS.

A. Status.

5875. Is officer of court.]—*Re HOUNSLOW BREWERY CO., LTD.* (1896), 12 T. L. R. 323; 40 Sol. Jo. 416.

Annotation:—Reid. Re Tweddle, [1910] 2 K. B. 67.

5876. ———.]—*BOTTOMLEY v. BROUGHAM*, No. 5890, *post*.

5877. ———.]—*BURR v. SMITH*, No. 5885, *post*.

B. Powers and Duties.

5878. Powers—To settle list of contributories—When acting as provisional liquidator.]—The term “liquidator,” mentioned in 1890 (Winding up) Rules, r. 83, includes the official receiver when acting as provisional liquidator, & therefore the list of contributories of a co. settled by the official receiver while acting as provisional liquidator of a co. which has been ordered to be wound up by the ct. is rightly settled.—*Re ENGLISH BANK OF THE RIVER PLATE*, [1892] 1 Ch. 391; 61 L. J. Ch. 205; 66 L. T. 177; 40 W. R. 325; 8 T. L. R. 238.

5879. ——— To lend name—To persons taking proceedings in winding up—On indemnity.]—*Re ANGLO-SARDINIAN ANTIMONY CO.* (1894), 38 Sol. Jo. 682.

5880. ———.]—The official receiver ought not to lend his name for taking proceedings in winding up or in bkpey. to a person who offers to indemnify him without exercising an independent judgment on the propriety of the proposed proceedings.—*Re PICCADILLY CHAMBERS CO.* (1894), 1 Mans. 370; 8 R. 617.

——— To act as receiver for debenture-holders.]—*See* Sect. 34, sub-sect. 6, B., *ante*.

Duties—To call first meetings of creditors & contributories.]—*See* Sub-sect. 6, E., *post*.

——— To account to liquidator.]—*See* Sub-sect. 6, F., *post*.

C. Statement of Affairs.

5881. Who may be required to submit statement—Person who has legally ceased to be director but has de facto acted as such.]—Although a person has not legally been a director of a co. within one year before an order for winding up the co., if he has in fact acted as a director within that period, he is a director who is liable to furnish a statement as to the affairs of the co. within 1890 (Winding up) Act, s. 7. Notwithstanding the provision for a penalty for default in complying with the requirements of the sect., contained in sub-sect. 5 thereof, the inherent power of the cts. to make such orders as are necessary to carry out the objects with which they have to deal is not taken away, & a county ct. has therefore jurisdiction to make an order that a director make out & furnish the statement of affairs required by the sect.—*Re NEW PAR CONSOLS*, [1898] 1 Q. B. 573; 67 L. J. Q. B. 595; 42 Sol. Jo. 98; 5 Mans. 273, D. C.; *subsequent proceedings*, [1898] 1 Q. B. 669, C. A.

5882. Default in submitting statement—Applica-

PART III. SECT. 36, SUB-SECT. 6.—A.

a. Position of receiver appointed by court—Effect of appointment on

*status of company.]—*The appointment of a receiver does not change the occupation of the estate, but by it a mode of management is directed by

the ct. through its officer as a common agent for all parties to the litigation.—*McMECKAN v. AITKEN* (1895), 21 V. L. R. 65.—AUS.

tion for order to submit—Jurisdiction of court to grant.]—*Re NEW PAR CONSOLS*, No. 5881, *ante*.

5883. ——— How made.]—Where the secretary or other proper officer of a co. does not comply with a direction by the Board of Trade to submit & verify a statement of the co.'s affairs under 1890 (Winding up) Act, s. 7, an order to do so is not to be taken as of course without the ct. having the means of satisfying itself that the non-compliance was wilful. Applications for such orders are to be made to the judge & not to the registrar.—*Re COLUMBIAN GOLD MINES* (1894), 42 W. R. 624; 38 Sol. Jo. 478; *sub nom. Re COLUMBIAN GOLD MINES*, 10 T. L. R. 478; 1 Mans. 349; 8 R. 411.

5884. Grounds for granting—Court must be satisfied that default wilful.]—*Re COLUMBIAN GOLD MINES*, No. 5883, *ante*.

D. Preliminary Report.

See 1908 Act, s. 148 (2).

5885. Nature of report—Absolutely privileged.]

—(1) An action will not lie against an official receiver in respect of a report made by him under 1890 (Winding up) Act, Sched. I, s. 3, & sent by him to the creditors & contributories of the co. In making such report he acts as an officer of the ct. & absolute privilege attaches to such a report, the same having been made in the performance of a statutory duty.

(2) Neither is an action maintainable against the Inspector-General in Companies' Liquidation in respect of a report made by him to the Board of Trade under 1890 (Winding up) Act, s. 29 (2), for the purpose of being included by the Board of Trade in its general annual report of all matters, judicial & financial, & laid before both Houses of Parliament. In making such report he is merely acting as an officer of the Board of Trade by whom it is enabled to perform its statutory duty, & the fact that the report is delivered into the hands of superior officers of the Board of Trade does not constitute publication at all.—*BURR v. SMITH*, [1909] 2 K. B. 306; 78 L. J. K. B. 889; 101 L. T. 194; 25 T. L. R. 542; 53 Sol. Jo. 502; 16 Mans. 210, C. A.

Annotation :—As to (1) *Refd. Re Tweddle*, [1910] 2 K. B. 697.

Compare No. 5890, *post*; & see, generally, LIBEL & SLANDER.

E. Summoning First Meetings of Creditors and Contributories.

5886. Duty of official receiver to summon—To decide whether liquidator shall be appointed in place of official receiver.]—When upon a creditors' petition the ct. makes an order for winding up a co., the ct. has no jurisdiction as part of that order to appoint a permanent liquidator other than the official receiver in bkpcy. for the district, as by 1890 (Winding up) Act, s. 4, upon an order being made by the ct. for winding up the co., the official receiver becomes, by virtue of his office, provisional liquidator, & it is his duty under sect. 6, to summon a meeting of the creditors to determine whether an application ought to be made to the ct. for appointing a liquidator; & until the creditors have been so consulted the ct. has no jurisdiction to appoint the person as permanent liquidator, even though such person had previously been appointed & approved of by the

creditors as voluntary liquidator in the voluntary liquidation of the co.—*Re REID (JOHN) & SONS, LTD.*, [1900] 2 Q. B. 634; 69 L. J. Q. B. 736; 83 L. T. 196; 49 W. R. 15; 16 T. L. R. 444; 7 Mans. 475, D. C.

F. Books and Accounts.

5887. Duty of official receiver to account to liquidator—Dissatisfaction with account—Liquidator should report to Board of Trade—Or apply for directions to court.]—When the trustee in bkpcy. is dissatisfied with the accounts rendered to him by the official receiver he should make a report thereon to the Board of Trade pursuant to 1883 Bkpcy. Rules, r. 249, & if the Board neglect or refuse to act in the matter he should then apply to the ct. for directions under Bkpcy. Act, 1883 (c. 52), s. 101.—*Re SMITH, Ex p. FOX* (1886), 17 Q. B. D. 4; 34 W. R. 535; *sub nom. Re SMITH, Ex p. TRUSTEE*, 55 L. J. Q. B. 288; 3 Morr. 63; *sub nom. Re SMITH, TRUSTEE v. OFFICIAL RECEIVER*, 54 L. T. 307.

5888. Information to be disclosed by official receiver to liquidator—Whether information obtained under 1903 (Winding up) Rules, r. 53, is to be disclosed—Power of court to direct disclosure of such information.]—Information obtained by the official receiver from officers of the co. under above rule is not "property" of the co. within r. 144 (1), or "information respecting the estate & affairs of the co. . . . necessary or conducive to the due discharge of the duties of the liquidator" within r. 144 (3), which it is the duty of the official receiver to produce to a liquidator superseding him as liquidator.

Qu.: whether the ct. on sufficient evidence may not direct the official receiver, as its officer, to disclose the information to an outside liquidator.—*Re LAKE GEORGE MINES, LTD.*, [1904] 1 Ch. 803; 73 L. J. Ch. 333; 11 Mans. 214.

G. Further Report to Court and Public Examination.

(a) Further Report.

See 1908 Act, s. 148 (2).

5889. When further report should be made—Discretion of official receivers—Should not be controlled by directions of Board of Trade—Should act on own responsibility.]—PUBLIC EXAMINATIONS, [1894] W. N. 44.

5890. Nature of report—Absolutely privileged.]—The report of an official receiver made to the ct. under 1890 (Winding up) Act, s. 8 (2), is absolutely privileged.

The official receiver has a statutory duty to inquire in a judicial way into certain matters by 1890 (Winding up) Act, & in performing that duty he is acting in a judicial capacity (CHANNELL, J.).—*BOTTOMLEY v. BROUGHAM*, [1908] 1 K. B. 584; 77 L. J. K. B. 311; 99 L. T. 111; 24 T. L. R. 262; 52 Sol. Jo. 225.

Annotations :—*Consd. Burr v. Smith*, [1909] 2 K. B. 306; *Re Tweddle*, [1910] 2 K. B. 697. *Refd. Copartnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405; *Everett v. Griffiths*, [1920] 3 K. B. 163.

Compare No. 5885, *ante*; & see, generally, LIBEL & SLANDER.

(b) Public Examination.

i. Power of Court to Order.

5891. Jurisdiction of court—Only on further report by official receiver—Showing in his opinion

PART III. SECT. 36, SUB-SECT. 6.— G. (b) i.

r. Official manager — Power to obtain examination of director under

Law 47 of 1887, s. 69—*Even contrary to resolution of creditors—Effect of director's willingness to comply.*—In an application to set aside an order to have one of the directors of the co.

examined upon oath concerning the trade dealings of the co.:—*Held*: although the examination might be for the purpose of obtaining information to institute an action against the

Sect. 36.—Winding up by court: Sub-sect. 6, G. (b) i., ii. & iii., & H.; sub-sect. 7.]

prima facie case of fraud.—(1) An order for public examination under 1890 (Winding up) Act, s. 8 (3), may be made if the official receiver has made a further report under sub-sect. 2, showing, though not necessarily stating in express terms, his opinion that fraud has been committed by some person in the promotion or formation of the co., or by some director or officer in relation to the co. since its formation; & that the person whom it is proposed to examine has taken part in the promotion or formation of the co., or has been a director or officer of the co., & it is not necessary that the report should allege him to have been a party to the fraud.

(2) Such order may be made *ex p.*, leaving the party to move to discharge it if he alleges it to have been made without jurisdiction.—*Re TRUST & INVESTMENT CORPN. OF SOUTH AFRICA, Re BERTRAM LUIPAARD'S VLEI GOLD MINING CO.*, [1892] 3 Ch. 332; 67 L. T. 777; 40 W. R. 689; 8 T. L. R. 770; 36 Sol. Jo. 697; 2 R. 76; *sub nom. Re GREAT KRUGER GOLD MINING CO., LTD., Ex p. BARNARD, Re TRUST & INVESTMENT CORPN. OF SOUTH AFRICA, LTD., Re BERTRAM LUIPAARD'S VLEI GOLD MINING CO., LTD.*, 62 L. J. Ch. 22, C. A.

Annotations:—As to (1) Expld. Re Laxon (3), [1893] 1 Ch. 210; *Re New Zealand Loan & Mercantile Agency Co.* (1894), 71 L. T. 130. *Consd. Re General Phosphate Corpn., Re Northern Transvaal Gold Mining Co., Re Delhi S.S. Co.*, [1895] 1 Ch. 3. *Refd. Re Birkdale Steam Laundry & Carpet Beating Co.*, [1893] 2 Q. B. 386; *Ex p. Barnes* (1896), 12 T. L. R. 239.

5892. S. P. Re GREAT KRUGER GOLD MINING CO., Ex p. BARNARD, [1892] 3 Ch. 307; 67 L. T. 770; 40 W. R. 625; 8 T. L. R. 688; 36 Sol. Jo. 644; 2 R. 11; *sub nom. Re GREAT KRUGER GOLD MINING CO., LTD., Ex p. BARNARD, Re TRUST & INVESTMENT CORPN. OF SOUTH AFRICA, LTD., Re BERTRAM LUIPAARD'S VLEI GOLD MINING CO., LTD.*, 62 L. J. Ch. 22, C. A.

Annotations:—Expld. Re Laxon (3), [1893] 1 Ch. 210; *Re New Zealand Loan & Mercantile Agency Co.* (1894), 71 L. T. 130. *Apld. Re Property Insee.*, [1914] 1 Ch. 775. *Refd. Re Birkdale Steam Laundry & Carpet Beating Co.*, [1893] 2 Q. B. 386; *Re New Travellers' Chambers* (1895), 64 L. J. Ch. 317; *Ex p. Barnes* (1896), 12 T. L. R. 239.

5893. ———.—*Held*: the ct. has no jurisdiction under 1890 (Winding up) Act, s. 8, to direct a public examination, unless the official receiver either states expressly in his further report that in his opinion some fraud such as is mentioned in sect. 8 (2), has been committed, or the facts which are stated in the report show clearly that in his opinion such a fraud has been committed. If the report merely suggests or gives rise to a suspicion of fraud, this is not enough to give the ct. jurisdiction to direct a public examination.—*Re GENERAL PHOSPHATE CORPN., Re NORTHERN TRANSSAAL GOLD MINING CO., Re DELHI S.S. CO.*, [1895] 1 Ch. 3; 64 L. J. Ch. 195; 71 L. T. 619; 43 W. R. 34; 11 T. L. R. 10; 39 Sol. Jo. 28; 1 Mans. 522; 12 R. 39, C. A.

Annotations:—Refd. Re New Travellers' Chambers, [1895] 1 Ch. 395; *Ex p. Barnes*, [1896] A. C. 146.

5894. ———.—The ct. has no jurisdiction to direct any person to be publicly examined under 1890 (Winding up) Act, s. 8 (3), unless the official receiver has made a "further report" under sub-sect. 2 from which it appears

that in his opinion, a fraud has been committed by a person in the promotion or formation of the co., or by a director or other officer of the co. in relation to the co. since its formation.—*Ex p. BARNES*, [1896] A. C. 146; 65 L. J. Ch. 394; 74 L. T. 153; 44 W. R. 433; 12 T. L. R. 239, H. L.

Annotations:—Expld. Re Civil, Naval & Military Outfitters, [1899] 1 Ch. 215. *Consd. Re Tweddle*, [1910] 2 K. B. 697. *Apld. Re Property Insee.*, [1914] 1 Ch. 775. *Mentd. Re London Health Electrical Institute* (1897), 76 L. T. 98; *Re Dunn, Ex p. Senior Official Receiver*, [1902] 1 K. B. 107; *Burr v. Smith*, [1909] 2 K. B. 306.

5895. ———.—(1) To enable the ct. to make an order, under 1890 (Winding up) Act, s. 8 (3), for a public examination of a person who is alleged to have taken part in the promotion or formation of a co. in liquidation, the further report of the official receiver under sub-sect. 2 must not only state that that person had taken part in the promotion or formation, & that, in the opinion of the official receiver, fraud had been committed by him in the promotion or formation, but must also state facts showing a basis for the official receiver's opinion, & warranting the judge in calling upon the person implicated for an explanation.

(2) Notice of motion to discharge an *ex p.* order for public examination under sub-sect. 3 ought to be given within a reasonably short time.—*Re CIVIL, NAVAL & MILITARY OUTFITTERS, LTD.*, [1899] 1 Ch. 215; 68 L. J. Ch. 164; 80 L. T. 241; 47 W. R. 233; 15 T. L. R. 114; 43 Sol. Jo. 125; 6 Mans. 100, C. A.

5896. ———.—**To inquire into charges against company—Of frauds committed in course of business—Against outsiders & not its members.**—The ct. has no power to order an examination under 1890 (Winding up) Act, s. 8 (3), for the purpose of inquiring into charges made against a co. of having, through its servants, committed frauds in the course of its business upon members of the outside public, not upon members of the co., nor connected in any way with the promotion or formation of the co.—*Re MEDICAL BATTERY CO.*, [1894] 1 Ch. 444; 63 L. J. Ch. 189; 69 L. T. 799; 42 W. R. 191; 38 Sol. Jo. 81; 1 Mans. 104; 8 R. 46.

Annotation:—Mentd. Re Bishop, [1900] 2 Ch. 254.

5897. What further report must contain—Facts pointing to fraud.—The further report of the official receiver under 1890 (Winding up) Act, s. 8 (2), in support of an application for public examination, need not in terms state that, in his opinion, fraud has been committed in the promotion or formation of the co. or the conduct of its business. It is sufficient if the further report state facts which suggest the existence of such fraud.—*Re LAXON & CO. (3)*, [1893] 1 Ch. 210; 62 L. J. Ch. 206; 67 L. T. 654; 41 W. R. 62; 9 T. L. R. 61.

Annotations:—Folld. Re Birkdale Steam Laundry & Carpet Beating Co., [1893] 2 Q. B. 386. *Refd. Re General Phosphate Corpn.* (1894), 71 L. T. 619.

5898. ———.—An order for public examination under 1890 (Winding up) Act, s. 8 (3), may be made if the official receiver has made a further report under sub-sect. 2 suggesting, though not stating expressly his opinion, that a fraud has been committed by some person in the promotion of the co.—*Re BIRKDALE STEAM LAUNDRY & CARPET BEATING CO.*, [1893] 2 Q. B. 386; 63

director that was no reason why the official manager should not be permitted to obtain the necessary information in the interests of the creditors by the means put at his disposal under the above sect.; the fact that a majority in value of creditors had passed a resolution directing that no

action should be taken by the liquidator pending further instructions from the creditors, did not debar him from exercising his statutory rights even without any authority from the creditors, the liquidator of course taking the risk of being found personally liable in costs should he be

unsuccessful; the fact that the director had expressed his willingness to supply all required information was no reason for refusing the order for the director's examination.—*Foss v. WOOLRIDGE & CO., LTD.* (1916), 37 N. L. R. 100.—S. AF.

L. J. Q. B. 20 ; 42 W. R. 144 ; 9 T. L. R. 650 ; 37 Sol. Jo. 717 ; 5 R. 557.

Annotation :—*Re* General Phosphate Corpn. (1894), 71 L. T. 619.

5899. ———.]—*Re* CIVIL, NAVAL & MILITARY OUTFITTERS, LTD., No. 5895, *ante*.

5900. ——— **Matters of information & belief.**]—*Re* GENERAL PHOSPHATE CORPN., *Re* NORTHERN TRANSVAAL GOLD MINING CO., *Re* DELHI S.S. CO., No. 5893, *ante*.

ii. *Who may be Examined.*

5901. **All promoters & directors—If *prima facie* case of fraud shown against any promoter or director.**]—If the official receiver's report under 1890 (Winding up) Act, s. 8, disclose a *prima facie* case of fraud against any person in the promotion or formation of the co. or against any director, all the promoters & directors whether implicated or not may be summoned for examination under the sect.—*Re* NEW ZEALAND LOAN & MERCANTILE AGENCY CO., LTD. (1894), 71 L. T. 130 ; 10 T. L. R. 371 ; 38 Sol. Jo. 339 ; 1 Mans. 300 ; 8 R. 302 ; *varied on appeal*, 71 L. T. 132, C. A. ; *subsequent proceedings*, 71 L. T. 693.

Annotations :—*Consd.* *Re* General Phosphate Corpn., *Re* Northern Transvaal Gold Mining Co., *Re* Delhi S.S. Co., [1895] 1 Ch. 3. *Distd.* *Re* Property Insee., [1914] 1 Ch. 775.

iii. *Remedies of Party Ordered to be Examined.*

5902. **Application to discharge order for examination—On ground that order made without jurisdiction.**]—*Re* TRUST & INVESTMENT CORPN. OF SOUTH AFRICA, *Re* BERTRAM LUIPAARD'S VLEI GOLD MINING CO., No. 5891, *ante*.

5903. ——— **Notice to be given within reasonable time.**]—*Re* CIVIL, NAVAL & MILITARY OUTFITTERS, LTD., No. 5895, *ante*.

5904. ——— **Unreasonable delay.**]—An application for the discharge of an order for public examination made in chambers, under 1890 (Winding up) Act, s. 8, must be made with reasonable diligence :—*Held* : a delay of two months in making such an application was unreasonable, & on that ground the application was properly dismissed.—*Re* NATIONAL STORES, LTD., [1900] 1 Ch. 27 ; 81 L. T. 529 ; 48 W. R. 185 ; 16 T. L. R. 59 ; 44 Sol. Jo. 74 ; 7 Mans. 56, C. A.

5905. ——— **Application successful—Official receiver's report defective—Whether official receiver personally liable for costs.**]—*Re* HOUNSLOW BREWERY CO. (1896), 12 T. L. R. 323 ; 40 Sol. Jo. 416.

Annotation :—*Re* Tweddle, [1910] 2 K. B. 67.

5906. **Application to amend report—To introduce facts which would negative fraud.**]—Where the ct. has made an order for a public examination under 1890 (Winding up) Act, s. 8, it will not allow the persons who have been ordered to be examined to go into evidence as to facts which, they say, would, if stated on the official receiver's report, show that a *prima facie* case of fraud was not made out ; & it will not entertain an application to amend the report or take it off the file to enable that to be done.

Where the official receiver in his report states a case which, in his opinion, acting honestly & in good faith, shows fraud, & he states that opinion, & the ct. on consideration of the report thinks that it shows that there was ground for such opinion, the ct. has jurisdiction to make an order for a public examination ; & if the ct., having such jurisdiction, does, in the exercise of its discretion, make the order, the persons affected will not be allowed to apply to the ct. & argue the question whether it has exercised its jurisdiction

rightly.—*Re* NEW TRAVELLERS' CHAMBERS, LTD., [1895] 1 Ch. 395 ; 64 L. J. Ch. 317 ; 72 L. T. 89 ; 43 W. R. 282 ; 11 T. L. R. 217 ; 39 Sol. Jo. 247 ; 2 Mans. 110 ; 13 R. 296.

Annotation :—*Re* National Stores, [1899] 2 Ch. 773.

5907. **Power to question exercise of court's discretion—*Prima facie* case of fraud disclosed.**]—*Re* NEW TRAVELLERS' CHAMBERS, LTD., No. 5906, *ante*.

5908. **Application for order under 1890 (Winding-up) Act, s. 7, for exculpation—Appearance of official receiver to oppose application—Application successful—Whether official receiver personally liable for costs.**]—A co. having been ordered to be wound up in the county ct., the official receiver, acting as liquidator, made a preliminary report under 1890 (Winding up) Act, s. 8 (1), & subsequently made a further report under sub-sect. 2, in which he stated that he was of opinion that the facts set out in the report constituted a fraud committed in the promotion or formation of the co., & that the persons named in the schedule—of whom the director of the co. was one—were parties to such fraud. The county ct. judge, under sub-sect. 3, ordered a public examination of the persons named, & after it had been held, the director in question applied for an order exculpating him from the charge of fraud made in the report. Notice of the application was served on the official receiver, & he appeared at the hearing & opposed the application. The judge, however, made the order, & further ordered the official receiver to pay to the director the costs of his public examination, & of the application for exculpation. The co. having no available assets, the order in effect was that the official receiver should personally pay the costs. The Div. Ct. discharged the order on the ground that the county ct. judge had no jurisdiction to make it :—*Held* : (1) in regard to the examination the official receiver was merely discharging a duty of a judicial character cast upon him by sect. 8 of the Act ; & the proviso in sub-sect. 7 of that sect. enabling the ct. in its discretion to "allow" the exculpated person costs meant that the ct. might allow such costs out of the assets of the co., & did not impose any personal liability upon the official receiver, & therefore there was no jurisdiction to order him to pay the costs of the public examination ; (2) in regard to the application for exculpation the official receiver had accepted the position of litigant, & had by his action become a party to a proceeding in the county ct., & consequently the judge had jurisdiction to order him to pay the costs of the application ; & as the judge had exercised his discretion, that was not a matter for appeal.—*Re* TWEDDLE (JOHN) & CO., LTD., [1910] 2 K. B. 697 ; 80 L. J. K. B. 20 ; 103 L. T. 257 ; 26 T. L. R. 583, C. A.

Annotations :—*As to* (1) *Re* Property Insee., [1914] 1 Ch. 775. *As to* (2) *Consd.* *Re* Williams, *Ex p.* Official Receiver, [1913] 2 K. B. 88.

H. *Costs.*

Generally.]—*Compare* BANKRUPTCY & INSOLVENCY, Vol. IV., pp. 202–204.

On discharge of order for examination on further report.]—*See* Nos. 5875, 5908, *ante*.

On misfeasance summons.]—*See* Sub-sect. 10, C., *post*.

SUB-SECT. 7.—BOARD OF TRADE.

5909. **Report by Inspector-General in Companies Liquidation to Board of Trade—Absolutely privileged.**]—*BURR v. SMITH*, No. 5885, *ante*.

Sect. 36.—Winding up by court: Sub-sect. 8, A. (a)

SUB-SECT. 8.—LIQUIDATORS AND COMMITTEE OF INSPECTION.

A. Appointment of Liquidator.

(a) In General.

5910. Discretion by court—Whether disturbed by Court of Appeal.]—Where a judge in the exercise of his discretion has appointed an official liquidator, the Ct. of Appeal will not disturb the appointment.—*Re INTERNATIONAL CONTRACT CO.* (1866), 1 Ch. App. 523; 14 L. T. 843; 12 Jur. N. S. 591, L. C.

Annotations:—Folld. Re London, Bombay, & Mediterranean Bank (1866), 1 Ch. App. 525; *Re London Quays & Warehouses Co.* (1868), 3 Ch. App. 394.

5911. ———.]—(1) Where a judge in the exercise of his discretion has appointed an official liquidator, the Ct. of Appeal will not disturb the appointment.

(2) The official liquidator may be appointed at the hearing of the petition for winding up.—*Re LONDON, BOMBAY, & MEDITERRANEAN BANK* (1866), 1 Ch. App. 525; 14 L. T. 843; 12 Jur. N. S. 591, L. C.

Annotation:—As to (1) Folld. Re London Quays & Warehouses Co. (1868), 3 Ch. App. 394.

5912. Liquidator appointed properly qualified.]—(1) Petitioner in a winding up is not as a matter of course entitled to appoint the official liquidator.

(2) Where an official liquidator who is personally qualified for the office has been appointed by the ct. below, his appointment will not be disturbed by the Ct. of Appeal.—*Re NORTHERN ASSAM TEA CO.* (1870), 5 Ch. App. 644; 22 L. T. 253; *sub nom. Re NORTHERN ASSAM TEA CO., Ex p. GALS-WORTHY*, 39 L. J. Ch. 465; 18 W. R. 362, L. C. & L. J.

5913. ——— Principle of appointment erroneous.]—*Re ALBERT AVERAGE ASSURANCE ASSOCN.*, No. 5919, *post*.

5914. ——— Whether court can delegate.]—A judge cannot delegate the nomination of an official liquidator.

A winding-up order was made on a shareholders' petition. Petitioner, who was largely supported by other shareholders, proposed one person as liquidator. Another person was proposed as nominee of other shareholders. The judge was not satisfied that either side should have the nomination; he therefore gave directions to his chief clerk that, provided a certain independent shareholder submitted the name of a person

impartial, competent, & unconnected with the co., such person would be the right person to appoint. The chief clerk afterwards approved the person nominated—no exception being taken on the score of his personal fitness—& notwithstanding the protests of the other shareholders appointed him liquidator. Petitioner moved unsuccessfully, that the chief clerk's order should be vacated:—*Held*: the order must be vacated, as the judge had not exercised his discretion.—*Re GREAT SOUTHERN MYSORE GOLD MINING CO.* (1882), 48 L. T. 11, C. A.

5915. Power of court to summon meeting—To ascertain wishes of creditors—Court not bound to follow decision of meeting.]—*Re LAND DEVELOPMENT ASSOCN.*, [1892] W. N. 23.

5916. ——— Or further meetings.]—*REYNOLDS (CHARLES) & CO., LTD.* (1895), 39 Sol. Jo. 263.

Annotation:—Reid. Re Radford & Bright, [1901] 1 Ch. 272.

(b) Who may be Appointed.

i. Petitioner's Nominee.

5917. Whether appointed as matter of course.]—In a winding up, where the party having the carriage of the winding-up order proposes a person to be appointed liquidator, if the judge in chambers is satisfied that he is a fit & proper person, he must be appointed, without reference to the qualifications of any other person proposed by other parties.—*Re GENERAL PROVIDENT ASSURANCE CO.* (1868), 19 L. T. 45; 17 W. R. 42.

Annotation:—Dbtd. Re Northern Assam Tea Co., Ex p. Galsworthy (1870), 39 L. J. Ch. 465.

5918. ———.]—*Re NORTHERN ASSAM TEA CO.*, No. 5912, *ante*.

5919. ———.]—(1) The Ct. of Appeal will not disturb an appointment made of an official liquidator, where the judge who has the conduct of the winding up has exercised his discretion in making the appointment, unless he has stated that he has made the appointment upon a principle which the Ct. of Appeal holds to be erroneous.

(2) An appeal from the appointment of an official liquidator ought not to be allowed unless in a very special state of circumstances.—*Re ALBERT AVERAGE ASSURANCE ASSOCN.* (1870), 5 Ch. App. 597; 40 L. J. Ch. 34; *sub nom. Re ALBERT AVERAGE ASSOCN., Re ARTHUR AVERAGE ASSOCN.*, 18 W. R. 986, L. J.

5920. Petitioner with small interest.]—*Re ROCKALL FISHING, FISH OIL & FISH MANURE CO., LTD.* (1862), 11 W. R. 84.

is not absolutely clear that the bank is solvent, the interests of creditors in the liquidation are entitled to greater consideration than those of the shareholders.—*Re COMMERCIAL BANK OF MANITOBA* (1893), 9 Man. L. R. 342.—**CAN.**

b. ——— Either creditors' or shareholders' nominee or stranger—Creditors entitled to appear to support nominee—Costs.]—In appointing a liquidator of a co. in terms of Act 31 of 1909, s. 128, the ct. has a discretion & may appoint the person submitted by the creditors & contributories or an independent liquidator. In exercising such discretion the history & business of the co. should be taken into consideration. The majority creditors are entitled to come to ct. in support of the appointment of their nominee & they are entitled to their costs out of the estate even though their nominee is not appointed.—*Re DELMAS GENERAL STORES, LTD.*, [1918] T. P. D. 31.—**S. AF.**

PART III. SECT. 36, SUB-SECT. 8.—

A. (a).

s. Discretion of court — Disinterested person should be appointed—Neither creditor or shareholder.]—Preference should be given to one who is neither a creditor nor a shareholder, the general rule being that it is desirable that liquidators should be disinterested persons.—*Re CENTRAL BANK OF CANADA* (1887), 15 O. R. 309.—**CAN.**

t. ——— Whether disturbed by Court of Appeal—General rules as to appointment.]—The Winding-up Act provides that the shareholders & creditors of a co. in liquidation shall severally meet & nominate persons who are to be appointed liquidators, & the judge having the appointment shall choose the liquidators from among such nominees. In the case of the Bank of Liverpool the judge appointed liquidators from among the nominees of the creditors, one of them being deft. bank:—*Held*: there is nothing in the Act requiring both

creditors & shareholders to be represented on the board of liquidators; a bank may be appointed liquidator & if any appeal lies from the decision of the judge in exercising his judgment as to the appointment, such discretion was wisely exercised in this case.—*FORSYTHE v. BANK OF NOVA SCOTIA, Re BANK OF LIVERPOOL* (1890), 18 S. C. R. 707.—**CAN.**

a. ——— Creditors' nominee if company insolvent — Shareholders' nominee if company solvent.]—Under Winding Up Act, R. S. C. 1886, c. 129, s. 101, as amended by 52 Vict., c. 32, s. 17, whilst the ct. is confined to a selection between the persons nominated at the meetings of creditors & shareholders, for the office of liquidator, it is not bound to adopt the choice of the majority, but must exercise its own discretion. If the creditors nominate one person & the shareholders another, the ct. will, *ceteris paribus*, have particular regard to the wishes of the latter if the co. is solvent, & of the former if it is not; when it

ii. *Creditors' Nominee.*

5921. Removal of liquidator originally appointed—At instance of majority of creditors—Two creditors appointed instead.]—An official liquidator had been appointed in chambers. Upon motion made on behalf of a very large majority of the unsecured creditors of the co., who alone were interested in the realisation of the assets, two creditors were appointed liquidators instead of the liquidator already appointed.—*Re LAND FINANCIERS' ASSOCN.* (1878), 10 Ch. D. 269; 27 W. R. 224.

5922. Extent of creditor's right—Subject to discretion of court.]—Under 1890 (Winding up) Act, s. 6 (1) (a), the right of the majority of creditors & contributories at the statutory meetings to have their nominee appointed as liquidator in the place of the official receiver is subject to the control of the ct.; & the ct. can, in the exercise of its discretion, decline to appoint such nominee, & can leave the winding up in the hands of the official receiver.—*Re JOHANNISBERG LAND & GOLD TRUST CO.*, [1892] 1 Ch. 583; 61 L. J. Ch. 284; 66 L. T. 605; 40 W. R. 456; 8 T. L. R. 296.

5923. — Wishes of majority in value followed.]—*Re BLOXWICH IRON & STEEL CO.* (1894), 38 Sol. Jo. 546; 1 Mans. 350; 8 R. 442.

5924. — Only material if creditors have chief interest—Contributories' wishes followed.]—Where the first meetings of creditors & contributories held under 1890 (Winding-up) Act, s. 6, were divided, the creditors wishing their nominee—an accountant—appointed liquidator, the contributories, the official receiver, the ct., being of opinion that the contributories had the chief interest in the realisation of the assets, refused to appoint the creditors' nominee, leaving the official receiver to act as liquidator, with liberty to apply for the appointment of a committee of inspection.—*Re BANK OF SOUTH AUSTRALIA, LTD.* (1895), 39 Sol. Jo. 264; 2 Mans. 148; 13 R. 343.

iii. *Other Persons.*

5925. Disinterested persons—Neither creditors nor shareholders.]—Liquidators appointed to wind up a co. under Joint Stock Banking Companies Act, 1857 (c. 49), ought, as a general rule, to be disinterested persons, & neither creditors nor shareholders.—*Re NORTHUMBERLAND & DURHAM DISTRICT BANKING CO.* (1858), 2 De G. & J. 508; 44 E. R. 1087, L. JJ.

PART III. SECT. 36, SUB-SECT. 8.—

A. (b) ii.

c. Creditors having chief interest—General rules—Convenience.]—Upon a contest for the appointment of liquidator in a winding-up proceeding it is desirable to follow the rules for guidance to be found in the English cases under the Winding-up Acts. The ct. abstains from laying down any such rule as that the nominee of the petitioning creditor should have a preference. The ct. will consider the condition of affairs to ascertain what parties are most interested in the due administration of the estate in liquidation, & other things being equal will act upon their recommendation. Where upon an application under the Dominion Act, the creditors were those whose interests were most to be regarded, & the great bulk of them favoured the appointment of the sheriff of L., & opposed the nominee of the petitioning creditors, & the sheriff resided in the county where the co.'s operations were carried on, & where all its books & assets were, was already *de facto* liquidator under voluntary proceedings, & was other-

well qualified for the position, the ct. appointed him liquidator.—*Re ALPHA OIL CO.* (1887), 12 P. R. 298.—CAN.

d. — — —.]—Under Winding-up Act, ss. 98 & 99, meetings of shareholders & creditors, respectively, of a bank, were held, at which the shareholders recommended the appointment of C. G. & S. as liquidators, & the creditors C. G. & H. On the application to the ct. for the appointment of three liquidators it appeared that resort to the double liability of shareholders would be necessary to satisfy the claims of creditors under R. S. C. c. 120, s. 70:—*Held*: the choice of the creditors, they having the chief & immediate concern in realising the assets, should be adopted.—*Re CENTRAL BANK OF CANADA* (1887), 15 O. R. 309.—CAN.

e. All creditors unanimous in choice—Although nominee shareholder.]—All creditors of an insolvent co. having agreed upon & recommended the appointment of E. as liquidator of the co.:—*Held*: the fact that E. was a shareholder of the co. was not a valid objection to his appointment.—

5926. Accountant.]—(1) Every suitor of the ct. has an unqualified right to have his case heard before the judge in person whether under the ordinary proceedings of the ct., or under the Winding-up Acts.

(2) The duties of an official manager require a sensible & an honest man, who is a good accountant.

Accountants are not to be regarded as officers of the ct. exercising any legal functions.—*Re AGRICULTURIST CATTLE INSURANCE CO.*, *Ex p. LOWE*, *Re SAME CO.*, *Ex p. FINDLATER* (1861), 30 L. J. Ch. 619; 4 L. T. 630; 9 W. R. 910, L. JJ.

5927. Voluntary liquidator—Compulsory order made after voluntary winding up.]—A compulsory order would in general continue the voluntary liquidator as official liquidator.—*Re LONDON & MEDITERRANEAN BANK, LTD.* (1866), 15 L. T. 153; 15 W. R. 33.

5928. One liquidator for two companies—Winding up of company which had purchased business of another company—Both companies in liquidation.]—In 1865 the W. assurance society made over its business to the A. co. In 1869 an order was made for winding up the A. co., & shortly afterwards a creditor of the W. society, who had not accepted the A. co. as his debtor, obtained an order for winding up the W. society. After the transfer the A. co. had carried on the business of the W. society, & all the transactions relative to that business were entered in the books of the A. co.:—*Held*: one of the liquidators of the A. co. was the most proper person to be appointed liquidator of the W. society, as a great saving of expense would thus be effected, & directions might be given for appointing separate solrs. to represent the interests of the two cos. if any question should arise between them.—*Re WESTERN LIFE ASSURANCE SOCIETY*, *Ex p. WILLETT* (1870), 5 Ch. App. 396; 39 L. J. Ch. 662; 22 L. T. 322; 18 W. R. 473, L. J.

Annotation:—*Distd. Re British Nation Life Assce. Asscn.* (1872), L. R. 14 Eq. 492.

5929. — Interests of companies conflicting.]—The ct. will not allow one person to act as liquidator of two cos. the interests of which are conflicting.—*Re CITY & COUNTY INVESTMENT CO., LTD.* (1877), 25 W. R. 342.

5930. Directors—Circumstances requiring investigation—Conduct of directors approved by shareholders—Directors appointed in voluntary liquidation.]—Where there are circumstances

Re NEW WESTMINSTER GAS CO. (1897), 5 B. C. R. 618.—CAN.

PART III. SECT. 36, SUB-SECT. 8.—
A. (b) iii.

f. Bank.]—A bank may be appointed liquidator.—*FORSYTHE v. BANK OF NOVA SCOTIA*, *Re BANK OF LIVERPOOL* (1890), 18 S. C. R. 707.—CAN.

g. Vakil of creditor—Should not continue to act for creditor after appointment.]—A person who has been appointed liquidator of a co. ought not, after such appointment, to continue to act as *vakil* of a creditor, whose right to prove against the co. is in dispute in the liquidation.—*Re WEST HOPETOWN TEA CO., LTD.* (1866), I. L. R. 9 All. 180.—IND.

h. Secretary of company—Though in default in not registering mortgage.]—The secretary of a limited co. who had neglected to enter in the register of mtges. a heritable bond, which had been granted by the co. before he became secretary, was not by reason of that omission disqualified from being appointed liquidator of the co.—

Sect. 36.—Winding up by court: Sub-sect. 8, A. (b), iii., (c), (d), & E

connected with a co. which require investigation the directors are not proper persons to be appointed liquidators; but where the conduct of the directors has been adopted by the shareholders, who have had full opportunity for objecting & inquiry, the ct. will not remove such directors who may have been appointed liquidators in a voluntary winding up.—*Re UNION ELECTRIC LIGHT & POWER CO., LTD.* (1885), 1 T. L. R. 234, C. A.

5931. Receiver for debenture-holders.]—Re LAND CO. OF AUSTRALASIA, LTD. (1893), 37 Sol. Jo. 784.

(c) Appointment of More than One Liquidator.

5932. Conduct of particular matter—May be given by court to particular liquidator.]—Re MIDLAND LAND & INVESTMENT CORPN., [1887] W. N. 58.

(d) Practice on Appointment.

5933. Appointment made at hearing of petition—By consent of all parties—Otherwise appointment settled in chambers.]—Re COMMERCIAL DISCOUNT CO., LTD., No. 5776, *ante*.

5934. —.]—Re LONDON, BOMBAY, & MEDITERRANEAN BANK, No. 5911, *ante*.

5935. Costs of contest as to appointment of liquidator.]—The ct. will in no case give the costs of a contest for the appointment of liquidators.—Re LONDON & NORTHERN INSURANCE CO., LTD. & COMPANIES ACTS (1868), 19 L. T. 144; 16 W. R. 965.

5936. Security—Surety's liability upon bond—Not entitled to receive notice of taking of accounts against liquidator—Right to attend if aware of taking of accounts—Reopening of accounts.]—In the winding up of cos., where the surety for a defaulting liquidator becomes liable upon his bond, it is not the practice to give notice to the surety of the taking of the accounts as against the liquidator; but if the surety becomes aware of the taking of the accounts & applies for leave to attend, such leave will be granted at his own expense.

H. was appointed liquidator in a winding up. The G. Society became his sureties for £3,000,

& for that purpose entered into a bond, which provided that the certificate of the chief clerk should be conclusive evidence as between all parties that the bond had been forfeited to the amount stated in the certificate. On the bkpcy. of H. a fresh liquidator was appointed in his place. The accounts of H., which were carried in & vouched without any notice having been given to the society, showed a probable deficit of £4,500. The society, on receiving notice of the date fixed for the final passing of the accounts, attended & asked to have them reopened in their presence. The ct. allowed the society to have the accounts reopened, on the terms that they should pay into ct. the whole of the £3,000 for which they were liable, together with £100 for the costs of such reopening, & should undertake to pay interest on the amount to be found due from them, & pay the costs of the application.—*Re BIRMINGHAM BREWERY, MALTING & DISTILLING CO., LTD.* (1883), 52 L. J. Ch. 358; 48 L. T. 632; 31 W. R. 415.

B. Position of Liquidator.

5937. Whether in better position than company.]—He [the liquidator] is appointed for the purpose of assisting the ct. in the winding up of a co., but in all his proceedings he appears to be merely substituted for the co. (LORD CHELMSFORD).

The rights of creditors against the shareholders of a co. when enforced by a liquidator must be enforced by him in right of the co. What is to be paid by the shareholders is to be recovered in that right. What is due to the co. is that only which is in fact recoverable by the co. (LORD WESTBURY).

If the Joint Stock Cos. Acts be thoroughly sifted, there will no doubt be considerable ground for coming to the conclusion when the proper time comes that the official liquidator, who in that capacity is bound to collect all the assets of the co. & distribute them by the direction of the ct. among the creditors, is in a position in which he may assert rights as against the co., & assume a position against the members of the co. which the co. itself possibly might not be in a position to assert (LORD HATHERLEY, C.).—*WATERHOUSE v. JAMIESON* (1870), L. R. 2 Sc. & Div. 29.

Annotations:—Consd. Re National Funds Assee. (1878), 10 Ch. D. 118, where JESSEL, M.R. agreed with the view

GILMOUR'S TRUSTEES v. KILMARNOCH HERITABLE PROPERTY INVESTMENT CO. (1883), 10 R. (Ct. of Sess.) 1221; 20 Sc. L. R. 811.—SCOT.

k. Person resident out of jurisdiction—Not appointed unless on special grounds.]—Application for appointment of a liquidator residing outwith the jurisdiction of the ct. refused on the ground that no adequate reason had been stated for appointing a person outwith the jurisdiction.—BABERTON DEVELOPMENT SYNDICATE, LTD. (1898), 25 R. (Ct. of Sess.) 654; 35 Sc. L. R. 499; 5 S. L. T. 342.—SCOT.

PART III. SECT. 36, SUB-SECT. 8.—A. (d).

5935 i. Costs of contest as to appointment of liquidator.]—As to the costs of the contest as to appointment of liquidator:—Held: one set of costs should be allowed to the shareholders & one to the creditors appearing on the petition, not including any costs occasioned by the contest, & costs must also be allowed to the petitioning creditor, those of the latter to include all reasonable disbursements connected with the holding of the meetings.—Re COMMERCIAL BANK OF

MANITOBA (1893), 9 Man. L. R. 342.—CAN.

l. Security—Left to be settled by master.]—In assigning to provincial cts. or judges certain functions under the Winding-up Act, Parliament intended that the same should be performed by means of the ordinary machinery of the ct. & by its ordinary procedure. It is no ground of objection to a winding-up order that the security to be given by the liquidator appointed thereby is not fixed by the order, but is left to be settled by a master.—SHOOLBRED v. CLARKE, Re UNION FIRE INSURANCE CO. (1890), 17 S. C. R. 265.—CAN.

m. — Surety's liability upon bond—Assessment of surety's liability—Appeal.]—After the assignee for the benefit of creditors of an incorporated co. had sold part of the assets & received the proceeds, he was appointed liquidator under the Winding-up Act & gave security by a bond which recited all the proceedings & orders, & was conditioned to be void if the liquidator should duly account for what he should receive or become liable to pay as liquidator:—Held: the funds & property in the hands of the assignee became vested in him as liquidator upon his appointment

as such, & the sureties were responsible for his subsequent misappropriation thereof.

The bond provided that the certificate of the master in ordinary of the amount for which the liquidator was liable should be sufficient evidence of liability as against the sureties, & should form a valid & binding charge against them:—*Held: the sureties had the right to appeal from the certificate in accordance with the usual practice of the ct.—Re ARMY & NAVY CLOTHING CO. OF TORONTO* (1901), 3 O. L. R. 37; 22 C. L. T. 11.—CAN.

n. Objection to suggested liquidator—Objection should be taken by counsel at the bar—Not by means of answers.]—Re ANDERSON & SONS (1917), 54 Sc. L. R. 524.—SCOT.

PART III. SECT. 36, SUB-SECT. 8.—B.

5937 i. Whether in better position than company.]—A liquidator is in no sense a subsequent purchaser for value, but represents the co. & acquires no rights as liquidator which the co. itself did not possess, save those which are given to him by the Winding-up Act.—HARRISON v. NEPISQUIT LUMBER CO. (1911), 11 E. L. R. 314.—CAN.

o. — On contract.]—A liquidator appointed in proceedings under the

of LORD HATHERLEY, C.; *Re Florence Land & Public Works Co.*, Nicol's Case, Tufnell & Ponsonby's Case (1885), 29 Ch. D. 421. *Reid. Re Appletreewick Lead Mining Co.* (1874), L. R. 18 Eq. 95; *Re London Celluloid Co.* (1888), 39 Ch. D. 190. *Mentd. Burkinshaw v. Nicholls* (1878), 48 L. J. Ch. 179; *Re Almada & Tiritto Co.* (1888), 38 Ch. D. 415; *Ooregum Gold Mining Co. of India v. Roper*, Wallroth v. Roper, [1892] A. C. 125; *Re Hemp Yarn & Cordage Co.*, Hindley's Case (1896), 3 Mans. 187; *Re Veuve Monnier et ses Fils, Ex p.*, Bloomenthal, [1896] 2 Ch. 525; *A.-G. for Canada v. Standard Trust Co. of New York*, [1911] A. C. 498.

5938. —.]—(1) The powers of a liquidator of a limited co. are more extensive than those of the co. prior to the winding up order; for instance, he can assert as against the members of the co. rights which the co. itself could not have asserted.

The arts. of assocn. of a limited insurance co. provided—art. 122—that “the directors might, without the sanction of a general meeting, pay interest at the rate of 5 per cent. per annum upon the paid-up capital.” The co. desiring to raise further capital, passed a resolution, empowering the directors, under 1867 Act, s. 27, to issue to members who had paid up the full amount of their shares, share warrants payable to bearer. Share warrants were issued accordingly, each warrant declaring that the bearer was entitled to interest at 5 per cent. per annum on the amount therein specified. The co. never having made any profits the interest on the warrants was from time to time paid to the holders of them out of capital by the directors with the express sanction of the general body of shareholders, & on the assumption that such payment was authorised by Art. 122. The co. having been ordered to be wound up, the liquidator applied by summons under 1862 Act, s. 165, that the directors might be ordered jointly & severally to pay to him the amount so paid for interest to the holders of the share warrants:—*Held*: (2) upon the literal construction of sect. 165 the liquidator was entitled to make the application independently of the question whether he, as representing the co., could sue its own agents, or whether he had an independent right to represent the creditors; (3) the directors had, in making payments to shareholders out of capital, acted *ultra vires* & committed a breach of trust, & they were therefore liable jointly & severally to make good the amount of such payments, but without prejudice to their right to recover from each shareholder the amount of capital he had received.—*Re NATIONAL FUNDS ASSURANCE Co.* (1878), 10 Ch. D. 118; 48 L. J. Ch. 163; 39 L. T. 420; 27 W. R. 302.

Annotations:—As to (2) *Reid. Re British Guardian Life Assce.* (1880), 14 Ch. D. 335. As to (3) *Folld. Re Exchange Banking Co.*, Flitcroft's Case (1882), 21 Ch. D. 519; *Re Oxford Benefit Building & Investment Soc.* (1886), 35 Ch. D. 502. *Distd. Leeds Estate Building & Investment Co. v. Shepherd* (1887), 36 Ch. D. 787. *Consd. Re Kingston Cotton Mill Co. (No. 2)*, [1896] 1 Ch. 331. *Folld. Moxham v. Grant* (1899), 68 L. J. Q. B. 283. *Reid. Wye Valley Ry. v. Hawes* (1880), 29 W. R. 177; *Guinness v. Land Corp. of Ireland* (1882), 22 Ch. D. 349; *Re Denham* (1883), 25 Ch. D. 752; *Liverpool Household Stores Asscn.* (1890), 59 L. J. Ch. 616; *Ammonia Soda Co. v. Chamberlain*, [1918] 1 Ch. 266.

Dominion Winding-up Act of a co. which has purchased goods under an unregistered conditional sale agreement providing for the retention of property & title in the vendor, can have no better title & no higher rights than the co. had, & the contract, though unregistered, being effective against the co., is also effective as against the liquidator, except that if there is an execution creditor of the co. the contract is null & void against the liquidator, to the extent that he stands in the place of, & is entitled to enforce the rights of, such execution creditor.—

Re NORTHERN CREAMERIES Co., LTD., DE LAVAL Co.'s CLAIM, [1921] 3 W. W. R. 355.—CAN.

p. Personal liability — To third party for breach of contract—*Removal & sale of goods not belonging to company.*—Pltf. claimed to have a cause of action against the liquidators of a corp. for the full price of goods alleged to have been wrongfully taken by the liquidators & sold after the making of the order for the winding up of the corp., whereby pltf. was deprived of the right of stoppage *in transitu*:—*Held*: the action was

5939. —.]—W. having applied for shares in a co., they were duly allotted to him; but owing to irregularities having shortly afterwards been discovered in the office of the manager to the co., W. & the directors had a private interview & in the result the directors rescinded their previous resolution allotting the shares to W., & returned the deposit he had paid on application. For five years W. was never treated as a shareholder in respect of these shares, but on the co. then going into liquidation, the liquidator sought to make W. liable in respect of the shares:—*Held*: (1) as by 1862 Act, s. 23, to constitute a shareholder a person must have agreed to become a shareholder & his name must be entered on the register, the liquidator was seeking for specific performance of the contract to take shares; he was in no better position than the co.; & the delay of five years was fatal; (2) the ct. was not satisfied that it would be just to place W.'s name on the register.—*Re WEST LONDON COMMERCIAL BANK, LTD., WHITELEY'S CASE* (1889), 60 L. T. 807; 1 Meg. 154.

5940. Represents company—On application to rectify register.]—The ct. will not in a winding up *ex mero motu* rectify the register. The application for that purpose must be made by some person whose claims can properly be adjudicated upon, & the ct. will have regard to all the circumstances of the case & the position of appct. Where an official liquidator was appct., & it appeared that the name of the proposed contributory had not been placed upon the register through the neglect & delay of the co. the ct. refused the application without dealing with the merits of the case as between the registered owner of the shares & the proposed transferee, upon the ground that the official assignee in such a case represents the co. only, & the merits of the case did not entitle the co. to move in the matter.—*Re JOINT STOCK DISCOUNT Co.*, SICHELL'S CASE (1867), 3 Ch. App. 119; 37 L. J. Ch. 373; 17 L. T. 363; 16 W. R. 292, L. J.

Annotations:—*Expld. Re Joint Stock Discount Co.*, Fyle's Case (1869), 4 Ch. App. 768. *Reid. Re Bank of Hindustan, China & Japan, Ex p. Kintrea* (1869), 5 Ch. App. 95; *Re Hercules Insce. Co.*, Lowe's Case (1870), L. R. 9 Eq. 589; *Re Hercules Insce. Co.*, Pugh & Sharman's Case (1872), L. R. 13 Eq. 566; *Re Land Credit Co. of Ireland*, Weikersheim's Case (1873), 8 Ch. App. 831; *Re Albion Assce. Soc.*, Winstone's Case (1879), 12 Ch. D. 239; *Re Clayton Mill Manufacturing Co.* (1887), 3 T. L. R. 798; *Bellerby v. Rowland & Marwood's S.S. Co.*, [1902] 2 Ch. 14. *Mentd. Re Shaw, Ex p. Piers* (1877), 46 L. J. Q. B. 394; *Trevor v. Whitworth* (1887), 12 App. Cas. 409.

5941. — To receive notice of assignment of debt due by company.]—Notice to an official liquidator of the assignment of a debt due from the co. is sufficient to perfect the assignment, & upon the subsequent bkpcy. of the assignor the debt does not vest in his assignee in bkpcy. as being in his order & disposition.—*Re BREECH-LOADING ARMOURY Co.*, WRAGGE'S CASE (1868), L. R. 5 Eq. 284.

5942. — In suit against strangers—Right of adverse party to discovery against liquidator.]—The

barred by the provisions of the Winding-up Act, R. S. C. c. 144, s. 133, the only remedy of pltf. under the sect. being by summary petition to the ct. & not by action, suit, etc. While the words of the sect. are general they should not be limited in their application, the clear intention being that claims either against the corp. or the liquidator in such case shall be dealt with in a summary way in order to prevent the assets being eaten up by litigation.—*CARSON & Co. v. MONTREAL TRUST Co.* (1915), N. S. R. 50.—CAN.

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official liquidator of a co. is in the position of a receiver or manager of partnership assets appointed by the ct. Where he represents the co. in a suit against strangers, or in a proceeding in the winding up against an alleged contributory, the adverse party has a right to the same discovery from him as from an ordinary litigant. But where the question is whether a past shareholder is to be placed on list B, & if so, what is the extent of his liability, that being a question which does not concern the co., the official liquidator is only bound to afford equal facilities to the shareholder & the creditors, but not to make discovery at the instance of either party.—*Re CONTRACT CORPN., GOOCH'S CASE* (1872), 7 Ch. App. 207; 41 L. J. Ch. 338; 26 L. T. 177; 20 W. R. 345, L. J.J.

Annotations:—Refd. Re Sir John Moore Gold Mining Co. (1877), 37 L. T. 242; *Re Leslie, R. v. Curzon* (1882), 46 L. T. 159.

5943. — Agreement by directors to forgo fees.]—All the directors of a co. in liquidation mutually agreed to forgo their respective claims to directors' fees then owing. The liquidator was a party to the agreement on behalf of the co. Subsequently the co. sued one of the directors for work done, & the director counterclaimed against the co. for his fees earned previously to the agreement:—*Held*: although there was no consideration for the agreement moving from the co., the fact of the liquidator being a party to it rendered it binding as between the director & the co.; & the agreement was, therefore, a good defence to the counterclaim.—*WEST YORKSHIRE DARRACQ AGENCY, LTD. v. COLERIDGE*, [1911] 2 K. B. 326; 80 L. J. K. B. 1122; 105 L. T. 215; 18 Mans. 307.

5944. Is officer of court.]—*Re MUTUAL SOCIETY*, No. 6199, *post*.

5945. Whether in fiduciary position towards company—Improper sale by liquidator.]—*SILKSTONE & HAIGH MOOR COAL CO. v. EDEY*, No. 6332, *post*.

5946. — Or merely agent of company—Assignment of lease.]—A covenant in a lease to a co. against assignment without the consent of the lessor is binding on the liquidator in a compulsory winding up of the co. There is no distinction for this purpose between a voluntary & a compulsory winding up.

The cases in bkptcy. in which it has been held that a trustee in bkptcy. can assign free from bkpt.'s covenant against assignment without

a. Validity of acts—Appointment subsequently discovered to be invalid—Calls by liquidator.]—The appointment of liquidators is to be deemed valid until the contrary is proved by legal proceedings. All acts done by liquidators are validated by Cos. Act, 1890, s. 67, up to the time that the invalidity of such liquidators has been established. Where liquidators, before the validity of their appointment had been challenged by legal proceedings, made call & subsequently applied for & obtained a balance order, although between the making of the call & the obtaining of the balance order they had been informed by a contributory that their appointment was invalid:—*Held*: all the proceedings taken & acts done by the liquidators were valid & binding.—*Re FRASER & CO., Ex p. JAMES* (1896), 22 V. L. R. 385.—**AUS.**

r. — — — — —.]—Where a liquidator whose appointment is laid settles a list of contributories & makes calls, a contributory sued on these calls is not estopped by delay from

impeaching the liquidator's title; but where all parties believed that the appointment was good, & have acted in that belief, the calls are validated by Cos. Act, 1882, s. 103. In respect to the validating effect of sect. 103, there is no difference between acts of internal & external management.—*Re EQUITABLE INSURANCE ASSOCN. OF NEW ZEALAND, SIMPSON'S CASE* (1893), 11 N. Z. L. R. 605.—**N.Z.**

s. Officer of court—Will not be compelled to give discovery in action—Unless in position of adverse litigant.]—An official liquidator cannot, as an officer of the ct., be called upon to make discovery unless he is representatively in the position of an adverse litigant to the party requiring the discovery. Where certain shareholders of an insolvent bank were suing the directors for negligence & misfeasance, & had made the bank debts for conformity without asking any relief against them, an application by the plffs. for leave to examine one of the liquidators or discovery before

licence depend on the circumstance that bkpt.'s leasehold interest vests in his trustee by operation of law, so that he is not an assign of bkpt. & consequently not bound by the covenant. These cases therefore have no application to a liquidator of a co., because the co.'s leasehold interest remains vested in the co. after a winding-up order & the liquidator acts on behalf of the co. in assigning it.—*Re FARROW'S BANK, LTD.*, [1921] 2 Ch. 164; 90 L. J. Ch. 465; 125 L. T. 699; 37 T. L. R. 847; 65 Sol. Jo. 679, C. A.

5947. Personal liability—For wages & work done for benefit of estate.]—Where an action was brought against an official liquidator personally, for wages, for work done for the benefit of the estate, an injunction restraining the action was refused.—*Re ORIGINAL HARTLEPOOL COLLIERIES CO.* (1882), 51 L. J. Ch. 508; 47 L. T. 116.

5948. — For rates—Assessed on property occupied only in his capacity of official liquidator.]—The official liquidator of a joint-stock co., which is in course of being wound up, is not personally liable for the rates assessed on premises of the co. which he occupies merely in his capacity of official liquidator.—*R. v. CURZON (MIDDLESEX JUSTICE), Re LESLIE* (1882), 46 L. T. 159; 47 J. P. 379; 30 W. R. 521.

5949. Validity of acts—Appointment subsequently discovered to be invalid.]—1862 Act, s. 67, which renders valid the acts of liquidators, etc., unduly appointed before the defect in their appointment is discovered, applies only to the case of an appointment invalidly made, & not to one where there is really no power of appointing a liquidator at all.—*Re BRIDPORT OLD BREWERY CO.* (1867), 2 Ch. App. 191; 15 L. T. 643; 15 W. R. 291, L. J.J.

Annotations:—Refd. Re Overend, Gurney, Ex p. Oakes & Peek (1867), 36 L. J. Ch. 413; *Re London Flour Co.* (1868), 19 L. T. 136; *MacConnell v. Prill*, [1916] 2 Ch. 57. **Mentd. Re London & Mediterranean Bank, Wright's Case (1868), L. R. 12 Eq. 334, n.; *Re Silkstone Fall Colliery Co.* (1875), 1 Ch. D. 38; *Stone v. City & County Bank* (1877), 3 C. P. D. 282.**

In misfeasance proceedings.]—See Sub-sect. 10, C. (g), *post*.

*C. Powers and Duties of Liquidator.**(a) In General.*

5950. Powers requiring sanction of court—When court will authorise its sanction being dispensed with.]—1862 Act, s. 95, defines the powers of the official liquidator to be exercised with the sanction of the ct.; sect. 96 enacts that the ct. may authorise the exercise of those powers

statement of claim was refused.—*HENDERSON v. BLAIN* (1891), 14 P. R. 308.—**CAN.**

t. — Will not be compelled to make affidavit of documents in action—If willing to give disclosure.]—In an action by the liquidator of a co., he being an officer of the ct. & subject to its directions, an order will not be made compelling him to make an affidavit of documents when he is willing to make disclosure.—*DOMINION TRUST CO. v. ROYAL BANK OF CANADA* (1919), 27 B. C. R. 166.—**CAN.**

PART III. SECT. 36, SUB-SECT. 8.—C. (a).

a. To give full account of liquidation.]—It is duty of liquidator in all cases to give full account of liquidation from its beginning.—*Re MERCANTILE FINANCE TRUSTEES & AGENCY CO. OF AUSTRALIA, LTD.* (1899), 25 V. L. R. 285.—**AUS.**

b. To pass accounts—Local liquidator—How discharged.]—The ct. has no jurisdiction to confirm the local

without its sanction or intervention; sect. 160 provides for compromise by the official liquidator with the sanction of the ct.:—*Held*: to support an order conferring these powers upon the official liquidator exclusively, there must be a *constat* justifying the exercise of a judicial discretion on the part of the judge.—*Re SOUTH-EASTERN OF PORTUGAL RY. CO., LTD.* (1869), 21 L. T. 220; 17 W. R. 809, L. J.J.

5951. ———.]—In appointing an official liquidator under a compulsory winding-up order, the ct., by consent, directed that all acts required or authorised by the Cos. Acts to be done by official liquidators, might be done by the official liquidator thereby appointed, without the previous sanction or interference of the ct.—*Re ROCHDALE PROPERTY & GENERAL FINANCE CO.* (1879), 12 Ch. D. 775; 48 L. J. Ch. 768; 41 L. T. 16.

Annotation:—*Apld. Re Watson*, [1891] 2 Ch. 55.

——— **Order in general terms.**]—*See BUILDING SOCIETIES*, Vol. VII., p. 510, Nos. 341, 342.

5952. ——— **Effect of exercise of power—Carriage of goods—Presumption that goods carried on original terms with company.**]—The N. co. was indebted to the M. railway co. for goods carried by the latter for the former. A petition was presented praying for a winding-up order of the N. co. That co. then sent other goods to the M. co. for carriage by them, after which an order was made to wind up the N. co. The M. co. then refused to deliver to the official liquidator of the N. co. the goods in their hands, claiming a lien on them for the debt previously due for the carriage of the other goods. The official liquidator of the N. co. then took out a summons in chambers to obtain delivery of the goods to him on payment of the money due for the carriage thereof:—*Held*: the summons must be dismissed, & the official liquidator of the N. co. must pay the debt due to the M. co. if he wished to obtain possession of the goods in their hands.

The official liquidator continued to send goods, & it must therefore be implied that he sent them under a continuation of the original contract between the parties (LORD ROMILLY, M.R.).—*Re NORTHFIELD IRON & STEEL CO., LTD.* (1866), 14 L. T. 695.

Annotation:—*Refd. Re Bushell, Ex p. G. W. Ry.* (1882), 52 L. J. Ch. 734.

5953. **Power to sell assets—For shares fully or partly paid-up—Validity of article conferring such power.**]—It is not competent for a co. by its arts. of assocn. to confer upon the liquidator in the event of the winding up of the co., whether voluntarily or otherwise, a power of selling the assets for shares fully or partly paid-up of another co., irrespective of the powers conferred upon him by the Cos. Acts & as an additional power thereto.—*PAYNE v. CORK CO., LTD.*, [1900] 1 Ch. 308; 82 L. T. 44; 48 W. R. 325; 16 T. L. R. 135; *sub nom. PAINE v. CORK CO.*, 69 L. J. Ch. 156; 7 Mans. 225.

Annotations:—*Consd. Doughty v. Lomagunda Reefs*, [1902] 2 Ch. 837; *Manners v. St. Davids Gold & Copper Mines*, [1904] 2 Ch. 593. *Refd. Bisgood v. Henderson's Transvaal Estates*, [1908] 1 Ch. 743; *Llewellyn v. Kasintoe Rubber Estates*, [1914] 2 Ch. 670.

5954. **Power to prove in bankruptcy of contributory—Effect of proving.**]—An order under

accounts of a foreign liquidator recognised by it, nor power to grant him a discharge in connection with the local administration. Where the master is satisfied that local creditors have been paid or secured on the basis of a liquidation & distribution plan

filed by such a foreign liquidator, the ct. will authorise the liquidator to remove the free balance of assets from its jurisdiction, if the master refuse to sanction such proceeding.—*Re GREATREX & SON, LTD.*, [1908] T. S. 201.—S. AF.

the Winding-up Acts is necessary to justify the official manager in proving under a bkpcy.; but proof having been made without such order against a bkpt. who had been committed for non-payment of a call:—*Held*: the bkpt. was entitled to his discharge.—*Re LIFE ASSURANCE TREASURY, Ex p. PEPPER* (1863), 1 Hem. & M. 755; 2 New Rep. 351; 8 L. T. 533; 11 W. R. 820; 71 E. R. 330.

——— **For future calls.**]—*See BANKRUPTCY & INSOLVENCY*, Vol. IV., pp. 302–304, Nos. 2833–2850.

5955. **Power to advance money collected as liquidator.**]—No liquidator of any co. which is being wound up by the ct., or otherwise, ought ever to advance any money come to his hands as liquidator, either on loan, or otherwise to make a profit thereof; & the practice is a most improper one.—*Re ANON.* (1866), 15 L. T. 170.

5956. **Power to execute deed of composition with company's debtor—Necessity for proof of liquidator's authority to assent.**]—A joint-stock co., in the course of being wound up compulsorily, appeared among the assenting creditors in the name of the official liquidator, G.:—*Held*: the debtor must prove that G. was in fact the official liquidator, & was duly authorised to assent to the deed.

Semble: the official liquidator must himself prove his appointment & authority to assent.—*DREW v. MYERS* (1869), 19 L. T. 740, N. P.

5957. **Power to assign lease—Necessity for consent of landlord.**]—*Re FARROW'S BANK, LTD.*, No. 5946, *ante*.

——— **In what circumstances covenant broken.**]—*See LANDLORD & TENANT*.

5958. **Power to deliver interrogatories—To person claiming to prove—Who has made affidavit of documents.**]—The liquidator of a co. is entitled to deliver interrogatories to a person, claiming to prove, who has made an affidavit of documents.—*Re ALEXANDRA PALACE CO.* (1880), 16 Ch. D. 58; 50 L. J. Ch. 7; 43 L. T. 406; 29 W. R. 70.

5959. **Right to possession of company's books & documents—Usually kept at registered office.**]—Books & documents belonging to a co., which, under the arts. of the co., or the provisions of the Cos. Acts, ought to be kept at the registered office of the co., ought not to be put into the possession of the solrs. of the co., & if they are, the solrs. cannot acquire a lien for costs over them, & on the winding up of the co. will be ordered to deliver them up to the liquidator.

The solrs. are entitled to a lien upon books & documents other than those that ought to be kept at the registered office of the co. if such books & documents came into their possession before the commencement of the winding up.—*Re ANGLO-MALTESE HYDRAULIC DOCK CO., LTD.* (1885), 54 L. J. Ch. 730; 52 L. T. 841; 33 W. R. 652; 1 T. L. R. 392.

(b) *Litigation by Liquidator.*

See 1908 Act, s. 151 (1) (a).

5960. **Sanction of court—Need not be stated in pleadings.**]—Where an official liquidator has obtained the sanction of the ct. that fact need not be stated in the pleadings.—*TURQUAND v. KIRBY*

PART III. SECT. 36, SUB-SECT. 8. C. (b).

c. *In whose name action brought—General rule.*]—Under the Canadian Winding-up Act, 1886, ss. 15, 31, a co. in liquidation retains its corporate

Sect. 36.—Winding up by court: Sub-sect. 8, C. (b) & (c).]

(1867), L. R. 4 Eq. 123; 36 L. J. Ch. 570; 16 L. T. 260; 15 W. R. 633.

Annotations:—**Folld.** *Ogilvie v. Currie* (1867), 16 L. T. 309. **Mentd.** *Re Agriculturist Cattle Insee., Baird's Case* (1870), 5 Ch. App. 725.

5961. — To be obtained before proceedings commenced—Even though liquidator ordered in debenture-holders' action to take proceedings—To get in uncalled capital.]—An order made in a debenture-holder's action, & also in the winding up of a co., directing the liquidator in general terms to call up the uncalled capital for the benefit of the debenture-holders, will not relieve the liquidator from the obligation of obtaining the sanction of the ct., or of the committee of inspection, under 1890 (Winding up) Act, s. 12, to the particular form of proceeding which he proposes to take, or from obtaining a similar sanction to the appointment of a solr. for the purpose of taking such proceeding. Such sanction must, as a rule, be obtained before the proceedings are instituted. The ct. has jurisdiction to give the sanction after the commencement of proceedings, but will not do so except in cases of urgency.—*Re LONDON METALLURGICAL CO.*, [1897] 2 Ch. 262; 66 L. J. Ch. 635; 76 L. T. 829; 45 W. R. 601; 13 T. L. R. 384; 41 Sol. Jo. 491; 4 Mans. 172.

5962. — Effect of not obtaining—Does not enable third parties to object to proceedings.]—1908 Act, s. 151, which enables a liquidator, in the case of a winding up in Ireland, to bring or defend legal proceedings with the sanction of the ct., does not confer on third parties any right to object to proceedings brought by a liquidator in the name of the co. on the ground that no such sanction has been obtained.—*DUBLIN CITY DISTILLERY, LTD. v. DOHERTY*, [1914] A. C. 823; 83 L. J. P. C. 265; 111 L. T. 81; 58 Sol. Jo. 413, H. L.

Annotation:—**Mentd.** *Wrightson v. McArthur & Hutchisons*, [1921] 2 K. B. 807.

5963. Extent of power—Includes power to serve bankruptcy notice—Form of bankruptcy notice.]—(1) By 1862 Act, s. 95, the official liquidator of a co. may "bring or defend any action, suit, or prosecution, or other legal proceeding, civil or

powers including the power to sue, although such powers must be exercised through the liquidator under the authority of the ct. The liquidator must sue in his own name or in that of the co., according to the nature of the action: in his own name where he acts as representative of creditors & contributories; in that of the co. to recover either its debts or its property.—*KENT v. COMMUNAUTÉ DES SŒURS DE CHARITÉ DE LA PROVIDENCE*, [1903] A. C. 220.—**CAN.**

d. —.]—An action by a liquidator of an insolvent co. against one of its shareholders to recover his share of bonds wrongfully distributed amongst them all by the co., by reason of which it became insolvent, is properly brought by the liquidator in his own name, it being an action in the interests of the creditors of the co.—*HYDE v. THIBAUDEAU* (1910), Q. R. 20 K. B. 200; 11 Q. P. R. 419; 16 R. L. N. S. 425.—**CAN.**

e. — As representative of all the shareholders.]—A shareholder has no right to sue on behalf of himself & all other shareholders of the co. after a winding up has begun as the liquidator alone represents the co.—*SHANTS v. CLARKSON* (1913), 24 O. W. R. 596; 4 O. W. N. 1303; 11 D. L. R. 107.—**CAN.**

f. Sanction of court—Necessity for where authorised by winding-up order—Subject to conditions which are satis-

fied.]—In an order for the winding up of a co., it was provided that the liquidators with the consent & approval of the inspectors appointed to advise in the winding up, might exercise any of the powers conferred upon them by the Winding up Act without any special sanction or intervention of the ct. Instituting or defending an action constituted one of the powers. The ct. had power to provide by an order subsequent to the winding-up order that the liquidator may exercise any of the powers conferred upon him by the Act without the sanction or intervention of the ct. The liquidators having brought an action, proceeding under the above order, the judge, at the trial held that it was necessary to obtain an order subsequent to the winding-up order:—**Held**: on appeal, the action having the consent & approval of the inspectors, was properly brought.—*KENDALL v. WEBSTER* (1910), 15 B. C. R. 268.—**CAN.**

g. — To proceedings in foreign court.]—Where liquidators of a limited co. prayed the ct. to ordain a former secretary, now resident in London, to appear for examination on oath & to produce books, papers, etc.; & also to pay & deliver money & other property of the co.; or alternatively, to authorise the petitioners to proceed against the said secretary in the English cts.; after discussion on the

criminal, in the name & on behalf of the co." :—**Held**: the power to serve a bkpcy. notice is included in the above enactment.

(2) A bkpcy. notice, served by the liquidator of a co. upon a judgment debtor of the co., was headed "*Ex p. N.*, liquidator of the M. Bank (Limited)"; it required the debtor to pay N., "the liquidator of the bank, the sum of £800, claimed by him as being the amount due on a judgment obtained by the bank":—**Held**: the notice was bad because it was not in the name of the co. in compliance with sect. 95.—*Re WINTERBOTTOM, Ex p. WINTERBOTTOM* (1886), 18 Q. B. D. 446; 56 L. J. Q. B. 238; 56 L. T. 168; 4 Morr. 5, D. C.

Annotations:—**As to** (2) **Folld.** *Re Bassett, Ex p. Lewis* (1895), 2 Mans. 177. **Distd.** *Re De Murrieta, Ex p. South American & Mexican Co.* (1896), 12 T. L. R. 238. **Generally, Mentd.** *Re Bates, Ex p. Lindsey* (1887), 4 Morr. 192; *Re Arkell, Ex p. Arkell* (1889), 6 Morr. 182; *Re Judgment Debtor*, [1908] 2 K. B. 474; *Re A Debtor*, [1911] 2 K. B. 718.

5964. — — —.]—The liquidator of a limited co. cannot present a bkpcy. petition on behalf of the co. in his own name, but must present it in the name of the co., though he may issue a bkpcy. notice in his own name on a judgment making a sum payable to him.—*Re BASSETT, Ex p. LEWIS* (1895), 43 W. R. 427; 39 Sol. Jo. 399; 2 Mans. 177; 15 R. 357.

5965. — — —.]—A bkpcy. notice served by a liquidating co. is not bad because it requires the debtor to pay or compound the debt to the satisfaction of the liquidator, though the liquidator is acting under a committee of inspection that must sanction any compromise.—*Re DE MURRIETA, Ex p. SOUTH AMERICAN & MEXICAN CO.* (1896), 12 T. L. R. 238; 40 Sol. Jo. 317; 3 Mans. 35, C. A.

Annotations:—**Mentd.** *Re Betts, Ex p. The Debtor* (1896), 3 Mans. 287; *Re Scott, Ex p. Paris Orleans Ry.* (1913), 58 Sol. Jo. 11.

5966. When proceedings may be taken by other persons in name of liquidator—In general.]—*HARRISON v. ST. ETIENNE BREWERY CO.* (1893), 37 Sol. Jo. 562.

— Proceedings to set aside amalgamation scheme.]—*See* No. 7068, *post*.

question of jurisdiction, the alternative crave of the prayer was granted authorising proceedings in the English cts.—*Re LIFE & HEALTH ASSURANCE ASSOCN., LTD. (LIQUIDATORS OF)*, [1909] 2 S. L. T. 252.—**SCOT.**

5966 i. When proceedings may be taken by other persons in name of liquidator—In general.]—Under Winding-up Act, R. S. C. 1906, c. 144, s. 131, further proceedings on an issue ordered to be tried between the liquidator of a co. being wound up under that Act & a person placed by him on the list of contributories, as to the liability of the latter, should be stayed when it is shown that an overwhelming proportion of both the shareholders & creditors of the co. & the liquidator himself desire that the claim against the contributory should be abandoned because of their belief that the proceeding would not be of benefit to them. The order for such stay, however, should contain a provision that any shareholder or creditor who is opposed to it may use the name of the liquidator or the co. in bringing the issue to trial on giving within a time limited a satisfactory indemnity to the liquidator against costs, in default of which only the issue to be dismissed.—*Re LONDON FENCE, LTD. (No. 1), Re BROWN, Re MERCHANTS BANK* (1911), 21 Man. L. R. 91.—**CAN.**

h. Action brought in company's instead of liquidator's name—Time for

5967. Bankrupt liquidator — Cannot continue action.—If trustee in bankruptcy declines to proceed.]—B. commenced an action on behalf of himself & all the other shareholders in a co., of which he was the liquidator. That action was dismissed & B. was adjudicated a bkpt. On the application of defts., as the official receiver declined to proceed with the action, the master made an order dismissing the action. On appeal to the judge, the master's order was affirmed:—*Held*: B. could not continue the action as liquidator of the co., & the order appealed from must be affirmed. If the validity of the judgment which pltf. alleged had been obtained against him by fraud was to be contested, it was a matter to be dealt with in the Bkpcy. Ct., as the right to continue the action was a chose in action, which was vested in the trustee, & therefore the bkpt. had no *locus standi*.—*BOALER v. POWER*, [1910] 2 K. B. 229; 79 L. J. K. B. 486; 102 L. T. 450; 26 T. L. R. 358; 54 Sol. Jo. 360; 17 Mans. 125, C. A.

5968. Necessity for stating liquidator's name & address.—In proceedings by the official manager of a joint-stock co., his name & address, as well as style, should be given.—*Re NATIONAL LAND CO., Re HERITAGE* (1854), Kay, App. xxix.; 23 L. J. Ch. 200; 22 L. T. O. S. 302; 2 W. R. 219; 69 E. R. 327.

5969. Order for directors to answer interrogatories obtained by defendant—Refusal of directors to answer—Whether liquidator entitled to apply for attachment.—An action having been brought by an official liquidator in the name of a co. that was being wound up by the Ct. of Ch., to recover arrears of calls, deft. obtained an order to administer interrogatories to certain directors of the co., & for a stay of proceedings. The directors not having answered the interrogatories an application was made by the official liquidator for an attachment against them:—*Held*: the directors did not cease to be officers of the co. on the commencement of the winding up & they were therefore bound to answer the interrogatories; & although the official liquidator was not the party who had obtained the order for the interrogatories, nor a party on the record, he was under the circumstances so interested in the matter as to be entitled to apply for an attachment.—*MADRID BANK v. BAYLEY* (1866), L. R. 2 Q. B. 37; 8 B. & S. 29; 36 L. J. Q. B. 15; 15 L. T. 292; 15 W. R. 159.

5970. Whether liable to make affidavit of documents.—*Re MUTUAL SOCIETY*, No. 6199, *post*.
Costs.—See Sub-sect. 8, E., *post*.

raising objection.—Action was brought to recover the price of an implement manufactured by pltf. co. A winding-up order had previously been obtained against pltf., & a liquidator appointed. An objection was taken at the trial, after the evidence had been given, that the action should have been brought in the name of the liquidator & with the approval of the ct., under R. S. C. c. 129, s. 31. The order authorising the liquidator to sue either in his own name or in that of pltf. was put in after the hearing:—*Held*: the objection was too late & must be overruled.—*SARNIA AGRICULTURAL IMPLEMENT MANUFACTURING CO. v. HUTCHINSON* (1889), 17 O. R. 676.—CAN.

k. Proceedings instituted before winding-up order—Liquidator not necessary party to continuation of action.—An action brought against an incorporated co. to set aside as fraudulent & preferential a chattel mtge. made to the co., was at issue when an

order was made for the winding up of the co. under the Dominion Winding-Up Act, R. S. C. 1906, c. 144, & a liquidator was appointed. By orders made by the ct., the liquidator was allowed to intervene & continue the defence of the action & pltf. was allowed to continue the action against the co. in liquidation:—*Held*: the liquidator of deft. co. was not a necessary or proper party to the action; & an order made upon the application of pltf. adding the liquidator as a deft., was set aside.—*COLE v. BRITISH-CANADIAN FUR & TRADING CO.* (1918), 42 O. L. R. 587.—CAN.

PART III. SECT. 36, SUB-SECT. 8, C. (c).

1. In general—Duty of liquidator to employ.—It is the duty of a liquidator to perform the business of the liquidation himself & only to employ a law agent in such matters as bring him into contact with the ct., & involve conveyancing, & in such other

(c) Employment of Solicitors.

See 1908 Act, s. 151 (1) (c).

5971. In general—Duty of liquidator to employ —On most reasonable terms obtainable.—It is the duty of an official liquidator, as an officer of the ct., to protect the assets of the co., & he should therefore obtain the assistance of a solr. on the most reasonable terms possible; in the event of his receiving notice of the solr.'s election to be remunerated according to the old system as altered by schedule 2, he should apply to the judge in chambers for advice before accepting such notice, in order that the question of the solr.'s remuneration may be properly looked into.—*Re UNITED KINGDOM LAND & BUILDING ASSOCN.* (1888), 40 Ch. D. 471; 58 L. J. Ch. 132; 60 L. T. 694; 37 W. R. 486.

Annotation:—*Refd. Re Evans*, [1905] 1 Ch. 290.

5972. — Necessity for sanction of court.—(1) The solr. appointed by the official liquidator has no claim against the official liquidator personally for the costs of the winding up, even though an order has been made on the application of the official liquidator that the costs should be taxed & paid by him to the solr.

(2) A solr. appointed according to 1862 Act, s. 97, is not any solr. whom the official liquidator may choose, but the latter is confined to the appointment of such a solr. as the ct. may sanction.—*Re ANGLO-MORAVIAN HUNGARIAN JUNCTION RY. CO., Ex p. WATKIN* (1875), 1 Ch. D. 130; 45 L. J. Ch. 115; 33 L. T. 650; 24 W. R. 122, C. A.

Annotations:—As to (1) *Refd. R. v. Curzon, Re Leslie* (1882), 46 L. T. 159; *Knowles v. Scott*, [1891] 1 Ch. 717; *Re E. G.*, [1914] 1 Ch. 927. *Generally, Refd. Re Rapid Road Transit Co.*, [1909] 1 Ch. 96.

5973. — Before proceedings begun.—*Re LONDON METALLURGICAL CO.*, No. 5961, *ante*.

5974. — Who should concur in selection of solicitor—Where more than one liquidator.—In the proceedings for winding up a co., the master made an order whereby he appointed A. & B. to be the official managers, & approved of Messrs. G. as the solrs., & directed Messrs. G. to attend him, & ordered all persons who had any writings relating to the co. to leave them at the office of Messrs. G. A motion to discharge this order, so far as it related to Messrs. G., on the ground that B. had not concurred with A. in the appointment of Messrs. G. as solrs., was granted.—*Re LONDON & MANCHESTER DIRECT INDEPENDENT RY. CO., BASS'S CASE, BARBER'S CASE* (1849), 1 De G. & Sm. 722; 18 L. J. Ch. 245; 13 L. T. O. S. 278; 13 Jur. 552; 63 E. R. 1267.

Annotation:—*Mentd. Re Universal Provident Life Asscn.*, *Ex p. Bell* (1856), 26 L. J. Ch. 137.

matters as justify him in obtaining legal advice for his guidance.—*REEKIE v. LEITH & EAST COAST SHIPPING CO. (LIQUIDATOR)*, [1911] S. C. 808.—SCOT.

m. Who should be employed—Independent solicitor.—It is preferable to have the proceedings under an order for winding up a co. under 45 Vict. c. 23, conducted by solrs. who are totally unconnected with the co. to be wound up.—*Re JOSEPH HALL MANUFACTURING CO.* (1884), 10 P. R. 485.—CAN.

n. — — — — ——In a proceeding for the winding up of a co., a solr. who is acting for claimants whose claims must be contested by the liquidators, cannot obtain the sanction of the ct. to his acting also as solr. for the liquidators. Nor will the ct. sanction the appointment of a special solr. to act for the liquidators in the matter of the contested claim. The winding up must be prosecuted by one disinterested solr., whose services will

Sect. 36.—Winding up by court: Sub-sect. 8, C. (c), (d), (e), (f), (g), & D.]

5975. Committee of inspection—Discharge of order obtained ex parte contrary to wishes of committee of inspection.]—Though 1908 Act, s. 151, enables a liquidator, in a winding up by the ct. to employ a solr. with the sanction either of the committee of inspection or the ct. he is not justified in obtaining from the ct., *ex p.* its sanction to the appointment of a solr. to whom he knows the committee of inspection object. He is bound by sect. 158 (1), to have regard to their directions, & if he thinks their directions unwise he can summon meetings of creditors or contributories to override them under sect. 158 (2).—*Re CONSOLIDATED DIESEL ENGINE MANUFACTURERS, LTD.*, [1915] 1 Ch. 192; 84 L. J. Ch. 325; 112 L. T. 535; 31 T. L. R. 91; 59 Sol. Jo. 234; [1915] H. B. R. 55.

Annotation:—Consd. Re Salmon, Ex p. Official Receiver, [1916] 2 K. B. 510.

5976. Who should be employed—Liquidator himself a solicitor—Not liquidator's partner—Unless he agrees to act without remuneration.]—The rule that a liquidator who is a solr. shall not employ his partner as his solr. in the winding up will only be departed from where the partner is willing to act as such solr. without any remuneration.—*Re UNIVERSAL PRIVATE TELEGRAPH CO.* (1870), 23 L. T. 884; 19 W. R. 297.

5977. Solicitor's costs—Who liable for—Official liquidator not personally liable—Even after order for payment of solicitor's taxed costs.]—*Re ANGLO-MORAVIAN HUNGARIAN JUNCTION RY. CO., Ex p. WATKIN*, No. 5972, *ante*.

5978. — Lien—What property subject to—File of proceedings in winding up & documents relating thereto.]—The solr. to an official liquidator has no lien for his costs on the file of proceedings in the winding up & the documents relating thereto. A solr. who had been employed by the official liquidator to the winding up & afterwards discharged, was ordered to deliver up all such documents to the official liquidator.—*Re UNION CEMENT & BRICK CO., Ex p. PULBROOK* (1869), 4 Ch. App. 627; 21 L. T. 46; 17 W. R. 946, L. J.

5979. — — — Money recovered by solicitor's exertions.]—The general principle that an official liquidator can retain no part of the co.'s estate without an order of the ct. applies equally to the lien of his solr. for costs on the co.'s money recovered by his exertions. Such moneys must, in the first instance, be paid into ct.—*Re UNION CEMENT & BRICK CO.* (1872), 26 L. T. 240; 20 W. R. 361.

5980. — — — Books not usually kept at company's registered office.]—*Re ANGLO-MALTESE HYDRAULIC DOCK CO., LTD.*, No. 5959, *ante*.

5981. — — — Proceeds of sale by auction

of company's stock-in-trade.]—A co. having assets in Scotland was ordered to be wound up. The solrs. of the official liquidator employed R., a Scottish solr. as their agent, to do certain work in Scotland relating to the realisation of the assets there. The stock-in-trade of the co. having been sold by auction, R. took proceedings in Scotland to attach the proceeds of sale in the hands of the auctioneers, & establish a lien on them for his costs. The agreement between the solrs. & R. provided that neither they nor the liquidator should be personally liable for R.'s remuneration, but that he should look only to the assets of the co.:—*Held*: R.'s proper course was to apply in the winding up for his costs, & the proceedings in Scotland must be stayed.—*Re HERMANN LOOG, LTD.* (1887), 36 Ch. D. 502; 58 L. T. 47; *sub nom. Re LOOG (HERMANN), LTD., RAMSAY'S CASE*, 35 W. R. 687.

(d) Sale of Company's Property.

See 1908 Act, s. 151 (2) (a), & Sect. 36, sub-sect. 10, F., *post*.

(e) As regards Negotiable Instruments.

See 1908 Act, s. 151 (2), (d).

5982. Acceptance of bills—Several liquidators—Bill should be signed by two or more liquidators—Unless one empowered to do so.]—Where a co. is being wound up, & several liquidators are appointed, it is necessary, in accepting a bill on the part of the co., that it should be signed by two or more of them, unless at the time of their appointment it be determined that the acceptance by one should be sufficient.—*Re LONDON & MEDITERRANEAN BANK, LTD., Ex p. LONDON & SOUTH-WESTERN BANK* (1867), 36 L. J. Ch. 807; 16 L. T. 691.

Annotation:—Apprvd. Re London & Mediterranean Bank, Ex p. Birmingham Banking Co. (1868), 3 Ch. App. 651.

5983. — — — Bills accepted by one liquidator invalid against company.]—The four liquidators of a co. resolved that one of them should have power to accept bills:—*Held*: this, as a general authority, would not be sufficient under 1862 Act, which requires the signature of two liquidators, but the four liquidators might authorise any one to sign any particular bill.

Bills accepted by one liquidator, in pursuance of this resolution:—*Held*: to be invalid against the co., but the holders of the bills could claim as creditors for money advanced.—*Re LONDON & MEDITERRANEAN BANK, Ex p. BIRMINGHAM BANKING CO.* (1868), 3 Ch. App. 651; 37 L. J. Ch. 905; 19 L. T. 193; 16 W. R. 1003, L. J.

Annotation:—Folld. Re London & Mediterranean Bank, Ex p. Agra & Masterman's Bank (1871), 6 Ch. App. 206.

5984. — — — Power of liquidators to authorise one of them to accept.]—The four liquidators of a co. passed a resolution that one of them

not be divided by the assertion of antagonistic claims.—*Re STARK (CHARLES) CO.* (1893), 15 P. R. 471.—CAN.

o. — — —.]—The fact that a solr. selected by a liquidator to assist him in the winding up of a co. under Winding-up Act has been acting up to the time of his selection for claimants in the winding up is not sufficient ground for the ct. to withhold approval of such solr. under sect. 35 of the Act; but before such approval the solr. must elect to relinquish acting for such claimants. It is not necessary for a liquidator in assigning reasons for a change of solrs. to go further than to allege that the change will be in the best interest of the winding up.—

Re WINDING-UP ACT, Re BANK OF VANCOUVER (IN LIQUIDATION), [1919] 3 W. W. R. 986.—CAN.

5977 i. Solicitor's costs—Who liable for—Official liquidator not personally liable.]—A solr. appointed by the liquidator of a co. under authorisation by the ct. pursuant to Winding-up Act, 1906, s. 38, must look to the assets of the co. in liquidation for his costs, & not to the liquidator personally; hence, as against a garnishing creditor of the solr., the liquidator may set off against the cost owing to the solr. a debt owing by the solr. to the co.—*MACINNES v. DALY & GWYNN*, [1921] 2 W. W. R. 869.—CAN.

p. — — — When paid—After taxation or sanction of court.]—A liquidator

should not pay a large bill of costs of a solr. without taxation or the sanction of the ct.—*Re PRUDENTIAL LIFE INSURANCE CO.*, [1920] 2 W. W. R. 628; 30 Man. L. R. 468.—CAN.

PART III. SECT. 36, SUB-SECT. 8, C. (e).

g. Endorsement of promissory note—No power after dissolution of company.]—Suit on a promissory note of debt in favour of a co.; the note was payable to the co. or order. The co. had gone into liquidation, & a liquidator had been duly appointed. Pltfs. had purchased, together with certain other assets of the co., the note sued on, but did not obtain the liquidator's endorsement of the note

should have power to accept bills of exchange. They afterwards resolved that bills to the amount of £7,500, which had been accepted to the credit of C., should be renewed. Fresh bills were accordingly drawn & accepted by one liquidator:—*Held*: the acceptances were invalid.

Qu.: whether, under any circumstances, liquidators can authorise one of their number to sign a bill in their name.—*Re LONDON & MEDITERRANEAN BANK, Ex p. AGRA & MASTERMAN'S BANK (1871)*, 6 Ch. App. 206; 24 L. T. 376; 19 W. R. 486, L. JJ.

5985. Negotiation of bills—By leave of court.]—The principles on which the ct. acts under 1862 Act, s. 95, considered.

At the time when an order was made for winding up a co., the co. was the holder of bills accepted by S. & Co. which would become payable in six months. At the same time S. & Co. were holders of bills drawn by the co., which the drawees, shortly before the winding-up order, had refused to accept:—*Held*: S. & Co. had no right to set off against each other the present liability of the co. under their dishonoured bills & the future liability of S. & Co. under their acceptances, nor any right to have the bills retained by the official liquidator, until a right to set off arose, but the official liquidator ought to be allowed to negotiate the bills accepted by S. & Co.—*Re COMMERCIAL BANK CORPN. OF INDIA & THE EAST, SMITH, FLEMING & CO.'S CASE, GLEDSTANES & CO.'S CASE (1866)*, 1 Ch. App. 538; 36 L. J. Ch. 333; 15 L. T. 148; 12 Jur. N. S. 806; 15 W. R. 78, L. JJ.

Annotations:—*Mentd.* *Watson v. Mid Wales Ry. (1867)*, L. R. 2 C. P. 593; *Re Barned's Banking Co., Kellock's Case, Re Xores Wine Shipping Co., Ex p. Alliance Bank (1868)*, 3 Ch. App. 769; *Re Vron Colliery Co. (1882)*, 20 Ch. D. 442; *Re Thurso New Gas Co. (1889)*, 42 Ch. D. 486.

5986. ———.]—Where a bank has issued a letter of credit, on the terms that the bills which they agree to accept are to be covered by bills of lading to a like amount, suspension of payment by the bank before there has been time for the letter of credit to be used is not a breach or repudiation of contract; inasmuch as permission might have been given to the liquidators under the winding up to negotiate the bills; & claim by the holder of the letter of credit, under 1862 Act, for damages for the alleged breach, disallowed.—*Re AGRA BANK, Ex p. TONDEUR (1867)*, L. R. 5. Eq. 160; 37 L. J. Ch. 121; 16 W. R. 270.

Annotation:—*Appld.* *Re Barber, Ex p. Agra Bank (1870)*, L. R. 9 Eq. 725.

(f) *As regards Unclaimed or Undistributed Assets.*

See 1908 Act, s. 224 (4).

5987. Duty to pay such assets into companies liquidation account—What are “undistributed assets.”]—In Dec., 1895, a limited co., being unable to pay the interest on its debentures, went into voluntary liquidation. On Apr. 15, 1896, the ct. sanctioned a scheme under Joint Stock Companies Arrangement Act, 1870 (c. 104), which

until after the dissolution of the co. was completed:—*Held*: the liquidator had no power to endorse the note to pltfs.—*KAMACHANDRA RAU v. KANDASAMI CHETTI (1895)*, 1 L. R. 18 Mad. 498.—IND.

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*r. How fixed—English scale.]—*The scale of remuneration of liquidators fixed in England will be followed here, not as absolutely binding, but as a guide.—*Re SAS-KATCHEWAN COAL MINING CO. (1890)*, 6 Man. L. R. 593.—CAN.

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*s. ———.]—*In fixing the liquidator's commission or compensation in the winding-up proceedings of an insolvent bank, it is proper to take into consideration amounts adjusted or set off, but not actually received by the liquidators; & in this case a commission of 2½ per cent having been allowed on the gross amount of moneys actually collected, a further commission of 1½ per cent on a sum of \$231,000, consisting of amounts adjusted or set off, was allowed. So far as possible, the amount allowed as compensation to liquidators in such winding-up proceedings should be

provided that the uncalled capital of the co. should be called up by the voluntary liquidators, & that they should thereout, by Sept. 1897, pay sums amounting to a dividend of 12s. 6d. in the £ to the debenture-holders, the balance being payable in 1902, & the interest being kept down in the meantime. Any surplus from calls, after payment of the first dividend, might be applied, according to the liquidators' discretion, for management & other expenses. The scheme also gave the liquidators power to borrow for the purpose of protecting & developing the assets. On the debenture-holders being paid off, the winding up was to be stayed, & the co. was to resume business. By a trust deed executed in pursuance of the scheme the liquidators covenanted to apply the proceeds of the call in accordance with the scheme. In May & Sept. 1897, the liquidators filed with the Registrar of Joint Stock Cos. the statements of account required by 1890 (Winding up) Act, s. 15; but they refused to pay into the Cos. Liquidation Account the surplus of calls shown by the accounts to be still in their hands or under their control, although directed to do so by the Board of Trade. On a motion by the Board for an order to comply with its direction:—*Held*: the money was not “undistributed assets” within 1890 (Winding up) Act, s. 15 (3), & the liquidators could not be called on to pay it into the Cos. Liquidation Account.

“Undistributed assets” mean undistributed assets capable of distribution in the winding up.—*Re LAND MORTGAGE BANK OF FLORIDA, [1898]* 1 Ch. 444; 67 L. J. Ch. 183; 78 L. T. 156; 46 W. R. 333; 14 T. L. R. 203; 42 Sol. Jo. 253; 5 Mans. 178.

5988. Effect of payment into Companies Liquidation Account—Whether “debt” due from official of Board of Trade to claimant.]—An unclaimed sum of money due to a shareholder in the winding up of a co. was paid by the liquidator of the co. into the Cos. Liquidation Account at the Bank of England under 1890 (Winding up) Act, s. 15:—*Held*: this did not create a “debt” due from the official of the Board of Trade who had the custody of the money to the shareholder so as to entitle a judgment creditor of the shareholder to obtain a garnishee order attaching the sum to answer the judgment debt.—*SPENCE v. COLEMAN, [1901]* 2 K. B. 199; 70 L. J. K. B. 632; 84 L. T. 703; 49 W. R. 516; 17 T. L. R. 469; 45 Sol. Jo. 483, C. A.

(g) *As regards Investment of Funds.*

5989. When ordered—Form of order.]—*Re MADRID & VALENCIA RY. CO. (1851)*, 16 L. T. O. S. 385.

D. Remuneration of Liquidator.

5990. How fixed—“Divisible assets.”]—(1) The regulation adopted by the judges of the Ct. of Ch. in 1868 for fixing the remuneration of official liquidators is not binding upon the judges,

evenly spread over the whole period of the liquidation, so as to ensure vigilance & expedition at all stages of the liquidation, as well as a proper distribution among the liquidators, when more than one.—*Re CENTRAL BANK, LYE'S CLAIM (1892)*, 22 O. R. 247.—CAN.

*in advance.]—*The remuneration to be allowed to the liquidators cannot be fixed at the time of their appointment, as notice of an application for that purpose seems to be required, & it would in any case be difficult to decide such a matter in advance.—*Re COMMERCIAL BANK OF*

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but is intended as a guide to them in exercising their discretion.

A limited co. being in course of liquidation, a new co. was formed, & a scheme was sanctioned by the ct., under which the new co. took over the assets of the old co., & in consideration thereof agreed to pay its debts & to allot shares to the old shareholders instead of their old shares, each share to be of the nominal value of £1, with 15s. paid up, & their market value was about 16s. The judge, in fixing the scale of remuneration of the liquidator, treated the value of the new shares allotted to the shareholders as assets of the old co. of the value of 15s. each:—*Held*: by the Court of Appeal, the judge had acted on a right principle in having regard to the value of the new shares in fixing the scale of remuneration, & they ought not to interfere with his discretion as to the value at which he estimated them.

(2) "Divisible assets" in the regulation means assets free to be divided among the creditors & shareholders, not assets actually divided.—*Re MYSORE REEFS GOLD MINING CO.* (1886), 34 Ch. D. 14; 56 L. J. Ch. 96; 55 L. T. 655; 3 T. L. R. 10, C. A.

5991. Special remuneration—Application for—Board of Trade & creditors should be given notice.]—*Re ESSEQUIBO RUBBER & TOBACCO ESTATES, LTD.* (1919), 148 L. T. Jo. 138.

5992. — Order for—Not impeached after lapse of time.]—*Re ESSEQUIBO RUBBER & TOBACCO ESTATES, LTD.* (1919), 148 L. T. Jo. 138.

5993. Priority—Postponed to solicitor's costs of winding up.]—In the winding up of a co. the costs of petitioner are the first charge upon the assets in priority to the costs of winding up, & in paying the costs of the winding up the bill of costs of the solr. employed is payable before the liquidator's private remuneration.—*Re MASSEY, Re FREEHOLD LAND & BRICKMAKING CO.* (1870), L. R. 9 Eq. 367; 39 L. J. Ch. 492; 22 L. T. 195; 18 W. R. 444.

Annotations:—*Expld. Re Trueman's Estate, Hooke v. Piper* (1872), L. R. 14 Eq. 278; *Re New York Exchange Co.*, [1893] 1 Ch. 371. *Consd. Re Meter Cabs*, [1911] 2 Ch. 557. *Refd. Re Anglo-Moravian Hungarian Junction Ry., Ex p. Watkin* (1875), 45 L. J. Ch. 115.

See, further, Sect. 36, sub-sect. 12, B. (a), post.

5994. Division of remuneration—Between joint liquidators.]—Joint liquidators are considered by

the ct. to be a species of partners, & in the absence of any arrangement between the liquidators themselves, the ct. will not divide the remuneration between them in proportion to the number of hours which they have respectively devoted to the business of the winding up.—*Re LANGHAM HOTEL CO., Ex p. LIQUIDATOR* (1869), 20 L. T. 163; 17 W. R. 463.

5995. — — — — —]—*Re TAWD VALE COLLIERY CO.* (1903), cited in Halsbury's Laws of England, Vol. V., p. 448, n.

E. Costs.**(a) In General.**

5996. Costs of litigation—General rule.]—*Re STAFFORDSHIRE GAS & COKE CO.*, No. 6014, *post*.

5997. — — — — —]—*Re WESTERN COUNTIES STEAM BAKERIES & MILLING CO.* (1896), cited in Halsbury's Laws of England, Vol. V., p. 450, n.

5998. — Action by liquidator—Instituted by direction of court.]—Some shareholders in a railway co. had instituted a suit in equity on behalf of themselves, & all other shareholders, with certain exceptions, against the directors. The master, to whom the winding up was referred, directed the official manager to continue & prosecute the suit. On the suit coming to a hearing, it was dismissed with costs, to be paid by the "official manager":—*Held*: the official manager was, under the order, liable to the costs personally.—*GRAND TRUNK RY. CO. v. BRODIE* (1853), 3 De G. M. & G. 146; 1 Eq. Rep. 64; 22 L. J. Ch. 514; 21 L. T. O. S. 2; 17 Jur. 309; 1 W. R. 260; 43 E. R. 58, L. J.

Annotations:—*Consd. Re Anglo-Moravian Hungarian Junction Ry., Ex p. Watkin* (1875), 1 Ch. D. 130. *Refd. Re Direct Exeter, Plymouth & Devonport Ry., Ex p. Woolmer* (1853), 22 L. J. Ch. 513; *Caldwell v. Ernest* (No. 2) (1859), 27 Beav. 42; *Consols Insee. Co.'s Official Managers v. Wood* (1865), 12 L. T. 170. *Mentd. Harford v. Rees* (1853), 9 Hare. App. II. lxxviii.; *Williams v. Salmond* (1855), 2 Jur. N. S. 251; *Williams v. Page* (1858), 24 Beav. 654; *Ernest v. Weiss* (1862), 2 Drew. & Sm. 561.

5999. — — — Form of order.]—Where, in a suit adopted & prosecuted by an official manager of a co. being wound up, an order is made as against the official manager, with costs to be paid to deft., the proper form of the order is to direct the costs to be paid by the official manager, naming him, without prejudice to his right to get back the costs, by application under the winding up, out of the estate of the co.—*CONSOLS INSURANCE CO. (OFFICIAL MANAGERS) v. WOOD* (1865), 2 Drew. &

MANITOBA (1893), 9 Man. L. R. 342.—**CAN.**

a. Basis of computation.]—The intention of Winding-up Act, R. S. C., c. 129, s. 28, is that the remuneration of liquidators is not necessarily to be increased because three are to be paid instead of one. The recompense for services is usually a percentage based on the time occupied, work done, & responsibility imposed & when fixed goes to the liquidator, & if more than one, is distributed amongst them.—*Re CENTRAL BANK OF CANADA* (1887), 15 O. R. 309.—**CAN.**

b. Division of remuneration—Between joint liquidators—Presumption in favour of equality.]—In dealing with the remuneration to be paid to liquidators appointed with equal powers under a statutory minute of meeting of a co. in liquidation, the ct. will disregard any alleged agreements or bargains of the liquidators *inter se*, & will, in terms of the Companies Act, 1862, s. 93, fix the total amount of remuneration due for the whole work, & distribute that amount in such proportions as it sees fit, the presumption being in favour of equality.—*CITY OF GLASGOW BANK (LIQUI-*

DATORS) (1880), 7 R. (Ct. of Sess.) 1196.—**SCOT.**

c. Application for — Should be supported by affidavit.]—An application by a liquidator to fix his remuneration should be supported by an affidavit showing the number of hours devoted by him and his clerks to the business of the liquidation. No charge can be made for time spent in procuring his own appointment or opposing his discharge.—*Re ASSINIBOINE VALLEY STOCK & DAIRY FARMING CO.* (1889), 6 Man. L. R. 184.—**CAN.**

d. Application to reduce — May be opposed by creditors—If their claims substantial.]—An application to reduce the monthly remuneration of a liquidator, on the ground that the liquidation is at a stage where his entire services are no longer required, will be refused upon opposition by creditors whose claims form a substantial portion of the aggregate.—*Re DOMINION TRUST CO.* (1918), 25 B. C. R. 537.—**CAN.**

e. Application for interim remuneration — Liability to be examined on.]—A mere statement exhibited by affidavit of a liquidator's receipts & disbursements is inadequate to support an application by him for interim

remuneration. On an application by a liquidator for an interim remuneration he may be examined on his affidavit and exhibits used thereon. The fact that a liquidator being examined as aforesaid is only vouching his accounts & claiming remuneration to a certain date, does not excuse him from being examined as to moneys received subsequent to such date.—*Re PRUDENTIAL LIFE INSURANCE CO.* (1920), 2 W. W. R. 628; 30 Man. L. R. 468.—**CAN.**

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5996 i. Costs of litigation—General rule.]—Where an action is brought by the liquidator of a co. in liquidation, in the name of the co., & he is not otherwise a party to it, he cannot be ordered personally to pay the costs of it.—*ONTARIO FORGE & BOLT CO. v. COMET CYCLE CO.* (1896), 17 P. R. 156.—**CAN.**

f. — Action by liquidator—How personal liability affected by leave of court to bring.]—Where an action is brought by the liquidator of co. in liquidation, in his own name, he is personally liable for costs; the fact

Sm. 353; 12 L. T. 170; 13 W. R. 492; 62 E. R. 655.

6000. ———.]—FREEHOLD LAND & BRICK-MAKING CO. v. SPARGO, [1869] W. N. 160.

6001. ——— Action defended by liquidator—In name & on behalf of company.]—The official liquidators of a co. who are defending an action in the name & on behalf of the co. are not liable for costs personally.—FRASER v. PROVINCE OF BRESCIA STEAM TRAMWAYS CO. (1887), 56 L. T. 771; 3 T. L. R. 587.

6002. ——— Application in suit pending in another branch of court—Jurisdiction of court to forbid payment of costs out of assets.]—The official manager of a co. which was being wound up before one Vice-Chancellor made a motion in a suit pending before another Vice-Chancellor:—*Held*: the latter judge had no jurisdiction to insert in the order on the motion a declaration that in the opinion of the ct. the official manager ought not to be allowed the costs out of the co.'s estate.—JONES v. JONES (1864), 2 D. G. J. & Sm. 294; 4 New Rep. 524; 34 L. J. Ch. 11; 10 Jur. N. S. 1166; 46 E. R. 388; *sub nom.* JONES v. JONES, *Ex p.* BRITISH PROVIDENT LIFE & FIRE ASSURANCE CO. (OFFICIAL MANAGER), 11 L. T. 172, L. J.

6003. ——— Company having conduct of administration action—Unsuccessful summons in action—Subsequent winding up of company.]—A co. having the conduct of an action for the administration of an estate obtained leave from the judge to prosecute a summons against B. & Co. on behalf of the estate. This summons was dismissed with costs. Shortly afterwards the co. became insolvent, & was ordered to be wound up. The estate which was being administered was insolvent, & the balance was not sufficient to pay the costs of either party to the summons:—*Held*: B. & Co. were entitled to be paid their costs out of the balance in priority to the co.—*Re* BLUNDELL, BLUNDELL v. BLUNDELL (1890), 44 Ch. D. 1; 59 L. J. Ch. 269; 62 L. T. 620; 38 W. R. 707, C. A. Administration proceedings generally, *see* EXECUTORS & ADMINISTRATORS.

6004. ——— Arbitration—Liquidator in position of defendant—Decision adverse to company.]—When in arbitration proceedings the liquidator of a co. is in the position of deft. & an award is

that he obtained leave from the ct. to sue will not relieve him of his liability in this respect.—JACKSON v. CANNON (1903), 10 B. C. R. 73; 23 C. L. T. 300.—CAN.

g. ——— Whether reimbursed out of company's assets.]—Under an order for winding up an insolvent co. under 45 Vict. c. 23, the proceedings to enforce the liability of shareholders must be taken by the liquidators, & not by the petitioner for the winding-up order. When proceedings are so taken by the liquidator, & are unsuccessful, costs may be awarded against him personally, leaving him to apply to be allowed such costs out of the assets of the co.—*Re* BOLT & IRON CO., HOVEDEN'S CASE (1884), 10 P. R. 434.—CAN.

6001 i. ——— Action defended by liquidator—In name & on behalf of company.]—If it is made to appear to the ct. that a liquidator has engaged upon behalf of the estate, in either external or internal litigation solely in the name of the liquidating co., or in his own name, resulting in costs being awarded against the co. or the liquidator, the ct. has power to order that the successful litigant be paid his costs in full out of the estate.—*Re* TRANS-CONTINENTAL TOWNSITE CO. (IN LIQUIDATION), PLAINVIEW FARMING

Co.'s CASE (1915), 33 W. L. R. 241.—CAN.

h. ——— Liquidator personally liable.]—After the action was at issue, an order was made by a Quebec ct. directing the winding up of deft. co. & appointing a liquidator. Pltf. then obtained leave from that ct. to proceed with this action. Afterwards the liquidator obtained an order from that ct. authorising him to intervene & defend the action in his own name as liquidator; he then applied to this ct. in the action, & obtained an order that the action proceed in the name of pltf. against the co. & the liquidator:—*Held*: the liquidator having thus intervened & made himself a party to the action, & having appeared by his counsel at the trial & contested the claim of pltf., the latter, having succeeded upon his claim, was entitled to a judgment for his costs both against the co. & the liquidator personally. This ct. had no authority to direct that the liquidator might reimburse himself out of the assets; that was a question for the ct. in Quebec having control of the assets.—BOYD v. DOMINION COLD STORAGE CO. (1897), 17 P. R. 468.—CAN.

k. ———.]—PERRIN v. ANTLERS REALTY CO. (1915), 8 W. W. R. 631.—CAN.

made against the co., the costs of the reference & award ought not to be ordered to be paid by the liquidator personally with a right to reimbursement out of the co.'s assets, but should be ordered to be paid by the co. If, however, the liquidator applies for & obtains the statement of a special case at the hearing of which he fails, he, as being then in the position of pltf., may be ordered to pay the costs of the hearing of the special case with a right to be recouped out of the co.'s assets.—VAN DEN HURK v. MARTENS (R.) & CO., LTD., [1920] 1 K. B. 850; 89 L. J. K. B. 545; 123 L. T. 110; 25 Com. Cas. 170.

Annotations:—*Mentd.* Saunt v. Belcher & Gibbons (1920), 90 L. J. K. B. 541; Hardy (London) v. Hillerns & Fowler, [1923] 1 K. B. 658.

— Proceedings in winding up.]—*See* Sub-sect. 8, E. (b), *post*.

6005. ——— Right to appeal—From order to pay costs personally.]—The principle laid down in *In re Silver Valley Mines*, No. 6025, *post*, that an official liquidator ordered to pay costs personally may appeal against such an order, extends to the case of an official receiver ordered to pay costs personally by a county ct. judge, & enables him to appeal against such an order to the Div. Ct.—*Re* RAYNES PARK GOLF CLUB, *Ex p.* OFFICIAL RECEIVER, [1899] 1 Q. B. 961; 68 L. J. Q. B. 529; 80 L. T. 388; 47 W. R. 496; 43 Sol. Jo. 383; 6 Mans. 316, D. C.

Annotations:—*Dbtd.* *Re* Tweddle, [1910] 2 K. B. 697. *Refd.* *Re* Williams, *Ex p.* Official Receiver (1913), 82 L. J. K. B. 459.

Costs of realisation & preservation of assets.]—*See* Sub-sect. 12, *post*.

Costs of solicitor employed by liquidator.]—*See* No. 5972, *ante*.

6006. Taxation of costs.]—Under an order that the costs, charges, & expenses of a retiring liquidator should be taxed & provided for, he carried in a bill showing disbursements & professional charges in separate columns. Amongst the latter he included & gave credit for two bills of party & party costs which had been taxed some time previously & paid to him by a third party. The registrar, on the ground that they had already been paid, struck out these items, with the result that the total amount of the costs was diminished. He proceeded to tax the bill on the footing that

—.]—Under a simple decree for expenses pronounced against the liquidators of a co. the liquidators are personally liable, but are entitled to relief out of the assets of the co. if there are any. Under a decree against the liquidators "personally" they have no right to recover from the co., & such a decree will be pronounced only where the liquidators have been personally blameworthy.—KILMARNOCK THEATRE CO. v. BUCHANAN, [1911] S. C. 607; 48 Sc. L. R. 547; 1 S. L. T. 225.—SCOT.

m. Costs of winding up—Priority of.]—The fees of the liquidator, of the inspectors, of their lawyers, costs of seizing party & rent during continuation of business all come within the purview of the words "in preference to all other claims," in R. S. C. 1906, c. 144, s. 92.—WELLAND HOTEL CO. & BEAUCHAMP v. MONTREAL CITY (1919), Q. R. 58 S. C. 130.—CAN.

n. ——— How taxed.]—In a winding-up matter the Official Liquidator was declared entitled to his costs without it being specified what mode of taxation should be followed. The ct. declined to direct the Official Liquidator's costs to be taxed as trustee's costs & ordered that they should be taxed as Official Liquidator's costs.—*Re* EAST HOLYFORD MINING CO. (1876), 10 I. R. Eq. 361.—IR.

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it must be treated as a whole & the disbursements & professional charges added together; & he thus reduced it by more than one-sixth. Items for drawing the bill of costs & attending the taxation were accordingly disallowed:—*Held*: the bills for party & party costs were properly included, & ought not to have been struck out of the bill; & for the purpose of ascertaining whether one-sixth had been taxed off the bill the amount of the professional charges only—omitting the disbursements—must be taken into consideration.—*Re MERCANTILE LIGHTERAGE CO., LTD.*, [1906] 1 Ch. 491; 75 L. J. Ch. 171; 94 L. T. 405; 54 W. R. 389; 22 T. L. R. 250; 50 Sol. Jo. 240.

Annotation:—*Consd.* *Cobbett v. Wood*, [1908] 2 K. B. 420.

(b) Of Proceedings in Winding up.

6007. General rule.—Where an application of an official liquidator is refused with costs, the order will be that the official liquidator do pay the costs.

Such will be the order in similar cases; the intention being that the liquidator shall pay the costs, whether he does or does not get them out of the estate (*per CUR.*).—*Re PARAGUASSU STEAM TRAMROAD CO., FERRAO'S CASE* (1874), 9 Ch. App. 355; 43 L. J. Ch. 482; 30 L. T. 211; 22 W. R. 386, L. J.J.

Annotations:—*Appld.* *Re Angerstein, Ex p. Angerstein* (1874), 30 L. T. 446. *Mentd.* *Re Paraguassu Steam Tram. Co., Adamson's Case* (1874), L. R. 18 Eq. 670; *Re Regent United Service Stores, Ex p. Bentley* (1879), 12 Ch. D. 850; *Re Barrow-in-Furness & Northern Counties Land & Investment Co.* (1880), 14 Ch. D. 400; *Re Land Development Assocn., Kent's Case* (1888), 39 Ch. D. 259; *Re Jones, Lloyd* (1889), 41 Ch. D. 159; *Re Johannesburg Hotel Co., Ex p. Zoutpansberg Prospecting Co.*, [1891] 1 Ch. 119; *North Sydney Investment & Tram. Co. v. Higgins*, [1899] A. C. 263.

6008. —.]—*Re HOUNSLOW BREWERY CO., LTD.* (1896), 12 T. L. R. 323; 40 Sol. Jo. 416.

Annotation.—*Refd.* *Re Tweddle*, [1910] 2 K. B. 67.

Liquidator ordered to pay petitioner's costs—Whether liquidator entitled to set off debts due from petitioner.—*See* Nos. 5750, 5751, *ante*.

6009. Failure of liquidator to supply court with necessary documents.—Where an official liquidator does not furnish the ct. with the necessary documents he will be allowed no costs.—*Re CHINA STEAMSHIP & LABUAN COAL CO., DRUMMOND'S CASE* (1869), 4 Ch. App. 772; 21 L. T. 317; 18 W. R. 2, L. J.

Annotations:—*Mentd.* *Re Heyford Co., Pell's Case* (1869), 5 Ch. App. 11; *Re Baglan Hall Colliery Co.* (1870), 5 Ch. App. 346; *Re Heyford Ironworks Co., Forbes & Judd's Case* (1870), 5 Ch. App. 270; *Re Empire Assco. Corpn., Leeke's Case* (1871), L. R. 11 Eq. 100; *Re Anglo-Moravian Hungarian Junction Ry., Dent's Case, Forbes' Case* (1873), 8 Ch. App. 768; *Re Pen'Alit Silver Lead Mining Co., Fothergill's Case* (1873), 8 Ch. App. 270; *Re Glory Paper Mills Co., Ex p. Dunster* (1894), 63 L. J. Ch. 885; *Re Wragg*, [1897] 1 Ch. 796.

6010. Applications by & against officers of company—Application for repayment of money received by solicitor—Application dismissed—Assets insufficient to pay both solicitor's & liquidator's costs.—The official liquidator of a co. applied by summons to compel A., formerly the co.'s solr., to repay a sum of money alleged to have been improperly received by him from the co. The application was dismissed with costs, to be paid

out of the assets, which were insufficient to pay both A.'s costs & the liquidator's costs in the winding up. On a summons taken out by A.:—*Held*: the costs must be paid to A. in full out of the assets, & he was entitled to priority, both for them & for the costs of the present application, over the liquidator's costs in the winding up.—*Re HOME INVESTMENT SOCIETY* (1880), 14 Ch. D. 167; 28 W. R. 576.

Annotations:—*Consd.* *Re Dronfield Silkstone Coal Co.* (No. 2) (1883), 23 Ch. D. 511; *Re Dominion of Canada Plumbago Co.* (1884), 27 Ch. D. 33; *Re Blundell, Blundell v. Blundell* (1890), 44 Ch. D. 1; *Re Staffordshire Gas & Coke Co.*, [1893] 3 Ch. 523; *Re London Metallurgical Co.*, [1895] 1 Ch. 758.

6011. — Summons to review taxation—Disallowed—Appearance by solicitor whose bill is under review.—A liquidator appearing, on a summons to review taxation disallowing certain costs of his solr., not by a separate solr., but by a solr. whose bill is under review, will not be allowed costs of the summons out of the estate.—*Re NATIONAL BANK OF WALES*, [1902] 2 Ch. 412; 71 L. J. Ch. 679; 87 L. T. 436; 50 W. R. 541; 46 Sol. Jo. 551.

6012. — Unsuccessful application by solicitor for order for call—To meet bill of costs—Liquidator's books imperfectly kept.—*Re DOVER, HASTINGS & BRIGHTON JUNCTION RY. CO., Ex p. A'BECKETT & SYMPSON & PRANCE*, No. 6062, *post*.

— **Misfeasance summons.**—*See* Nos. 6201, 6202, *post*.

6013. Applications by & against contributories—Application against contributory.—A member of a joint-stock co., & who had taken a very prominent part as chairman, etc., was desirous of retiring from the co., & transferred the shares which he held therein to two other persons, duly complying with all the requisitions to render such transfer legal. Considerable litigation took place before the judge's chief clerk as to his being a contributory or not, which finally ended in the ct. deciding that he ought never to have been put upon the list of contributories:—*Held*: the costs of such litigation should be paid in the first instance by the official assignee, who had originated the litigation, & whether he could or could not recoup himself the amount of those costs as against the assets of the co., was immaterial.—*Re KILBRICKEN MINES CO., LIBRI'S CASE* (1857), 30 L. T. O. S. 185.

Application by contributory to be struck off list—Application successful—Assets insufficient.—(1) An application by certain persons to be struck off the list of contributories of a co. in liquidation having been successful, the liquidator, who had opposed the application, was ordered to pay their costs out of the assets of the co. The assets in the hands of the liquidator, including calls made & recovered subsequently to the date of the order, were insufficient to satisfy both appcts.' costs & the costs of the liquidation:—*Held*: appcts.' costs were payable in priority to the costs of the liquidation other than the liquidator's costs of realisation.

(2) As a general rule a liquidator who fails in litigation should be ordered to pay costs without regard to the question whether the assets are

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o. Against shareholders—With view to include in list of contributories—Costs allowed out of estate.—A liquidator who was justified in his attempt to place applts. upon the list of contributories was allowed his costs out

of the estate.—*Re MODERN HOUSE MANUFACTURING CO., DOUGHERTY & GOUDY'S CASE* (1913), 28 O. L. R. 237; 4 O. W. N. 861; 12 D. L. R. 217.—**CAN.**

p. — — — — —.—An unsuccessful application by an official liquidator to place certain shareholders upon the list of contributories having

been *bonâ fide* made in the liquidation of the co., the ct. ordered that the cost of each side should be paid as a first charge out of the estate.—*Re WEST HOPETOWN TEA CO.* (1889), 1 L. R. 11 All. 349.—**IND.**

q. Against director for misfeasance—Duty of liquidator—Where assets insufficient to cover costs.—Where

sufficient to reimburse him.—*Re STAFFORDSHIRE GAS & COKE CO.*, [1893] 3 Ch. 523; 63 L. J. Ch. 68; 69 L. T. 376; 9 T. L. R. 654; 1 Mans. 334; 8 R. 365.

Annotation:—*As to (2) Overd.* *Re Bolton, Salisbury-Jones & Dale's Case*, [1895] 1 Ch. 333.

6015. ————.]—An application by certain persons to be struck off the list of contributories of a co. in liquidation was opposed by the liquidator & was refused with costs; but an appeal from such refusal was allowed with costs above & below. The assets of the co. were insufficient for payment of the costs:—*Held*: appcts. were entitled to costs only out of the assets of the co., & not against the liquidator personally.

In re Staffordshire Gas & Coke Co., No. 6014, *ante*, *overd.*—*Re BOLTON (R.) & Co., SALISBURY-JONES & DALE'S CASE*, [1895] 1 Ch. 333; 64 L. J. Ch. 285; 72 L. T. 171; 2 Mans. 221; 12 R. 177, C. A.

Annotations:—*Distd.* *Re Bowling & Wilby* (1895), 64 L. J. Ch. 427. *Mentd.* *Channel Collieries Trust v. St. Margaret's, Dover & Martin Mill Light Ry.* (1914), 84 L. J. Ch. 28.

6016. Applications by & against creditors—Petition for payment out—Money paid into court by debtor company.—Money owed by a co. was paid into ct. On petition for payment out, the liquidator was allowed costs of appearance, but not costs incurred previously to payment in investigating the title of rival claimants.—*Re BONELLI'S ELECTRIC TELEGRAPH CO., COOK'S CLAIM (No. 2)* (1874), L. R. 18 Eq. 656; 44 L. J. Ch. 207.

— **Proof of debt.**—*See* Sub-sect. 11, *post*.

(c) *Where Winding-up Order Discharged or Invalid.*

6017. No costs allowed to liquidator—Out of assets in subsequent winding up.—An official manager appointed by the Ct. of Ch. in a matter in which it had no jurisdiction is not entitled to his costs out of the assets of the co. when properly in course of winding-up.—*Re PLUMSTEAD WATERWORKS CO., LTD., Ex p. HARDINGE* (1862), 1 New Rep. 40; 32 L. J. Ch. 145; 7 L. T. 550; 8 Jur. N. S. 1140; 11 W. R. 99, L. JJ.

6018. Official liquidator allowed his costs as ministerial officer of court—& authorised to make call for that purpose.—The assocn. was formed for the mutual insurance of ships, & consisted of eighty members, but was not registered. A winding-up order was obtained. Special rate policies had been issued, but not in the form required by law. Great expense was incurred in ascertaining the amount payable to the policy holders, but it was subsequently decided by the M.R., & affirmed by the Ct. of Appeal, that the winding-up order ought not to have been made, & that the policy holders could claim nothing. The official liquidator applied to the ct. for a call to be made on the contributories for the payment of debts & of costs of liquidation. The application was opposed on the ground that the individuals by whom each debt was incurred, & not the assocn., as such, were liable:—*Held*: as the assocn. had been wound up as one assocn., the official liquidator was only the ministerial officer of the ct. he was entitled to his costs, & the call must be paid.—*Re ARTHUR AVERAGE ASSOCN.*

(1876), 3 Ch. D. 522; 45 L. J. Ch. 346; 34 L. T. 388; 24 W. R. 514.

Annotation:—*Folld.* *Re Queen's Average Assocn., Ex p. Lynes* (1878), 38 L. T. 90.

Insurance companies generally, *see* Part V., *post*.

(d) *On Appeals.*

6019. Unsuccessful appeal by liquidator.—Where, on an appeal, the official liquidator supports unsuccessfully the decision of the ct. below, his costs of the appeal will be allowed out of the estate—where he appeals & is unsuccessful it will be left to the ct. below to determine whether they shall come out of the estate.—*Re PERUVIAN RYS. CO., CRAWLEY'S CASE, ROBINSON'S CASE, INTERNATIONAL CONTRACT CO.'S CASE* (1869), 4 Ch. App. 322; 20 L. T. 96; 17 W. R. 454, L. JJ. *Annotations*:—*Mentd.* *Re Land Shipping Colliery Co., Ex p. Harwood, Gull, Geary & Stafford* (1869), 20 L. T. 736; *Re British & American Steam Navigation Co., Ward's Case* (1870), L. R. 10, Eq. 659; *Re Disdori* (1870), 23 L. T. 694; *Re International Contract Co. Levita's Case* (1870), 39 L. J. Ch. 673.

6020. ———.]—The appeal of an official liquidator of a co. seeking to settle a resp. upon the list of contributories being dismissed with costs, resp.'s costs will, as a rule, be ordered to be paid by the official liquidator & not out of the estate.—*Re UNITED PORTS & GENERAL INSURANCE CO., BECK'S CASE* (1874), 9 Ch. App. 392; 43 L. J. Ch. 531; 30 L. T. 346; 22 W. R. 460, L. JJ.

Annotations:—*Mentd.* *Re United Ports & General Insee., Nelson's Case*, [1874] W. N. 197; *Re Railway Time Tables Publishing Co., Ex p. Sandys* (1889), 42 Ch. D. 98; *Re Homp, Yarn & Cordage Co., Hindley's Case*, [1896] 2 Ch. 121; *Re Veuve Monnier, Ex p. Bloomenthal*, [1896] 2 Ch. 525.

6021. ———.]—Where an official liquidator unsuccessfully appeals against a judge's decision he must personally pay the costs of the appeal.—*WARNE v. NEW BATTERSEA-PARK LAUNDRY CO.* (1885), 1 T. L. R. 248, D. C.

6022. Liquidator supporting unsuccessful appeal.—*Re PERUVIAN RYS. CO., CRAWLEY'S CASE, ROBINSON'S CASE, INTERNATIONAL CONTRACT CO.'S CASE*, No. 6019, *ante*.

6023. Liquidator appearing as neutral party.—When a liquidator is brought before the Ct. of Appeal as a neutral party, his costs should as a rule be allowed out of the estate, but the Ct. of Appeal will make no order on the subject, but will leave the matter to the discretion of the ct. below.—*Re WHEAL VYVYAN MINING CO., WESTCOMB'S CASE* (1874), 9 Ch. App. 553; 43 L. J. Ch. 599; 22 W. R. 699; *sub nom.* *Re WHEAL VYVYAN MINING CO., Ex p. WESTCOMB*, 30 L. T. 669, L. JJ.

6024. Liquidator attending with books in London—Appeal from Stannaries Court.—On an appeal from an order of the Stannaries Ct. in the winding up of a co., the costs of the liquidator attending in London with the books were allowed, but with a suggestion as to an amendment of the practice.—*Re NATIVE IRON ORE CO., Ex p. ELPHINSTONE* (1876), as reported in 24 W. R. 503, C. A.

Annotations:—*Mentd.* *Re International Pulp & Paper Co., Knowles' Mortgage* (1877), 6 Ch. D. 556; *Re Globe New Patent Iron & Steel Co.* (1879), 48 L. J. Ch. 295; *Re South Durham Iron Co., Smith's Case* (1879), 11 Ch. D. 579; *Wright v. Horton* (1887), 12 App. Cas. 371; *Re Kingston Cotton Mill Co.* (1895), 44 W. R. 210.

6025. Liquidator appealing without leave.—(1) On July 29, 1881, a petition was presented to wind up a co. On the same day an order was made by Bacon, V.-C., on an application by A.,

misfeasance proceedings are unsuccessfully instituted against a director of a co. in liquidation & the assets of the co. are insufficient to meet the cost of

liquidation, including the costs of the misfeasance proceedings, the liquidator must under Act 31 of 1909, s. 133, file a contribution account similar

to that required by Law 32 of 1916, s. 93, in the case of insolvency.—*STANDARD BANK v. B. & C. SYNDICATE* (1918), T. P. D. 470.—S. AF.

Sect. 36.—Winding up by court: Sub-sect. 8, E. (d)
), F. & G.]

that his name should be taken off the register of shareholders & his money returned to him. This order was made in ignorance that a winding-up petition had been presented, & was drawn up as of Aug. 24, 1881. On Aug. 26 a winding-up order was made by Hall, V.-C. A. claimed as a creditor for the moneys ordered to be refunded to him, & his claim was allowed. The liquidator was advised he ought to obtain a decision on the question whether V.-C. Bacon's order was right; he thereupon took out a summons to have the claim of A. to rank as a creditor disallowed. The judge, on June 24, 1882, dismissed the summons as misconceived, since he had no jurisdiction to disturb V.-C. Bacon's order, & refused to give the liquidator his costs out of the estate. The liquidator on June 29, took out a summons for leave to appeal against V.-C. Bacon's order of Aug. 24, 1881, & the judge's order of June 24, 1882. The judge dismissed this summons with costs, refusing the liquidator his costs out of the estate. The liquidator applied to vary this order:—*Held*: an official liquidator is a person who as a general rule is entitled to his costs out of the estate, & under Ord. 55 an appeal would lie; (2) as the application of June 24 was a manifest mistake it was competent to the judge below to refuse the liquidator his costs of it, & the Ct. of Appeal would not interfere with his decision.

(3) A liquidator, though in some sense a trustee, is a paid agent bound to discharge his duties with reasonable care & skill, & may be deprived of costs for a mistake which would not be sufficient to disentitle an ordinary gratuitous trustee to costs:—*Held*: a liquidator who applies for leave to appeal from an order is as a general rule entitled to the costs of the application, but they will be refused if the appeal would be frivolous; (4) if the application of June 29 had only been for leave to appeal against the order of June 24, 1882, the Ct. of Appeal would not have interfered as to the costs, but an application for leave to appeal against the order of Aug. 24, 1881, was reasonable, & as the including in the application liberty to appeal against the other order did not increase the costs, the liquidator must be allowed his costs of that application out of the estate.

Leave to appeal against the order of Aug. 24, 1881, so as to entitle the liquidator to costs in any event, was, however, refused on the ground of lapse of time.

(5) A liquidator may appeal without leave of the judge, but does so at his own risk as to costs. The ordinary practice of the Ct. of Appeal is not to order the liquidator's costs to be paid out of the estate, or refuse them, but to leave the matter in the hands of the judge controlling the winding up.—*Re SILVER VALLEY MINES* (1882), 21 Ch. D. 381; 47 L. T. 597; 31 W. R. 96, C. A.

Annotation:—As to (5) *Apprvd.* Dublin City Distillery v. Doherty, [1914] A. C. 823.

PART III. SECT. 36, SUB-SECT. 8.—
E. (e).

r. When ordered—Intervening shareholder out of jurisdiction.]—An order was made by the ct. delegating the powers exercisable by the ct. for the purpose of winding up a co., to a referee, pursuant to R. S. C. c. 129, s. 77, as amended by 52 Vict. c. 32, s. 20:—*Held*: power was delegated to the referee to order security for costs & to stay proceedings till security should be given by a shareholder resident out of the jurisdiction, who

intervened.—*Re SARNIA OIL CO.* (1891), 14 P. R. 335.—CAN.

PART III. SECT. 36, SUB-SECT. 8.—F.

s. Who may apply for—Liquidator himself—Supported by majority of creditors—Unopposed application.]—*GARBEL HAEMATITE CO., LTD., PETITIONER (LIQUIDATOR OF)* (1877), 14 Sc. L. R. 637.—SCOT.

6030 i. Grounds for—Wishes of large majority of creditors—To save expense—Appointment of other liquidator willing to act without remuneration.]—An ap-

(e) *Security for Costs.*

6026. When ordered—Misfeasance summons.]—*Re POWELL (W.) & SONS*, No. 6201, *post*.

6026a. ———.]—*Re STRAND WOOD CO., LTD.*, No. 6202, *post*.

In actions by & against companies.]—See Sect. 33, sub-sect. 13, *ante*.

F. Removal of Liquidator.

See 1908 Act, s. 149 (6).

6027. Who may apply for—Contributory in arrear with call—Liability to pay disputed.]—The rule that a contributory who has not paid a call cannot present a winding-up petition, applies also to applications under the winding up, e.g., for the removal of the liquidator, & therefore, a summons for the removal of a liquidator, by a person who had, by an order of the ct., been made a contributory, but who intended to appeal from that order, was dismissed, on the ground above stated, although he offered to pay the amount of the call into ct. to abide the result of the decision of the Ct. of Appeal as to its validity.—*Re NORWICH PROVIDENT INSURANCE SOCIETY, Re HESKETH* (1879), 49 L. J. Ch. 187; 41 L. T. 673; *sub nom. Re NORWICH PROVIDENT INSURANCE CO., Ex p. HESKETT*, 28 W. R. 272.

6028. Grounds for—“On cause shown.”]—(1) The jurisdiction of the ct. to remove a liquidator under 1862 Act, ss. 93, 141, “on due cause shown,” is not confined to cases where there is personal unfitness in the liquidator. Whenever the ct. is satisfied that it is for the general advantage of those interested in the assets of the co. that a liquidator should be removed, it has power to remove him, & appoint a new one.

(2) A liquidator who has been removed by a judge may appeal against his removal.—*Re EYTON (ADAM), LTD., Ex p. CHARLESWORTH* (1887), 36 Ch. D. 299; 57 L. J. Ch. 127; 57 L. T. 899; 36 W. R. 275; 3 T. L. R. 738, C. A.

Annotation:—As to (1) *Appld.* *Re Rubber & Produce Investment Trust*, [1915] 1 Ch. 382.

6029. ——— No personal unfitness shown—“Professional” liquidator not removed in favour of “lay” liquidator—Willing to act gratuitously.]—*Re CIVIL SERVICE & GENERAL STORES*, [1884] W. N. 158.

6030. ——— Wishes of large majority of creditors—To save expense—Appointment of “lay” liquidators willing to act without remuneration.]—A co. was insolvent, & the secured creditors held good security. There were no calls to be made. After the judge in chambers had appointed an accountant official liquidator, he discharged his own order upon motion made in ct. & supported by a large majority of the unsecured creditors, who wished to nurse the assets & to save the expense of a professional accountant; & two gentlemen in business, who were not accountants, being willing to act as official liquidators without remuneration, were appointed accordingly.—*Re LAND FINANCIERS' ASSOCN.* (1878), 10 Ch. D. 269; 27 W. R. 224.

plication to remove a liquidator & appoint others was granted upon the grounds, that creditors to the amount of \$29,123.23 out of a total of \$29,451.39 requested the change; that the proposed liquidators would act without remuneration, & that the business connection of one of the proposed liquidators would be of value to the co.—*Re ASSINIBOINE VALLEY STOCK & DAIRY FARMING CO.* (1889), 6 Man. L. R. 105.—CAN.

t. ——— Inadvertent appointment as permanent—In winding-up order.]—

6031. — Disagreement as to conduct of winding up—Jeopardy to interests of creditors.]—A winding-up order was made on a contributories' petition containing serious charges of misfeasance against the directors, & a liquidator & committee of inspection nominated by the contributories were appointed with the view of making a thorough investigation. At that time the co. was apparently solvent with a balance for the contributories which might be increased by misfeasance proceedings. Subsequently, however, a very heavy claim was admitted & it was found that the co., notwithstanding the amount possibly recoverable in misfeasance proceedings, was hopelessly insolvent. The liquidator & committee of inspection, acting quite *bona fide* & in pursuance of what they believed to be their duty under the order appointing them, continued to treat the liquidation as a contributories' liquidation & proposed to spend the creditors' assets in misfeasance proceedings against the wishes of the creditors. The creditors applied to remove the liquidator & the committee of inspection:—*Held*: the liquidation having become a creditors' liquidation since the order to compulsorily wind up the co., the creditors were the sole persons interested, & were entitled to decide whether the small remaining assets should be used in misfeasance proceedings against the directors, & "due cause" had been shown for the removal of the liquidator within 1908 Act, s. 149 (6), & there should be a reference to chambers to appoint some one in his place.—*Re RUBBER & PRODUCE INVESTMENT TRUST*, [1915] 1 Ch. 382; 84 L. J. Ch. 534; 112 L. T. 1129; 31 T. L. R. 253; [1915] H. B. R. 120.

6032. Insisting on continuing proceedings against wishes of creditors—Company insolvent.]—The liquidator of a co., the assets of which are clearly insufficient for the payment of the debts, will be removed on the ground of insisting on continuing proceedings against the will of the majority of the creditors.—*Re TAVISTOCK IRONWORKS CO.* (1871), 24 L. T. 605; 19 W. R. 672.

6033. Effect of—Absconding liquidator—Vesting order under Trustee Act in new liquidator.]—After an order had been made for the compulsory winding up of a co. A. was appointed official liquidator. A. afterwards absconded & he was removed from the post of official liquidator, & in his place B. was appointed official liquidator. It was then found that a sum of consols, part of the assets of the co., was standing in A.'s name as official liquidator. An application under Trustee Act, 1850 (c. 60), ss. 22 & 43, was therefore made by motion *ex p.* for an order to vest such sum of consols in B. as official liquidator. A. had become

bkpt. & could not be found:—*Held*: the ct. had jurisdiction to make the order asked for upon motion; but except in simple cases like the present, the application should be made by petition.—*Re CAPITAL FIRE INSURANCE ASSOCN., LTD.* (1886), 55 L. T. 633.

6034. — On retainer of solicitor.]—I apprehend that when a solr. has been properly retained on behalf of a co. in liquidation his retainer is not revoked by the removal of the particular liquidator who retained him (WRIGHT, J.).—*R. v. LONDON (LORD MAYOR), Ex p. BOALER*, [1893] 2 Q. B. 146; 63 L. J. M. C. 29; 57 J. P. 633; 42 W. R. 159; 9 T. L. R. 508; 5 R. 554.

6035. Appeal against—Right of liquidator to appeal.]—*Re EYTON (ADAM), LTD., Ex p. CHARLESWORTH*, No. 6028, *ante*.

G. Committee of Inspection.

6036. Constitution of committee—Creditor or class of creditors unrepresented—Court may order meetings to decide whether constitution should be amended.]—Where a creditor, or a class of creditors with a substantial interest of a co. which is being wound up by the ct. is, through no fault of his or its own, unrepresented on the committee of inspection, the ct. may direct the liquidator to summon a meeting of the creditors to consider whether one or more members of the committee should be removed & some other person or persons, representative of the "aggrieved" & unrepresented creditor or creditors, appointed in substitution; or *semble*: may order fresh first or further meetings of the creditors & contributories to be summoned for the following purpose of 1890 (Winding Up) Act, s. 6, namely, to determine whether an application is to be made to the ct. to appoint a committee of inspection, & who are to be its members if appointed.—*Re RADFORD & BRIGHT, LTD.*, [1901] 1 Ch. 272; 70 L. J. Ch. 78; 49 W. R. 270; 17 T. L. R. 81; 9 Mans. 98.

6037. — — First meetings of creditors & contributories may be re-summoned—To decide constitution of committee.]—In the winding up of a co. by the ct. the ct. has power to order the first meetings of the creditors & contributories to be re-summoned, & it may limit the purposes of the meetings to the selection of persons to be appointed as members of the committee of inspection.

Where the creditor of a co. for a large amount was unrepresented on the committee of inspection, & at a meeting of the creditors, summoned by the direction of the ct., a resolution was passed that it was desirable that the creditor should be represented on the committee, but a majority of the creditors at the meeting expressed the opinion

An execution creditor of a co. made a seizure of certain goods which were claimed by other persons under a chattel mtge. An interpleader issued was directed between claimants, as plffs., & the execution creditor & certain other creditors who desired to take part therein, as defts. Subsequently an order for the winding up of the co. was made under the Dominion Winding-up Act. The consent of the co. was taken as sufficient to dispense with notice being given to the co. of the application for the winding-up order; but, by an oversight, the order appointed a permanent liquidator, no notice having been given to creditors, as required by sect. 27 of the Act. On an application by certain creditors of deft. co. to be allowed to come in as defts.:—*Held*: the winding-up order should be amended by substituting a provisional for a permanent

liquidator.—*GREAT WEST SUPPLY CO. v. INSTALLATIONS, LTD.* (1914), 26 W. L. R. 682.—CAN.

a. — Liquidator's interest in subject-matter of litigation.]—Where the liquidator of a co. had raised an action against A. & B., two of the contributories, for recovery of shares alleged to belong to the co., & it was afterwards discovered that the liquidator himself as an individual held a few of these shares, & was to that extent in the same position as A. & B.:—*Held*: the liquidator was in the circumstances an unsuitable person to conduct the action & should be removed from office.—*LYSONS v. MIRAFLORES GOLD SYNDICATE, LTD.* (1895), 22 R. (Ct. of Sess.) 605; 32 Sc. L. R. 469.—SCOT.

b. — Unreasonable delay of liquidation—Misapplication of funds.]

—A liquidator of a co. unreasonably delayed liquidation & without obtaining or seeking the approval of the mtgees. applied funds, which were required to discharge their preferent claims, in litigation of which the mtgees. disapproved:—*Held*: sufficient cause had been shown for his removal.—*GREENACRE'S EXECUTORS v. KEMP*, [1916] T. P. D. 247.—S. AF.

PART III. SECT. 36, SUB-SECT. 8.—G.

c. Inspector—Powers—To purchase property of insolvent company.]—An inspector appointed in a liquidation under Winding-up Act, R. S. C. c. 29, cannot be allowed to purchase property of the insolvent. Such sale will be set aside, & an account of profits ordered.—*Re CANADA WOOLLEN MILLS CO., LTD.* (1905), 9 O. L. R. 367.—CAN.

Sect. 36.—Winding up by court: Sub-sect. 8, G.; sub-sect. 9, A., B. & C.; sub-sect. 10, A.]

that it was undesirable that any members of the present committee should retire, the ct. directed the first meetings to be re-summoned to determine whether a committee should be appointed & who should be the members of it.—*Re RADFORD & BRIGHT, LTD.*, (No. 2), [1901] 1 Ch. 735; 70 L. J. Ch. 352; 84 L. T. 150; 17 T. L. R. 200; 9 Mans. 189.

Annotation:—*Refd. Re Rubber & Produce Investment Trust*, [1915] 1 Ch. 382.

6038. Effect of decision of committee—Power of Court of Equity to review decision.]—(1) Although the Ct. of Equity has regard to the opinion of the committee of inspection, it has nevertheless a clear alternative & inherent original jurisdiction not by way of appeal but by way of original right to review the decision of the committee of inspection.

1908 Act, s. 173, itself provides for an alternative method by the words being in the alternative, "the special leave of the ct. or the sanction of the committee."

(2) Where in the winding up of a co. the committee of inspection, of which the majority was composed of contributories, refused to sanction a call on the shares, the ct., on the ground that the creditors' claims must have first consideration, granted to the liquidator leave to make the call.—*Re NORTH EASTERN INSURANCE CO., LTD.* (1915), 85 L. J. Ch. 751; 113 L. T. 989; 31 T. L. R. 428; 59 Sol. Jo. 510; [1916] 11 B. R. 154.

SUB-SECT. 9.—MEETINGS OF CREDITORS AND CONTRIBUTORIES.

A. First Meetings.

See 1908 Act, s. 152.

6039. Voting—Proof for specific sum may be admitted for purpose of voting—Verification of affidavit—Although partly in respect of services rendered since winding up began.]—At a first meeting of creditors of a co. in liquidation a proof for a specific sum may be admitted for the purpose of voting, if it is properly verified by affidavit, although it is partly in respect of services rendered subsequent to the commencement of the winding up.

Qu.: whether an appeal to the ct. will lie where such proof was not objected to at the meeting.—*Re CANADIAN PACIFIC COLONIZATION CORPN., LTD.* (1891), 40 W. R. 40.

Proof of debts generally, *see* Sub-sect. 11, *post*.

6040. Power of court to order fresh first meetings.]—*Re RADFORD & BRIGHT, LTD.*, No. 6037, *ante*.

B. Court Meetings.

See 1908 Act, s. 219.

6041. Application of section—Not only to cases where winding-up order made—But also when petition before court.]—*Re WESTERN OF CANADA OIL, LANDS & WORKS CO.*, No. 5342, *ante*.

6042. — When court will direct meetings to be called—Only where company is going concern.]—*Re TUMACACORI MINING CO.*, No. 5326, *ante*.

PART III. SECT. 36, SUB-SECT. 10.—A.

d. Assets—What are—Guarantee fund for payment of dividends.]—By a Railway Act, reciting that it was expedient that certain baronies adjoining the proposed line, which would be greatly benefited by the construction of the railway, should guarantee the payment of a limited dividend on

the share capital of the co., & that for such purpose the lands within the said baronies should, when necessary, be chargeable with any deficiency of such limited dividend, it was enacted that if & whenever, after the opening of the whole of the railway, & for 22 years after, the receipts over the working expenses should not amount to a dividend of 5 per cent, on the share

capital, the amount required to make up such dividend should become payable half-yearly by the baronies ratably; provided that so much of the receipts over the working expenses should, during the said period, be applied to the payment of said dividend in priority to any mtge. deed, bond or debenture-stock, or to any dividend or any other portion of the

C. General Rules as to Meetings.

6043. Process—Meeting of particular class—Proxies must be held by member of such class—Liquidator cannot hold proxies at meeting of mortgage-holders.]—*Re MADRAS IRRIGATION & CANAL CO.*, [1881] W. N. 120.

Annotation:—*Folld. Re Central Bahia Ry.* (1902), 18 T. L. R. 503.

6044. — Attestation—Proxy cannot himself attest instrument under which he is appointed.]—A proxy appointed to attend a meeting of creditors cannot be the attesting witness to the instrument under which he is appointed.—*Re PARROTT, Ex p. CULLEN*, [1891] 2 Q. B. 151; 60 L. J. Q. B. 567; 64 L. T. 801; 39 W. R. 543; 7 T. L. R. 564; 8 Morr. 185.

—.]—*Compare* Sect. 30, sub-sect. 3, D. (e), *ante*.

6045. Voting at meetings—Determination of result—Whether majority in number or in value should prevail.]—*Re BLOXWICH IRON & STEEL CO.* (1894), 38 Sol. Jo. 546; 1 Mans. 350; 8 R. 442.

—.]—*Compare* Sect. 30, sub-sect. 3, D. *ante*.

SUB-SECT. 10.—PROPERTY AVAILABLE FOR DISTRIBUTION AMONGST CREDITORS AND CONTRIBUTORIES.

A. In General.

See 1908 Act, s. 164.

6046. General rule.]—The exception in a prohibition of assignment or alienation of "by operation of law" extends to enable a person, such as a liquidator, to whom the property passes by operation of law with an obligation to realise it, to assign the property.—*Re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY, OFFICIAL RECEIVER v. LICENSES INSURANCE CORPN.*, [1913] 2 Ch. 34; 82 L. J. Ch. 386; 108 L. T. 664; 57 Sol. Jo. 559.

Annotations:—*Consd. Re Farrow's Bank*, [1921] 2 Ch. 164. *Mentd. Cohen v. Popular Restaurants*, [1917] 1 K. B. 480

See, also, No. 5946, *ante*.

6047. Assets—What are.]—In a winding up, the funds contributed by the B list of shareholders become part of the general assets of the co., & are not to be applied, preferentially or exclusively, to the payment of those debts which were incurred before the B shareholders retired from the co. 1862 Act, s. 38, makes the "past members," persons who have become so by retiring from the co. within a year before the date of the winding-up order, liable to contribute to the assets of the co. for the payment of the debts & liabilities of the co., but though they are not specifically liable to satisfy debts which have been contracted since they left the co., yet, when they have become liable to contribute to the assets of the co., & have so contributed, their contributions become part of the general assets, & cannot be appropriated exclusively to the payment of those debts which had been incurred before these members retired from the co. The word "assets" in

sect. 38 of the Act means the same as the word "property" in sect. 133, & both alike mean all the unpaid capital recoverable, as well as the other property of the co.

Sect. 133 of the Act applies to the case of a voluntary winding up only; but it has been thought important in the case of voluntary windings up to make specific provisions & to give specific directions as to matters which were supposed to be so plain & so necessarily consequential upon the general scheme of the Act, that in a winding up under the order of the ct. it was not thought necessary to give express directions upon these matters of detail. So also with regard to the distribution of assets, we have this direction given to the liquidators under a voluntary winding up, who were not, therefore, acting directly & constantly under the orders of ct.: "The following consequences shall ensue upon the voluntary winding up of a co.: the property of the co. shall be applied in satisfaction of its liabilities *pari passu*" (LORD CAIRNS).—WEBB v. WHIFFIN (1872), L. R. 5 H. L. 711; 42 L. J. Ch. 161, H. L.; *affg.* S. C. *sub nom.* *Re ACCIDENTAL & MARINE INSURANCE CORPN., Ex p. BRITON MEDICAL & GENERAL LIFE ASSOCN.* (1870), 5 Ch. App. 428, L. J.

Annotations:—**Consd.** *Re Oriental Commercial Bank, Morris' Case* (1871), 20 W. R. 25; *Re Blakely Ordnance Co., Brett's Case, Re Oriental Commercial Bank, Morris' Case* (1873), 8 Ch. App. 800; *Re Pyle Works* (1890), 44 Ch. D. 534. **Refd.** *Re Blakely Ordnance Co., Brett's Case* (1871), 6 Ch. App. 800; *Re Whitehouse* (1878), 9 Ch. D. 595; *Re Hull & County Bank, Burgess's Case* (1880), 15 Ch. D. 507; *Birch v. Cropper, Re Bridgewater Navigation Co.* (1889), 14 App. Cas. 525. **Mentd.** *Massey v. Allen* (1878), 26 W. R. 908; *Re National Funds Asso.* (1878), 10 Ch. D. 118; *Ladies' Dress Asso.* (1900), 69 L. J. Q. B. 705.

6048. ——— Money recovered from director or contributory—Dividends improperly paid.]

The ct. has summary power under 1862 Act, ss. 101, 165, to order a contributory or director to repay a dividend declared & paid under a delusive & fraudulent balance-sheet.—*Re MERCANTILE TRADING CO., STRINGER'S CASE* (1869), 4 Ch. App. 475; 38 L. J. Ch. 698; 20 L. T. 591; 17 W. R. 694, L. J.

Annotations:—**Consd.** *Overend, Gurney v. Gurney* (1869), 20 L. T. 652. **Expld.** *Re County Marine Insee., Rance's Case* (1870), 6 Ch. App. 104. **Consd.** *Re Star & Garter* (1873), 42 L. J. Ch. 374. **Expld.** *Re British Guardian Life Asso.* (1880), 14 Ch. D. 335. **Consd.** *Leo v. Neuchatel Asphalte Co.* (1889), 41 Ch. D. 1; *Dovey v. Cory*, [1901] A. C. 477. **Refd.** *Re Alexandra Palace Co.* (1882), 21 Ch. D. 149; *Re Kingston Cotton Mill Co. (No. 2)*, [1896] 1 Ch. 331. **Mentd.** *Re Mercantile Trading Co., Schroder's Case* (1870), L. R. 11 Eq. 131; *Re National Funds Asso.* (1878), 10 Ch. D. 118; *Re Mammoth Copperopolis of Utah* (1880), 50 L. J. Ch. 11; *Re Exchange Banking Co., Fliteroft's Case* (1882), 31 W. R. 174; *Leeds Estate, Building & Investment Co. v. Shepherd* (1887), 36 Ch. D. 787; *Municipal Freehold Land Co. v. Pollington* (1890), 63 L. T. 238; *Re Sharpe, Re Bennett, Masonic & General Life Asso. v. Sharpe*, [1892] 1 Ch. 154; *Re London & General Bank* (1894), 72 L. T. 227.

Misfeasance proceedings generally, *see* Sect. 36, sub-sect. 10, C., *post*.

6049. ——— Funds contributed by contributories—On "B." list.]—WEBB v. WHIFFIN, No. 6047, *ante*.

6050. ———.]—A past member or "B." contributory of a co., in which the property & the money obtained from the "A." contributories were insufficient for the payment of the debts, bought up & caused to be released to the co. the

only debts due when he had ceased to be a member of the co., & remaining due when the winding-up order was made:—*Held*: no call could be made upon him in the winding up. In estimating the debts for which a "B." contributory is liable, all dividends paid in respect of these debts under the winding up must be deducted; but the funds contributed by the "B." contributories form part of the general assets of the co., & are not to be applied preferentially or exclusively to the payment of those debts which existed before that contributory ceased to be a member of the co.—*Re BLAKELY ORDNANCE CO., BRETT'S CASE, Re ORIENTAL COMMERCIAL BANK, MORRIS' CASE* (1873), 8 Ch. App. 800; 43 L. J. Ch. 47; 29 L. T. 256; 37 J. P. 612; 22 W. R. 22, L. C. & L. J.

Annotations:—**Expld.** *Webb v. Whiffin* (1872), L. R. 5 H. L. 711. **Mentd.** *Re Greening, Marsh's Case* (1871), L. R. 13 Eq. 388.

6051. ———.]—In the case of a co. limited by shares, calls made by the liquidator in the winding up form part of the capital of the co.; & accordingly, where the memorandum & arts. of assocn. of a co. limited by shares give a power to mortgage the uncalled capital of the co., such a mtge., when made by the directors while the co. is a going concern, is effectual to operate after the winding up upon calls made in the winding up by the liquidator, & entitles the mtgee. to be paid out of such calls in priority to the unsecured creditors of the co.—*Re PYLE WORKS* (1890), 41 Ch. D. 534; 59 L. J. Ch. 489; 62 L. T. 887; 38 W. R. 674; 6 T. L. R. 268; 2 Meg. 83, C. A.

Annotations:—**Consd.** *Page v. International Agency & Industrial Trust* (1893), 62 L. J. Ch. 610. **Apprvd.** *Newton v. Anglo-Australian Investment Co. Debenture Holders, etc.*, [1895] A. C. 244. **Refd.** *Re Russian Spratts, Johnson v. Russian Spratts* (1898), 78 L. T. 480; *Bellerby v. Rowland & Marwood's S.S. Co.*, [1902] 2 Ch. 14. **Mentd.** *Fowler v. Broad's Patent Night Light Co.* (1893), 68 L. T. 576; *London Provident Bldg. Soc. v. Morgan*, [1893] 2 Q. B. 266; *New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock*, [1894] 1 Q. B. 622; *Lock v. Queensland Investment & Land Mortgage Co.* (1896), 65 L. J. Ch. 301; *Re Auriferous Properties*, [1898] 1 Ch. 691; *Re Mayfair Property Co., Bartlett v. Mayfair Property Co.*, [1898] 2 Ch. 28.

6052. ——— Fruits of execution—Obtained after winding up.]—*Re ORIENTAL INLAND STEAM CO., Ex p. SCINDE RY. CO.*, No. 5829, *ante*.

6053. ——— Guarantee fund by vendor of business for payment of dividends.]—The vendor of property to a joint-stock co. agreed to invest part of the purchase-money to guarantee the payment of dividends at £7 per cent. for four years. A considerable sum was accordingly invested in the name of trustees, & by an indenture to which the vendor, the co. & the trustees were parties, it was declared that the trustees should hold the fund on trust to pay an aliquot part of it to the directors every half-year, & the vendor covenanted with the co. that dividends at £7 per cent. should, for four years, be paid on all shares issued to the public. The arts. of assocn. of the co. provided that dividends should be payable out of profits; & payments made to the directors out of the guarantee fund should be considered as profits, & applicable only to the payment of dividends. Before the expiration of four years the co. went into liquidation, & the trustees paid the fund in their hands into ct. Upon a petition by shareholders, who alleged that they had taken shares on the faith of a prospectus which stated the fact of

capital. By a subsequent Act, the foregoing enactments were extended to other baronies & the period of liability to make up the dividend to 5 per cent. extended to 35 years:—*Held*: the baronial guarantee fund was dedicated to payment of dividend on share capital & was not general assets of the co. for

payment of its debts.—*Re WATERFORD RY. CO.* (1880), 5 L. R. Ir. 102.—IR.

e. ——— In hands of contributories.]—A contributory in the liquidation of a joint-stock co. registered under Companies Act, 1862, presented a petition for restraint of diligence used by the liquidators to

enforce payment of calls, & for an order against the liquidators to discharge petitioner upon making a full surrender of his estate other than a claim which he had against the bank in respect that he had purchased the stock from the bank itself upon the faith of fraudulent misrepresentations

Sect. 36.—Winding up by court: Sub-sect. 10, A. &

the guarantee:—*Held*: the fund belonged to the liquidator as assets of the co. in the winding up.—*Re STUART'S TRUSTS* (1876), 4 Ch. D. 213; 46 L. J. Ch. 86; 25 W. R. 295; *sub nom. Re WELSH FREEHOLD COAL & IRON CO.*, 35 L. T. 788.

Annotations:—*Consd. Re Gelly Deg Colliery Co.* (1878), 38 L. T. 440. *Refd. Re South Llanharan Colliery Co., Ex p. Jegon* (1879), 12 Ch. D. 503.

6054. ————.]—By an agreement for the sale of mining property to a trustee for a co. in formation it was agreed that the sum of £15,000 should be paid in cash by the vendors to two trustees, who should hold the same in trust to secure the payment, & if necessary thereout pay a minimum dividend of 10 per cent. *per annum* on the preferred shares of the co., for a term of three years, payable quarterly, & subject thereto for the vendors. The guarantee was announced in a prospectus, & the agreement confirmed by the arts. of assocn. of the co., which was registered shortly afterwards. The trustees paid the sums necessary to make up the guaranteed dividend for every quarter during the three years, except the last, to the directors, who distributed them to the shareholders. The trustees had also paid some surplus moneys to the vendors, retaining sufficient to meet the accruing dividends. Shortly after the last quarter's payment became due the co. was ordered to be wound-up, & the official liquidator claimed the fund then remaining in the hands of the trustees:—*Held*: the agreement created a trust for the individual shareholders; the fund had never belonged to the co., & was not liable for its debts.—*Re GELLY DEG COLLIERY CO.* (1878), 38 L. T. 440.

6055. ————.]—J. contracted with a trustee for an intended co. to sell to the co. a coal mine & works for £35,000, of which £10,000 was to be paid in money & the remainder in paid-up shares of the co.; & he agreed to pay the co. during the first two years of its incorporation such a sum as together with the net profits of the co. would be equal to interest at 5 per cent. on the paid-up capital; such money to be repaid to him in a certain event. The co. was formed, & the contract was recited & adopted in the arts. of assocn. The profits not being sufficient to pay 5 per cent., J. paid a sum of money to the directors for distribution among the shareholders to make up the deficiency in pursuance of his contract. After the last payment became due, but before it was paid, the co. was wound up voluntarily, & J. paid to the shareholders the amount necessary to bring the last dividend up to £5 per cent. The liquidator claimed the money as part of the assets of the co.:—*Held*: the money due from J. under his guarantee was properly payable to the shareholders, & was not part of the assets of the co.; the contract was valid, & was not an evasion of 1862 Act, s. 12.—*Re SOUTH LLANHARRAN COLLIERY CO., Ex p. JEGON* (1879), 12 Ch. D. 503; 41 L. T. 567; 28 W. R. 194, C. A.

Annotations:—*Distd. Clifford v. Imperial Brazilian Natal & Nova Cruz Ry. & Gibbs* (1888), 60 L. T. 60; *Re Mennell, Regent Street Fur Co. v. Diamant* (1915), 84 L. J. Ch. 593. *Refd. Richardson v. English Spelter Co.* (1885), 1 T. L. R. 249.

6056. ————.]—A limited co., R., formed in 1913, bought a business of another co. By the contract of sale the selling co. guaranteed that the net profits of co. R. in respect

of the business should not be less than 10 per cent. *per annum* on the paid-up capital of the shares subscribed for by the public of an intended issue, & the selling co. undertook to pay out of the purchase-moneys a sum equal to that percentage for the first year into a bank, in the joint names of themselves & two trustees for co. R., to secure the performance of the guarantee; & subject thereto for themselves. In June, 1913, the amount of the percentage was paid into the bank as agreed. In Jan. 1914, co. R. was ordered to be wound up. Its liquidator claimed the sum deposited as part of the assets of the co. divisible among its creditors. The deposited sum was also claimed by the shareholders of co. R., who had not in fact received the guaranteed dividend:—*Held*: under the contract for sale there was no obligation upon the selling co. to make the deposit except out of the purchase-moneys; the moneys deposited were, & never ceased to be, moneys of the R. co.; the claim of shareholders was an attempt to get back part of the capital of the co., & was therefore illegal; & therefore the claim of the liquidator must be allowed.—*Re MENELL ET CIE, LTD., REGENT STREET FUR CO., LTD. v. DIAMANT*, [1915] 1 Ch. 759; 84 L. J. Ch. 593; 113 L. T. 77; 31 T. L. R. 270; [1915] H. B. R. 141.

6057. ———— *Form general fund*—For benefit of all creditors.]—*WEBB v. WHIFFIN*, No. 6047, *ante*.

———— *Right of secured creditors to pursue remedies under security.*]—See Sect. 34, sub-sect. 5, *ante*.

6058. *Delivery of assets*—In hands of trustee agent or officer of company—*Money overpaid to company's solicitors.*]—The directors of a provisionally-registered railway co. paid to solrs. employed by the co. a sum of money in respect of their bill of costs, which was not then delivered, & which, when delivered, fell short of the sum paid. The balance was claimed by the assignees of another solr., who had acted jointly with the former, in respect of certain extra costs not included in the bill; & the first-mentioned solrs. also claimed a lien in respect of subsequent costs:—*Held*: irrespectively of these claims, the balance was not in the hands of the solrs. as "agents or trustees" for the co., so as to give jurisdiction to the master, under Joint-Stock Companies Act, 1848 (c. 45), s. 66, to direct it to be paid to the official manager.—*Re DIRECT LONDON & EXETER RY. CO., HOLLINGSWORTH'S CASE* (1849), 3 De G. & Sm. 102; 14 L. T. O. S. 151; 64 E. R. 399; *subsequent proceedings*, 1 Mac. & G. 534, L. C.

Annotations:—*Refd. Re United English & Scottish Assco., Ex p. Hawkins* (1868), 3 Ch. App. 787. *Mentd. Re Direct Exeter Plymouth & Devonport Ry., Ex p. Mathew* (1850), 15 L. T. O. S. 273.

6059. *Money paid to judgment creditor under garnishee order*—Made after presentation of petition but before winding-up order.]—A creditor of a joint-stock co. obtained a garnishee order under Common Law Procedure Act, 1854 (c. 125), s. 61, attaching the money of the co. in the hands of their bankers. Subsequently, a petition for winding up the co. was presented; & after the presentation of the petition, but before the winding-up order, the creditor obtained an order under the above Act for payment of the money, & received it from the bankers. The official liquidator having taken out a summons under 1862 Act, s. 100, to cause the creditor to refund

by the directors contained in the reports & balance sheets. Petition refused, on the merits, because the claim, if worth anything, was a

valuable portion of the contributors' estate, which ought to be made available to creditors represented by the liquidators.—*TENNENT v. CITY OF*

GLASGOW BANK (1879), 6 R. (Ct. of Sess.) 972; 16 Sc. L. R. 555.—*SCOT.*

the money:—*Held*: the creditor was not a "trustee" within the meaning of sect. 100; & the ct. had no jurisdiction to make the order.—*Re UNITED ENGLISH & SCOTTISH ASSURANCE CO., Ex p. HAWKINS* (1868), 3 Ch. App. 787; 37 L. J. Ch. 632; 19 L. T. 232; 16 W. R. 1136, L. J.J.

Annotation:—*Mentd. Re British Guardian Life Assce.* (1880), 14 Ch. D. 335.

6060. ——— **Money paid to company's bankers.**—The ct. has no jurisdiction under 1862 Act, s. 100, to order moneys of the co. to be repaid by the bankers of the co. unless the moneys can be clearly proved to have been paid directly out of the funds of the co.

The bankers of a co. are not officers of the co. within sect. 165 of the above Act, & the ct. has no jurisdiction, therefore, on a summary application to order them to repay moneys improperly retained.—*Re IMPERIAL LAND CO. OF MARSEILLES, Re NATIONAL BANK* (1870), L. R. 10 Eq. 298; 39 L. J. Ch. 331; 22 L. T. 598; 18 W. R. 661.

Annotations:—*Reid. Re Carpenter & Bristol Corpn.*, [1907] 2 K. B. 617. *Mentd. Re General Provident Assce., Ex p. National Bank* (1872), L. R. 14 Eq. 507; *Re Great Western (Forest of Dean) Coal Consumers' Co., Carter's Case* (1886), 31 Ch. D. 496; *Re Western Counties Steam Bakeries & Milling Co.*, [1897] 1 Ch. 617.

6061. ——— **Documents—Ordered ex parte to be delivered up by manager of company.**—The ct. will not, under 1862 Act, s. 100, make an order *ex parte* for the delivery over of documents by the manager of a co. to the official liquidator.—*Re COMMERCIAL UNION WINE CO.* (1865), 35 Beav. 35; 55 E. R. 807.

6062. ——— **On which lien claimed by company's solicitors.**—In July, 1850, the master, by an order by consent, directed that the bill of costs of the solrs. of a defunct railway co., then being wound up, should be paid by the official manager out of the first moneys which should come to his hands from the assets of the co. or the contributories thereof; & he further directed the solrs., who had previously refused to do so without being guaranteed the payment of their costs, to deliver up forthwith to the official manager all the books & papers, etc. belonging to the co. In Feb. 1856, an order for a call was made, but it was never enforced, as the debts of the contributories were settled by compromise. In May, 1856, the master, on the application of the solrs. for that purpose, refused to make a call upon the contributories, in order that their bill of costs

might be paid out of the proceeds of such call. Upon motion on appeal to discharge the order of May, 1856, the ct. declined to interfere, & no order was made.

Where it appeared that the books of the official manager had not been perfectly kept, the ct. refused to make any order as to his costs.—*Re DOVER, HASTINGS & BRIGHTON JUNCTION RY. CO., Ex p. A'BECKETT & SYMPSON & PRANCE* (1856), 27 L. T. O. S. 212; 2 Jur. N. S. 684.

6063. ——— **Re CAPITAL FIRE INSURANCE ASSOCN., No. 5825, ante.**

6064. ——— **Property sold by vendor to company—Possession not delivered up to company.**—*Re OAKWELL COLLIERIES CO.*, [1879] W. N. 65.

Annotation:—*Reid. Re Centrifugal Butter Co.*, [1913] 1 Ch 188.

6065. ——— **In hands of contributories—How enforced—Whether by proceedings in winding up or by action.**—When a co. is being wound up under 1856 Act the proper mode of recovering its assets in the hands of contributories is by a proceeding under the winding up, & not by a suit. The A. co., a limited co., with all its shares fully paid-up, sold its business & property to B. co., & as part of the consideration, 950 shares in B. co. were divided among the shareholders of A. co. A. co. was afterwards ordered to be wound up in the Ct. of Bkpcy.:—*Held*: A. co. & its official liquidators could not maintain a suit in equity against the shareholders who had been placed upon the list of contributories to have the 950 shares in B. co. transferred to the official liquidators as assets of A. co. A winding-up order under above Act is not invalid because founded on neglect to pay on a demand of petitioning creditor in excess of what was actually due to him.—*CARDIFF PRESERVED COAL & COKE CO. v. NORTON* (1867), 2 Ch. App. 405; 36 L. J. Ch. 451; 15 W. R. 521, L. C.

Annotation:—*Consd. Re Mercantile Trading Co., Stringer's Case* (1869), 4 Ch. App. 475.

B. Discovery of and Examination of Persons in regard to Property.

(a) In General.

See 1908 Act, s. 174.

6066. **Nature of examination—Intended for information of liquidator only—Premature newspaper publication of report of proceedings—Contempt of court.**—Examinations under 1862 Act, s. 115, are intended for the information of the

6060 i. **Delivery of assets—In hands of trustee, agent or officer of the company—Money paid to company's bankers.**—In the winding-up of a co., a question arose as to what interest was payable by C. in respect of a mtge. made by C. to the co. By the terms of the mtge., all payments thereunder "shall be duly made if paid to the credit of the mtgee." at a named bank. C. deposited in the bank named, to the credit of the co., before the winding-up order, a marked cheque sufficient to meet the mortgage, but attached thereto a letter of instructions to the bank, requiring them not to allow the money to be paid out to the co. without a discharge or assignment of the mtge. authorised by the shareholders of the co., handing over the title deeds, etc.; & the bank accepted the deposit "subject to indorsement on under-mentioned cheque & letter attached thereto":—*Held*: the fair reading of the letter of instructions to the bank was, that the bank should hold the money as trustee for C. until the co. delivered an assignment or discharged as mentioned & handed over the title

deeds; & the money was not property of the co. available for the liquidator.—*Re KOOTENAY VALLEY FRUIT LANDS CO., COOPER'S CASE* (1912), 21 W. L. R. 309; 2 W. W. R. 479; 3 D. L. R. 428; 22 Man. L. R. 300.—**CAN.**

i. ——— **Patent rights.**—By Companies Act, 1862, s. 100, the ct. may, after making a winding-up order, require "any officer of the co." to transfer to the liquidator any "effects which happen to be in his hands for the time being, & to which the co. is *prima facie* entitled." A., the holder of certain patents, who had sold them to a co., & was under an obligation to assign them to it, became its managing director. In a liquidation at the instance of a creditor of the co. the liquidator presented a note under the above sect. craving the ct. to ordain A. to assign the patents to him. A. maintained, that the petition was incompetent in that he was an officer of the co., & that the co. was not *prima facie* entitled to the patents, which he held, not as an officer of the co., but as an undivested seller; & that he was entitled to retain the letters patent in security for the pay-

ment of the balance of the price:—*Held*: A. was an officer of the co. within the above sect., & the substantial rights to the patents belonged to the co., entitling the liquidator to a decree ordaining A. to assign them, but A. was entitled to a reservation of any claim to a preference in the liquidation for the balance of the of any claim to a preference in the price which he would have had if he had retained possession of the patents.—*DUNLOP v. DONALD* (1893), 21 R. (Ct. of Sess.) 125; 131 Sc. L. R. 101; 1 S. L. T. 303.—**SCOT.**

PART III. SECT. 36, SUB-SECT. 10.—B. (a).

g. **Nature of examination—Not litigation.**—The provisions of Bkpcy. Act, 1899, s. 77, are by Companies Act, 1899, s. 264, made applicable to a winding up under that Act, but an examination held under Companies Act, s. 123, is not litigation within the meaning of the above sect. of Bkpcy. Act.—*Re SHADLER, LTD.* (1904), 5 S. R. N. S. W. 33; 21 N. S. W. N. 217.—**AUS.**

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liquidator, & it is a contempt of ct. to publish prematurely the proceedings thereon.

An action was brought by a co. in liquidation against several defts., one of whom, L., was examined under the above sect. A newspaper published an account of an interview held with L., containing statements purporting to be made by her of what occurred at her examination. The printer & publisher was ignorant of the contents of the article, but he did not disclose the name of the writer. Upon motion to commit the printer & publisher for contempt:—*Held*: he was responsible for the contempt, & he ought to pay the costs of the motion.—*Re AMERICAN EXCHANGE IN EUROPE, LTD., AMERICAN EXCHANGE IN EUROPE, LTD. v. GILLIG* (1889), 58 L. J. Ch. 706; 61 L. T. 502; 5 T. L. R. 721.

6067. ———.]—An action was brought by the official liquidator of a co. to obtain rescission of a contract made with defts. After the action was commenced certain officers of the co. were examined under an order obtained by the liquidator under 1862 Act, s. 115; & subsequently, during the examination of certain witnesses under a joint commission to examine witnesses abroad issued on behalf of both parties to the action, the depositions taken under the above sect. were used for the purpose of cross-examining certain of deft.'s witnesses, & questions & answers were read to them from the depositions:—*Held*: defts. were not entitled to an order to inspect & take copies of the depositions, although they had been used, the object of sect. 115 being to give the liquidator such information as would enable him to determine how to act in the liquidation.—*NORTH AUSTRALIAN TERRITORY CO. v. GOLDSBOROUGH, MORT & CO.*, [1893] 2 Ch. 381; 62 L. J. Ch. 603; 69 L. T. 4; 41 W. R. 501; 2 R. 397, C. A.

Annotations:—**Distd.** *Re Standard Gold Mining Co.*, [1895] 2 Ch. 545. **Consd.** *Goldstone v. Williams, Deacon*, [1899] 1 Ch. 47. **Refd.** *Re Merchants' Fire Office* (1899), 68 L. J. Ch. 211. **Mentd.** *Re Strachan*, [1895] 1 Ch. 439.

6068. ——— **Is private proceeding.**—*Re LONDON & NORTHERN BANK, LTD., HADDOCK'S CASE, HOYLE'S CASE, No. 6120, post.*

6069. ——— **Is "proceeding in Supreme Court"** —**Within Judicature Act, 1890 (c. 44), s. 5.**—An examination under 1862 Act, s. 115, is a "proceeding in the Supreme Ct." within the meaning of Judicature Act, 1890 (c. 44).

The ct. has, therefore, jurisdiction under the Act to order the costs—as distinguished from the expenses—of a person examined to be paid by the person who procured the examination; but *Seem*: not where the examinee is a mere witness, & not a person with whom litigation is pending or intended.

A., a creditor of a co. in winding up, & B., a contributory, & other contributories took out a summons for liberty to issue a misfeasance summons against the directors of the co., & for liberty to examine such persons as they might be advised under 1862 Act, s. 115. On this summons an order was made giving liberty to examine W. & X., & to apply for leave to issue a misfeasance summons after the examination was concluded. A summons was then issued for the examination

of W. & X., & at their examination they employed solrs. & counsel. A misfeasance summons was then issued by A. & B. against W. & X., who were officers of the co., but was dismissed with costs, which were taxed & paid. W. & X. then applied for an order that A. & B. should pay the appcts. their costs incurred in connection with their examination & being represented thereat by counsel:—*Held*: there was jurisdiction under Judicature Act, 1890 (c. 44), s. 5, to make the order, & having regard to the object of the examination & the position of appcts. as intended litigants, the order must be made.—*Re APPLETON, FRENCH & SCRAFTON, LTD.*, [1905] 1 Ch. 749; 74 L. J. Ch. 471; 93 L. T. 8; 53 W. R. 601; 49 Sol. Jo. 483; 12 Mans. 335.

Annotation:—**Refd.** *Re Tweddle* (1910), 80 L. J. K. B. 20.

(b) *Power of Court to Order Examination.*

6070. Jurisdiction to order—No direct issue raised.—Under 1862 Act, s. 115, witnesses may be summoned to be examined concerning the "dealings, estate, & effects" of the co., though no direct issue may have been raised.

A stockbroker who had lodged a transfer of 823 shares in the co. to an infant of limited means:—*Held*: a person "capable of giving information concerning the trade dealings, estate & effects of the co.," & ordered to attend & be examined accordingly.—*Re MERCANTILE CREDIT ASSOCN., CLEMENT'S CASE* (1868), L. R. 13 Eq. 179, n.; 41 L. J. Ch. 279, n.; *sub nom. Re IMPERIAL MERCANTILE CREDIT ASSOCN.*, 18 L. T. 596; 16 W. R. 769, L. C.

Annotations:—**Apld.** *Re Bank of Hindustan, China & Japan, Swan's Case* (1870), L. R. 10 Eq. 675. **Consd.** *Re Gold Co.* (1879), 12 Ch. D. 77.

6071. ——— **Examination touching formation of company.**—An order was made for winding up a co. incorporated under the Companies Acts. On Jan. 12, 1888, it was ordered on the application of the official liquidator of the co., that, pursuant to 1862 Act, s. 115, certain of the directors should be examined before an examiner. C. who was alleged to be a shareholder of the co., & who had been served with a notice to place him on the list of contributories, but who disputed his liability, obtained on Feb. 10 an order giving him liberty to attend at the examination of the directors, & after the liquidator to examine, & if necessary, cross-examine, the directors "touching the formation, trade dealing, estate & effects of the said co." This order was not made by the judge in person. One of the directors named in the order for examination moved to discharge the order of Feb. 10:—*Held*: it would require a very strong case to justify an examination by a contributory as well as by the liquidator under the above sect., which was intended for the benefit of the co. only; there was no jurisdiction under the sect. to allow an examination touching "the formation" of the co.; although orders under the sect. are made *ex parte*, the director had a fundamental right to have the matter brought before the judge in person; & the motion to discharge the order was proper, & should be allowed.

It appeared that C.'s solr. had had access to some depositions already taken under the above sect. & filed:—*Held*: General Order of Nov. 1862,

6068 i. ——— **Is private proceeding.**—An examination under Act 31 of 1909, s. 151, is a private one, & application for such examination should be made in chambers & not in open ct. The public are not entitled to access to the application or documents relating thereto nor to the examination itself, nor to any information given or docu-

ments filed there.—*MACDUFF & CO. v. LAWN*, [1922] W. L. D. 66.—**S. AF.**

h. Leave to examine—Effect of not taking advantage of.—Where the petitioner for the winding-up of a co. does not avail himself of the opportunity to examine the officers of the co. when leave is given by the judge who hears the petition, an inquiry

will not be granted on appeal.—*Re OKELL, ETC. CO.* (1902), 9 B. C. R. 153.—**CAN.**

PART III. SECT. 36, SUB-SECT. 10.—B. (b).

k. Jurisdiction to order—Who will be appointed—General rule.—Under Act 31 of 1909, s. 151, ct. may,

r. 58, does not require depositions taken to be filed at once, & the depositions already taken in the case should not have been filed.—*Re LONDON & LANCASHIRE PAPER MILLS CO., LTD.* (1888), 57 L. J. Ch. 766; 4 T. L. R. 389; *sub nom. Re LONDON & LANCASHIRE PAPER MILLS CO., LTD., SCOTT'S CASE*, 59 L. T. 362.

Annotations:—*Reid. Re Standard Gold-Mining Co., Ex p. Mee* (1895), 64 L. J. Ch. 790; *Re Merchants' Fire Office* (1899), 68 L. J. Ch. 211.

6072. — Without any application.—The ct. may, of its own motion, order an examination under 1862 Act, s. 115.—*Re LAND SECURITIES CO., LTD.* (1894), 42 W. R. 624; 38 Sol. Jo. 459; 1 Mans. 369; 8 R. 713.

6073. — Examination in open court.—It is only in exceptional circumstances, if at all, that an order should be made in the winding up of a co. for a public examination of its officers to be held in open ct. under 1908 Act, s. 174.

A co. was in voluntary liquidation, & a report was made by the liquidator alleging grave irregularities in the conduct of the co.'s business, & suggesting the examination of certain of the directors as necessary to an investigation, but making no charge of fraud against them. An order was made on the application of the liquidator directing a public examination of these directors in open ct.:—*Held*: the part of the order which directed the examination to be held in open ct. must be discharged.

Semble: under proper circumstances there is power to order an examination in open ct. under the above sect. having regard to 1909 (Winding up) Rules, r. 5.—*Re PROPERTY INSURANCE CO., LTD.*, [1914] 1 Ch. 775; 83 L. J. Ch. 525; 110 L. T. 973; 58 Sol. Jo. 472.

6074. Grounds for ordering—General rule.—*Re IMPERIAL CONTINENTAL WATER CORPN.*, No. 6129, *post*.

6075. — To obtain further evidence—For summons to substitute one contributory for another.—On a summons in chambers to substitute the name of one contributory for another, the chief clerk refused to grant a summons under 1862 Act, s. 115, to obtain further evidence:—*Held*: he was wrong in such refusal, & a summons was ordered to issue directed to such persons as appct. should name as necessary witnesses.—*Re OVEREND, GURNEY & CO., Ex p. MUSGRAVE* (1867), 16 L. T. 378.

6076. — At instance of liquidator—To ascertain whether proceedings should be continued.—The pendency of an action against an officer of a co. which is in course of being wound up is not sufficient to justify him in refusing to be examined under 1862 Act, s. 115, & it makes no difference whether such action was commenced before or after the winding up.

The official liquidator of a co. may properly apply the above sect. for the purpose of ascertaining whether proceedings should be continued or not against an officer of the co., or against any other person.—*Re METROPOLITAN (BRUSH) ELECTRIC LIGHT & POWER CO., LTD., Ex p. LEAVER* (1884), 51 L. T. 817.

Annotation:—*Reid. Re North Australian Territory Co.* (1890), 59 L. J. Ch. 654.

after having made a winding-up order for a co., summon & examine certain persons concerning the dealings of the co.:—*Held*: the ct. has inherent jurisdiction to appoint a commissioner to act under the above sect. & as a general rule it would appoint an official cognisant of the procedure in bkpcy.—*Ex p. ARGUS CO., LTD. (LIQUIDATORS OF)* (1920), T. P. D. 200.—S. AF.

(c) *Who may Apply for Examination.*

6077. Liquidator—Prior right to apply—Notice of application not necessary.—A liquidator & directors of a co. who had been summoned under 1862 Act, s. 115, to attend for examination, appealed to discharge the order summoning them:—*Held*: (1) the discretion of the judge in the ct. below under that sect., when the matter was within the terms of the sect., could not be interfered with; (2) a witness summoned under that sect. had no *locus standi* for appealing against the order summoning him to attend.

Where a contributory applies under that sect. he must give notice to the liquidator, who is *dominus litis*, & has a prior right to make such application himself. The liquidator on such application need not give notice thereof to any one. It is not necessary, on an application under this sect., to make out a *prima facie* case; the probability of a case is sufficient.—*Re GOLD CO.* (1879), 12 Ch. D. 77; 48 L. J. Ch. 650; 40 L. T. 865; 27 W. R. 757.

Annotations:—*As to* (1) *Distd. Re London & Lancashire Paper Mills Co.* (1888), 57 L. J. Ch. 766. *As to* (2) *Consd. Re North Australian Territory Co.* (1890), 45 Ch. D. 87. *Reid. Re Silkstone & Dodworth Coal & Iron Co., Whitworth's Case* (1881), 19 Ch. D. 118; *Re Great Kruger Gold Mining Co., Ex p. Barnard*, [1892] 3 Ch. 307; *Re Debtor* (No. 3 of 1909), *Ex p. Goldstein*, [1917] 1 K. B. 558. *Generally, Mentd. Re Grey's Brewery Co.* (1883), 25 Ch. D. 400; *Re Standard Gold Mining Co.* (1895), 2 Mans. 463.

6078. Contributory—Must give notice of application to liquidator.—*Re GOLD CO.*, No. 6077, *ante*. In voluntary liquidation.—*See* Nos. 6912, 6916, 7112, *post*.

(d) *Who may be Examined.*

6079. Person engaged in arranging amalgamation of company with another.—(1) Where a co. is being wound up under 1862 Act, & a special examiner has been appointed, the proper mode of summoning before the examiner "any person whom the ct. may deem capable of giving information concerning the trade, dealings, estate, or effects of the co.," under sect. 115 of the Act, is not by *subpoena*, but by summons in chambers.

(2) A person who has been engaged in arranging a scheme for amalgamating another concern with a co. is "a person whom the ct. may deem capable of giving information concerning the trade, dealings, estate, or effects of the co.," within the meaning of the above sect.—*Re ENGLISH JOINT STOCK BANK* (1866), L. R. 3 Eq. 203; 15 L. T. 206; 15 W. R. 102.

Annotations:—*As to* (1) *Appld. Credit Co. v. Webster* (1885), 53 L. T. 419; *Re Westmoreland Green & Blue Slate Co.* (1891), 66 L. T. 52. *As to* (2) *Distd. Re Accidental & Marine Insec. Corpn.* (1867), L. R. 5 Eq. 22. *Generally, Mentd. R. v. Surrey County Court Judge* (1884), 13 Q. B. D. 963.

6080. Creditor of company—Unable to give an information.—A mere creditor of a co. in liquidation, who is not shown to be capable of giving the information referred to in 1862 Act, s. 115, is not a person to be examined under that sect.—*Re ACCIDENTAL & MARINE INSURANCE CORPN.* (1867), L. R. 5 Eq. 22; *sub nom. Re ACCIDENTAL & MARINE INSURANCE CO., LTD., MERCATI'S CASE*, 37 L. J. Ch. 56; 17 L. T. 308.

Annotations:—*Distd. Re Tyne Chemical Co.* (1874), 43 L. J. Ch. 354. *Consd. Massey v. Allen* (1878), 9 Ch. D.

PROPRIETARY, LTD., [1908] V. L. R. 414.—AUS.

m. Judgment debtor—In what circumstances.—An order to examine a judgment debtor should not be granted, unless the creditor shows that execution has been issued, placed in the sheriff's hands & returned *nulla bona*, or that, if called upon to return the *fi. fa.*, the sheriff would return

PART III. SECT. 36, SUB-SECT. 10.—B. (d).

1. *Person who has committed fraud.*—The ct. has no jurisdiction to direct a person to be publicly examined under section 133, Companies Act, 1896, unless the facts before the ct. suggest that something in the nature of fraud has been committed by such person.—*Re RUBBER INVENTIONS CO.*

Sect. 36.—Winding up by court: Sub-sect. 10, B.

164. *Reid. Re South Essex Estuary & Reclamation Co.* (1869), 20 L. T. 68; *Re Bank of China & Japan, Swan's Case* (1870), 22 L. T. 854.

6081. — Against whom counterclaim set up by company.]—*Re TYNE CHEMICAL CO., LTD.*, No. 6097, *post*.

6082. Person against whom proceedings likely to be taken—As result of examination.]—A person between whom & the co. no proceedings are pending is bound to go before the examiner appointed to take the examination & cross-examination of witnesses in the winding up, although he may conceive that such examination is required for the purpose of afterwards taking proceedings against him.

A person summoned under 1862 Act, s. 115, is not entitled to be heard on the appointment of the special examiner before whom he is to be examined.—*Re CONTRACT CORPN.* (1871), L. R. 13 Eq. 27; *sub nom. Re CONTRACT CORPN., HAKIM'S CASE*, 41 L. J. Ch. 225; 25 L. T. 552.

6083. Contributory's banker—Managing clerk.]—The managing clerk of a bank in which a contributory has an account is a witness, compellable to answer as to that account, under 1862 Act, s. 115.—*Re FINANCIAL INSURANCE CO., LTD.* (1867), 36 L. J. Ch. 687.

Annotations:—Folld. Re Mercantile Credit Assocn. (1868), 37 L. J. Ch. 295. *Apld. Re Bank of Hindustan, China & Japan, Swan's Case* (1870), L. R. 10 Eq. 675.

6084. — Manager of bank.]—Under 1862 Act, s. 115, the manager of a bank where a contributory has had an account is liable to attend & be examined, & to produce any books & documents relative to such account.—*Re CONTRACT CORPN., BRUITT'S CASE* (1872), L. R. 14 Eq. 6; *sub nom. CONTRACT CORPN., FORBES'S CASE*, 41 L. J. Ch. 67; 26 L. T. 680; 20 W. R. 585.

6085. Stockbroker—Who had lodged transfer of shares to infant.]—*Re MERCANTILE CREDIT ASSOCN., CLEMENT'S CASE*, No. 6070, *ante*.

6086. — Who had attested transfer of shares to infant.]—A stockbroker, who was the attesting

witness to transfers of shares to an infant, & suspected of having an interest in the shares, was held liable to be summoned as a witness under 1862 Act, s. 115.—*Re CONTRACT CORPN., Ex p. CARTER* (1870), 40 L. J. Ch. 15; 23 L. T. 446; *sub nom. Re CONTRACT CORPN., BAKER'S CASE, Ex p. CARTER*, 19 W. R. 55.

6087. Shareholders of another company—Which was judgment debtor of company being wound up.]—The C. Co., which was being wound up by the ct. was a judgment creditor of the T. Ry. Co., & the official liquidator sued out an *elegit* under the judgment. Afterwards the G. & M. Ry. Cos. entered into an arrangement with the T. Co. to run over the T. line; but this arrangement brought no profit to the T. Co. or their creditors. The official liquidator of the C. Co. then promoted a bill in Parliament to oblige the G. & M. Ry. Cos. to take a transfer of the T. Ry. & pay off its liabilities. To assist in this object he applied for a summons to examine the shareholders of the T. Co., for the purpose of proving that they were nominees of the G. & M. Cos.:—*Held*: the summons might issue, without prejudice to any objections which the witnesses might take.—*Re CONTRACT CORPN.* (1871), 6 Ch. App. 145; 40 L. J. Ch. 351; 19 W. R. 337, L. JJ.

Compare No. 6136, post.

6088. Relatives of contributory.]—The relatives of a contributory are persons within the meaning of 1862 Act, s. 115, who may be capable of giving information concerning the estate or effects of the co., & as such may be summoned before the examiner.—*Re BANK OF HINDUSTAN, CHINA & JAPAN, SWAN'S CASE* (1870), L. R. 10 Eq. 675; 18 W. R. 1017; *sub nom. Re BANK OF CHINA & JAPAN, SWAN'S CASE*, 22 L. T. 854.

Annotation:—Folld. Re Bank of Hindustan, China & Japan, Fricker's Case (1871), L. R. 13 Eq. 178.

6089. — Mother-in-law.]—A mother-in-law of a contributory having declined to give liquidators any information as to his address, a summons was, under 1862 Act, s. 115, ordered to be issued for her examination.—*Re BANK OF HIN-*

same *nulla bona*.—*Re BISHOP ENGRAVING & PRINTING CO.* (1893), 9 Man. L. R. 62.—CAN.

n. Agent of company under power of attorney.]—Deft. co. was formed in England for exploration purposes, & acquiring mining properties in North America. M., an officer of deft. co., held an unlimited power of attorney from the co. to act for it within any part of such territory in any way in which it could act by any means & he was the only person representing deft. co. or entitled to act for it as regards any business which had hitherto been undertaken by it:—*Held*: he was liable to examination.—*STEELE v. PIONEER TRADING CORPN.* (1898), 6 B. C. R. 158.—CAN.

o. Present officer of company—Duty to supply all possible information.]—Pltf. made application for the attendance of the second vice-president of deft. co. before a special examiner to answer certain questions which he had failed to answer upon his examination for discovery as an officer of deft. co. An order for such attendance was refused by the Referee. On appeal:—*Held*: the application ought to be granted; an officer of a corpn. examined for discovery is bound to obtain information from other departments & to use his best efforts to obtain the information required; if the information is contained in documents, books, or papers, he must inspect them, or if inspection of them is wrongfully refused he must take proceedings to enforce

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officer.] While a sales-agent and an agent for the sale of machinery on behalf of a co., a part only of his business being canvassed deft. to buy machinery & an ptff. co., which deft. did; & an ptff. co., which that transaction arose out of as intended for 1902, permits the examination of the officer of a corpn. to be used as evidence in the same way as the examination of a party, it could not be said that S. was such an "officer" as was intended by the rule.

(2) It is the duty of the officer who is examined to prepare himself to make discovery by obtaining information from the other servants or agents of the co. who have personally conducted the transaction in question.—*NICHOLS & SHEPARD CO. v. SKEDANUK* (1912), 22 W. L. R. 114.—CAN.

q. — With most personal knowledge of relevant facts.]—When designating an officer of a co. for examination on discovery in order that such examination may be used as evidence against the co., that officer should be designated who has most personal knowledge of the facts & circumstances relevant to the issue in the action; therefore it was held more just & convenient to designate the co.'s president rather than the local manager who had occupied said position for only two months & had no personal knowledge of the matters in issue.—

(1906), 4 W. L. R. of CAN.

REGINA CITY v. ROBINSON'S CLOTHES, LTD., [1922] 2 W. W. R. 807; 66 D. L. R. 820.—CAN.

r. Former officer of company.]—There is no power now under Rule 439 (a), as submitted by Rule 1250 for the Rule 439 (1), to make an order for the examination for discovery of a former officer or servant of a corpn. party, nor is there power to make such an order under Rule 485.—*CANTIN v. NEWS PUBLISHING CO. OF TORONTO* (1904), 8 O. L. R. 531; 24 C. L. T. 398; 4 O. W. R. 162, 217.—CAN.

s. — To ascertain contributories' rights.]—Winding-up Act, R. S. C. 1906, c. 144, s. 117, confers a special power, of inquisitorial character, intended to be used by the liquidator acting under a winding-up order, for his own guidance in the conduct of the liquidation. But, in certain circumstances, there may be some right of discovery open to a person charged in the winding up as a contributory. In this case it was directed, upon an appeal, that an official referee, before whom the reference under an order for the winding up of a bank was pending, should consider the application of five persons whose names were placed by the liquidator upon the list of contributories, for leave to examine for discovery the former general manager of the bank, in view that appcts. might have a claim to invoke the aid of above sect.—*Re SOVEREIGN BANK OF CANADA, NEWMAN'S CASE* (1915), 34 O. L. R. 577; 9 O. W. N. 168.—CAN.

DUSTAN, CHINA & JAPAN, FRICKER'S CASE (1871), L. R. 13 Eq. 178; 41 L. J. Ch. 278.

Annotation.—*Re* Gold Co. (1879), 12 Ch. D. 77.

6090. Debtor to contributory.—Under 1862 Act, s. 115, any person indebted to a contributory is liable to attend & be examined as to the means of the contributory. Witnesses summoned under the above sect., & refusing to attend, will in future be liable to pay the costs of compelling their attendance.—*Re* LAND CREDIT CO. OF IRELAND, TROWER & LAWSON'S CASE (1872), L. R. 14 Eq. 8; 41 L. J. Ch. 468.

6091. Party against whom contributory had right to indemnity—Assignment by contributory of right to company.—A. assigned his right to indemnity against B. & C. in respect of certain shares standing in his name in a co. in course of liquidation to that co. The liquidator commenced an action against B. & C. in A.'s name. The ct., on the application of the liquidator, summoned B. under 1862 Act, ss. 115, 117, to give evidence concerning matters the subject of the action.—*MASSEY v. ALLEN* (1878), 9 Ch. D. 164; 47 L. J. Ch. 702; 26 W. R. 908.

Annotation.—*Re* North Australian Territory Co. (1890), 59 L. J. Ch. 654.

(c) *Appointment of Special Examiner.*

6092. Only by consent of all parties.—A special examiner ought only to be appointed after all persons interested in the appointment have been heard thereon. Where, therefore, a special examiner was appointed to take the examination & cross-examination of witnesses in the winding up of a co.:—*Held*: a person who had given evidence in opposition to a summons to place him on the list of contributories & who had not consented to the appointment of the special examiner, could not be required to attend & be examined before him.—*Re* SMITH, KNIGHT & CO. (1869), L. R. 8 Eq. 23; 20 L. T. 510; *sub nom.* *Re* SMITH, KNIGHT & CO., LTD., HAKIM'S CASE, 38 L. J. Ch. 710; 17 W. R. 758.

Annotation.—*Consd.* *Re* Lisbon Steam Tram. Co. (1876), 34 L. T. 209.

6093. Who may be heard on appointment—Not person to be examined.—*Re* CONTRACT CORPN., No. 6087, *ante*.

(f) *Refusal of Witnesses to be Examined.*

i. *Refusal to Attend.*

6094. Whether justified—Refusal to attend before chief clerk—Counsel unable to attend before chief clerk.—The chief clerk, at the instigation of the official liquidator of the above co., issued a summons directing two witnesses to attend before one of the examiners of the ct. to be examined by him. They refused to do so, alleging that there had been no special authority given by the judge to the chief clerk to issue the summons in question; that it was properly returnable only before the chief clerk himself; that the witnesses wished to have the assistance of their counsel at their examination, but that, as no counsel would attend before the chief clerks, they could not have proper legal advice in the matter, & were not therefore bound to obey the summons. A motion was then made on behalf of the official liquidator of the co. for an order to commit them for contempt, or for one directing them to attend & be examined in due course:—*Held*: they must attend before the examiner for the examination, & pay the costs of the motion.—*Re* NOWGONG TEA Co. (1867), 16 L. T. 47.

Compare No. 6101, *post*.

6095. Pendency of action—Against witness.—

Re METROPOLITAN (BRUSH) ELECTRIC LIGHT & POWER CO., LTD., *Ex p.* LEAVER, No. 6076, *ante*.

6096. — Order to attend & produce documents—Documents not in witness's possession.—Where an order is made in chambers under 1908 Act, s. 174, requiring a person capable of giving information as to the affairs of a co. to attend at chambers for examination by the liquidator & to produce certain documents, such person is bound to attend as required by the order, even although the documents which he is required by the order to produce are not in his possession or custody.—*Re* LEITNER ELECTRICAL CO., LTD. (1916), 32 T. L. R. 474; [1917] H. B. R. 277.

6097. By witness in Scotland—Order for examination before sheriff of witness's county—At witness's expense.—When a witness in Scotland, summoned under 1862 Act, s. 127, objects to be examined, the proper course is to move the Ct. of Ch. in England that he be ordered to attend for examination before the sheriff of his county, at his own expense.

A creditor of a co. may be summoned to ascertain whether the co. has an alleged counterclaim against him.—*Re* TYNE CHEMICAL CO., LTD. (1874), 43 L. J. Ch. 354.

6098. Waiver of ground for refusal—Attendance several times without objection.—A witness having been ordered to attend & give evidence before a special examiner appointed with his consent, under 1862 Act, s. 115, & having attended several times in pursuance of such order, cannot refuse to continue giving his evidence on the ground that his deposition may be used against him in a pending action commenced before the appointment of the special examiner.—*Re* LISBON STEAM TRAMWAYS CO. (1876), 2 Ch. D. 575; 34 L. T. 209; *sub nom.* LISBON STEAM TRAMWAYS CO., *Re* GRANT'S EXAMINATION, 24 W. R. 516.

6099. Liability for costs of compelling attendance.—*Re* NOWGONG TEA CO., No. 6094, *ante*.

6100. Debtor to contributory.—*Re* LAND CREDIT CO. OF IRELAND, TROWER & LAWSON'S CASE, No. 6090, *ante*.

ii. *Refusal to be Sworn.*

6101. Whether justified—Examination before chief clerk—Counsel unable to attend before chief clerk.—An alleged contributory under a winding-up order was summoned before the chief clerk as a witness, & to produce papers. He refused to be sworn, on the ground that it was important that he should have the assistance of counsel. Upon a motion to commit:—*Held*: the witness had no right to refuse to be sworn, but the proper course was, after he was sworn, to apply to the chief clerk to have his examination taken before the judge or an examiner, &, if necessary, to have the question determined by adjournment into ct.—*Re* ELECTRIC TELEGRAPH CO. OF IRELAND, *Ex p.* BUNN (1857), 24 Beav. 137; 26 L. J. Ch. 614; 29 L. T. O. S. 104; 3 Jur. N. S. 1013; 53 E. R. 309. *Compare* No. 6094, *ante*.

iii. *Refusal to Answer Specific Questions.*

6102. Whether justified—General rule.—*Re* WESTERN OF CANADA OIL, LANDS & WORKS CO., *Ex p.* CARVER (1877), 47 L. J. Ch. 702, n.; 26 W. R. 909, n.

Annotation.—*Folld.* *Massey v. Allen* (1878), 9 Ch. D. 164.

6103. — That witness would incriminate himself—On ground of dealings in shares of illegal company—No proof that company in fact illegal.—A stockbroker who was subpoenaed as a witness to give evidence before the examiner, declined to

l. 36.—Winding up by court: Sub-sect. 10, B. (f) iii. & (g) i. & ii.]

answer questions put to him whether he had had dealings in the scrip or shares of the above co., alleging as his reason that he "was advised that the co. was illegal, & that he might render himself liable to criminal proceedings or to penalties":—*Held*: in the absence of proof that the co. was illegal, & the reason the witness gave for his declining to answer was wholly insufficient.—*Re MEXICAN & SOUTH AMERICAN CO., ASTON'S CASE* (1859), 4 De G. & J. 320; 28 L. J. Ch. 631; 33 L. T. O. S. 229; 5 Jur. N. S. 779; 7 W. R. 539; 45 E. R. 124, L. J.J.

6104. — Pendency of action—Against witness.]

—B. was pltf. in an action against the co. which was being wound up. While the action was pending, certain contributories subpoenaed him as a witness before a special examiner in the matter of the winding up, & proposed to examine him as to matters connected with the action:—*Held*: the pendency of the action offered no reason why his examination should not be proceeded with, & a motion on his behalf to stay the examination was refused.—*Re CONTRACT CORPN., Ex p. BATEMAN* (1866), 15 L. T. 195; 15 W. R. 245, C. A.

6105. — For misrepresentation in prospectus.]—In winding-up proceedings against a co. of which he had been a director, resp. refused to answer a question at his examination before the registrar relating to a statement in the prospectus. Resp. objected to answer on the ground that there were certain actions pending against him alleging misrepresentation in the prospectus, & that he ought not to be called upon to answer any questions relating to the issues in those actions. On report by the registrar under Winding up Rules, r. 72, of such refusal to answer:—*Held*: resp. was bound to answer, as in the circumstances there was no reasonable risk of any information obtained being improperly used, & the mere fact that proceedings were pending against resp. by shareholders was no reason why he should refuse to answer.—*RELIANCE TAXI-CAB CO., LTD.* (1912), 28 T. L. R. 529.

6106. — Against company of which witness director—Libel action.]—*Re LONDON & NORTHERN BANK, LTD.* (1902), 18 T. L. R. 637, C. A.

6107. — That questions referred to mere hearsay.]—A witness summoned under 1862 Act, s. 115, must answer questions which refer to mere hearsay, since the object of the sect. is to enable the official liquidator to get full information as to all the co.'s affairs, & hearsay may be valuable in putting him on the right inquiries.—*Re OTTOMAN CO., LTD.* (1867), 15 W. R. 1069.

6108. — That questions related to witness's solvency—& only relevant to bankruptcy proceedings.]—A contributory, on being examined under 1862 Act, s. 115, objected to answer some questions aimed at impeaching a composition deed executed by him, on the ground that the Ct. of Bkpcy. was the proper forum in which proceedings of that nature should be taken:—*Held*: he must answer the questions, one of the objects of the above sect. being to enable a liquidator to ascertain whether he ought or ought not to take proceedings elsewhere.—*Re LONDON GAS LIGHT CO., LTD., Ex p. WEBBER* (1872), 26 L. T. 227; 20 W. R. 394, C. A.

6109. — Improper use of procedure by liquidator—In attempting by such means to obtain discovery in pending action—After discovery refused as being premature.]—The liquidator in the voluntary winding up of a co., with leave of the ct.,

brought an action against another co., & obtained an order for affidavit of documents in the action; but the ct. refused to order the production of documents, or the examination of the co.'s secretary or interrogatories, on the ground that in the present stage of the action, no defence having been put in, the discovery was premature. The liquidator then obtained an order under 1862 Act, s. 115, for the examination of the secretary before an examiner. The secretary did not appeal from this order, but when examined refused to answer a question relating to the matters in issue in the action:—*Held*: as the liquidator had shown no reason for seeking the discovery except to assist him in the action, & so to evade the order of the judge postponing discovery in the action, the witness was justified in refusing to answer the question. *Qu.*: whether the witness might not have appealed against the original order for his examination.—*Re NORTH AUSTRALIAN TERRITORY CO.* (1890), 45 Ch. D. 87; 59 L. J. Ch. 654; 63 L. T. 77; 38 W. R. 561; 6 T. L. R. 348; 2 Meg. 230, C. A.

Annotations:—**Distd.** *Re London & Northern Bank, Ex p. Archer* (1901), 85 L. T. 698. **Consd.** *Re A Debtor* (No. 3 of 1909), *Ex p. Goldstein*, [1917] 1 K. B. 558.

6110. — Examination of officer—Questions as to documents—Documents in hands of litigant against company.]—The pendency of an action commenced by the liquidator of a co., which is in course of being wound up, against third persons, may be a good ground for postponing the examination of a witness under 1862 Act, s. 115. But where the witness to be examined was a former manager of a co. which was in voluntary liquidation, & the liquidator was simply seeking to obtain information as to the documents of the co. which were in the manager's possession & also information as to how he had dealt with those documents:—*Held*: it was a proper case for the liquidator to put in force the powers conferred by the sect., notwithstanding that the manager had improperly handed over some of the documents to a person with whom the co. was in litigation.

An officer of a co. which has gone into liquidation is not justified in refusing, in the course of an examination under the above sect., to answer questions as to documents belonging to the co. which have come into his possession as an officer of the co., on the ground that such documents have passed into the possession of persons who are in litigation with the co., & have successfully claimed privilege in the litigation in respect of such documents.—*Re LONDON & NORTHERN BANK, Ex p. ARCHER* (1901), 85 L. T. 698; 50 W. R. 262; 46 Sol. Jo. 176; *sub nom. Re LONDON & NORTHERN BANK, LTD.*, 18 T. L. R. 206, C. A.

Annotation:—**Refd.** *Re London & Northern Bank, Ex p. Haddock* (1902), 86 L. T. 430.

6111. — Examination of solicitor—Solicitor's privilege—Refusal to state from whom documents obtained.]—Upon the examination of the secretary of a co. in liquidation under 1862 Act, s. 115, the witness was represented by a solr. who was also acting as solr. for a person against whom the co. had brought an action of libel. Upon the examination of the solr. to the above-mentioned witness, he refused to state, on the ground of privilege, from whom he received certain documents in his possession which belonged to the liquidator of the co.:—*Held*: he was privileged from answering.—*Re LONDON & NORTHERN BANK, LTD., HADDOCK'S CASE, HOYLE'S CASE*, [1902] 2 Ch. 73; 86 L. T. 430; 50 W. R. 386; 18 T. L. R. 403; 46 Sol. Jo. 358.

Annotation:—**Mentd.** *Re Property Insee.*, [1914] 1 Ch. 775.

(g) *The Examination.*i. *In General.*

6112. Discretion of court—Occasion & extent of examination—Conduct of examination.]—A witness has no *locus standi* to appeal against an order to attend & be examined, nor is there any ground, except want of jurisdiction to make the order to attend, on which he can contest the order.

In summoning persons to attend for examination under 1862 Act, s. 115, the judge to whose ct. the winding up is attached has a direction as to the occasions & extent of the examination & also as to the persons by whom the examination is to be conducted. The Ct. of Appeal will not interfere with this discretion.—*Re SILKSTONE & DODWORTH COAL & IRON CO., WHITWORTH'S CASE* (1881), 19 Ch. D. 118; 51 L. J. Ch. 71; 45 L. T. 449; 30 W. R. 33, C. A.

Annotation:—Consd. Re London & Lancashire Paper Mills Co. (1888), 57 L. J. Ch. 766.

6113. Mode of summoning witness—Whether by summons or subpœna.]—*Re ENGLISH JOINT STOCK BANK*, No. 6079, *ante*.

6114. ———.]—A witness summoned under 1862 Act, s. 115, at the instance of a contributory, who has obtained leave to examine him, should be summoned by summons in the form given in Rules of Nov. 1862, sched. 3, form 54, & not by *subpœna*. Motion to compel attendance in pursuance of *subpœna* refused.—*Re WESTMORELAND GREEN & BLUE SLATE CO., LTD.* (1891), 66 L. T. 52; 36 Sol. Jo. 139.

Refusal of witness to answer questions.]—*See* Sub-sect. 10, B. (f), iii, *ante*.

Adjournment of examination.]—*See* No. 6131, *post*.

6115. Costs of witness—Liability of person procuring examination.]—*Re APPLETON, FRENCH & SCRAFTON, LTD.*, No. 6069, *ante*.

ii. *Who may Attend.*

6116. General rule.]—The examination of a witness before the examiner is a private examination at which no person has a right to be present, except the parties & their counsel, solrs. or agents.

The members of a mercantile firm were summoned to attend before the examiner & be examined on behalf of the official liquidator of a limited co., pursuant to 1862 Act, s. 115:—*Held*: the confidential clerk on commission of the firm, who appeared to be one of the parties principally concerned in the transaction under enquiry, & might have to be called as a witness, was not entitled to be present during the examination in the capacity of agent of the firm.—*Re WESTERN OF CANADA OIL, LANDS & WORKS CO.* (1877), 6 Ch. D. 109; 46 L. J. Ch. 683; 25 W. R. 787.

Annotations:—Refd. Re Greys Brewery Co. (1883), 53 L. J. Ch. 262; *Re Heseltine*, [1891] W. N. 25.

6117. Witness's counsel & solicitor.]—A witness who is summoned to attend for examination before an examiner, under 1862 Act, s. 115, is entitled to be attended by counsel & solr.—*Re BREECH-LOADING ARMOURY CO., Re MERCHANTS' CO.* (1867), L. R. 4 Eq. 453; *sub nom. Re BREECH-LOADING ARMOURY CO., LTD., CALISHER'S CASE*, 17 L. T. 5; 15 W. R. 1007.

6118. ——— Right to take notes—& re-examine deponent.]—Where a person is examined at the instance of the official liquidator under 1862 Act, s. 115, his counsel & solr. are entitled to be present at the examination, to examine the deponent when the examination on behalf of the official liquidator is concluded, & to take notes of the

proceedings.—*Re BREECH-LOADING ARMOURY CO., Re MERCHANTS' CO.* (1867), L. R. 4 Eq. 453; 15 W. R. 1057.

Annotation:—Refd. Re Greys Brewery Co. (1883), 25 Ch. D. 400.

6119. ——— For purpose of re-examination.]—A person summoned for the purpose of being examined under 1862 Act, s. 115, is entitled to have counsel & solr. on his behalf present during his examination, & to be re-examined for the purpose of explaining his examination-in-chief, but the re-examination must be limited to that purpose; & his counsel & solr. are entitled to take & carry away notes of the examination, but only to use such notes for the purpose of the re-examination.—*Re CAMBRIAN MINING CO.* (1881), 20 Ch. D. 376; 51 L. J. Ch. 221; 30 W. R. 283.

6120. ——— Undertaking may be required from solicitor—Not to use information acquired—Or from solicitor's clerk to disclose information only to his principal.]—The examination of a witness under 1862 Act, s. 115, is a strictly private proceeding, and the registrar has jurisdiction to require of the solr. attending on behalf of the witness, as a condition of his being present at the examination, to give an undertaking to use any information acquired at the examination for the purpose only of the re-examination of the witness, & not to disclose or allow to be disclosed to any one without the leave of the ct. any information so acquired, & at the end of the examination forthwith to destroy all notes taken by him at the examination; & if a clerk of a solr. attends in the place of his principal, he may be required only to disclose the information to his principal after the principal has given a similar undertaking to the registrar.

The ct. can upon an application under Companies (Winding-up) Rules, Nov. 1895, r. 1, allow information obtained at an examination under the above sect. to be disclosed to third parties if & so far as in its discretion it thinks it right that the information should be disclosed.—*Re LONDON & NORTHERN BANK, LTD., HADDOCK'S CASE, HOYLE'S CASE*, [1902] 2 Ch. 73; 71 L. J. Ch. 511; 86 L. T. 430; 50 W. R. 536; 18 T. L. R. 536; 46 Sol. Jo. 463; 9 Mans. 325, C. A.

Annotation:—Refd. Re Property Insee., [1914] 1 Ch. 775.

Whether inability of counsel to attend ground for refusal to be examined.]—*See* Nos. 6094, 6101, *ante*.

6121. Liquidator of another company—With which amalgamation alleged to have been made—Power of liquidator to cross-examine.]—Under 1862 Act, ss. 115, 117, an order was made that witnesses should be examined before a special examiner as to the affairs of the B. co., in course of liquidation. Previously to the winding up the co. had become amalgamated with the C. co., also in course of liquidation, but the validity of the amalgamation was in dispute between the parties. By an order in chambers leave was given to the liquidator of the C. co. to attend all proceedings in the winding up of the B. co., & on the examination of the manager of the latter co. representatives of the C. co. attended & insisted on their right to cross-examine the witness. Upon an application to the ct. by the B. co. to prevent the course pursued by the representatives of the C. co.:—*Held*: they had a right to attend & cross-examine on their undertaking to abide by any order as to the costs of their cross-examination which the ct. might think fit to make, but that such cross-examination

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Sect. 36.—Winding up by court: Sub-sect. 10, B. (g)

should be strictly confined to the matters arising out of the examination-in-chief.—*Re EMPIRE ASSURANCE CORPN., LTD.* (1868), 17 L. T. 488.

Annotations.—Consd. Re Greys Brewery Co. (1883), 25 Ch. D. 400. *Refd. Re Norwich Equitable Fire Insce.* (1884), 27 Ch. D. 515.

6122. Examination of members of firm—Firm's confidential clerk not entitled to be present.]—*Re WESTERN OF CANADA OIL, LANDS & WORKS Co., No. 6116, ante.*

6123. Contributories—Whether entitled further to examine witnesses.]—An order, allowing contributories to attend the examination of witnesses by the official liquidator & further examine them, was enforced.—*Re SILKSTONE & DODSWORTH COAL & IRON Co., LTD., WHITWORTH'S CASE* (1881), 50 L. J. Ch. 752; 45 L. T. 173; 29 W. R. 866.

6124. ———.]—*Re LONDON & LANCASHIRE PAPER MILLS Co., LTD., No. 6071, ante.*

6125. Creditors.]—Admitted creditors of a co. in course of winding up have not a general right under the General Order of Nov. 11, 1862, r. 60, to attend an examination of witnesses before an examiner summoned under 1862 Act, s. 115. But the ct. in its discretion may allow the attendance. The word "proceedings" in that rule cannot be held to include an examination before an examiner which is strictly of a private character.—*Re GREYS BREWERY Co.* (1883), 25 Ch. D. 400; 53 L. J. Ch. 262; 50 L. T. 14; 32 W. R. 381; 28 Sol. Jo. 104.

Annotations.—Consd. Re Norwich Equitable Fire Assee. (1884), 51 L. T. 404; *Re Appleton, French & Scafton*, [1905] 1 Ch. 749. *Refd. Re London & Lancashire Paper Mills Co.* (1888), 57 L. J. Ch. 766; *Learoyd v. Halifax Joint Stock Banking Co.*, [1893] 1 Ch. 686; *North Australian Territory Co. v. Goldsborough, Mort*, [1893] 2 Ch. 381; *Re Standard Gold Mining Co.* (1895), 2 Mans. 463; *Re London & Northern Bank, Haddock's Case, Hoyles' Case*, [1902] 2 Ch. 73; *Re Walker, Ex p. Childs* (1909), 100 L. T. 860.

6126. ——— Claim to be creditor disputed.]—The official liquidator of a co. which was in liquidation had taken out a summons under 1862 Act, s. 115, for the examination of a former officer of the co., for the purpose of obtaining information from him relating to certain claims brought against the co. One of the persons whose claim to be a creditor was disputed by the liquidator had obtained an order "to attend the proceedings in this matter at his own expense":—*Held*: this order did not give him the right to attend the examination of the witness under the above sect.—*Re NORWICH EQUITABLE FIRE INSURANCE Co.* (1884), 27 Ch. D. 515; 54 L. J. Ch. 254; 51 L. T. 404; 32 W. R. 964, C. A.

Annotation.—Refd. Re London & Lancashire Paper Mills Co. (1888), 57 L. J. Ch. 766.

6127. Liquidator's former clerk—Employed in investigation of certain accounts—Liquidator ham-

pered if clerk not present.]—*Re HESELTINE (W.) & SON, LTD.*, [1891] W. N. 25.

6128. Clerk of liquidator's solicitor.]—*Re HESELTINE (W.) & SON, LTD.*, [1891] W. N. 25.

(h) Postponement and Adjournment of Examination.

6129. Postponement — Pendency of action — Begun by & for benefit of person asking court for examination—Examination postponed until after trial of action.]—The power given to the ct. by 1862 Act, s. 115, is a discretionary power, to be used for the purposes of the winding up & for the benefit of the persons interested in the winding up, & not for the personal benefit of some individual.

Although the mere fact that an action against the co. & the directors is pending, at the instance of the person asking the ct. to exercise its power, does not necessarily suspend the exercise of such power, still, where the action is for the individual benefit of pltf., the ct. ought not as a general rule to allow an examination under the sect. which is desired for the purposes of the action so long as the action is pending.

Where an order allowing such examination had been made upon the summons of a contributory, pltf. in an action against the co. & the directors, not on behalf of the other contributories, but for his own individual benefit, the Ct. of Appeal ordered the examination to be postponed until after the trial of the action.—*Re IMPERIAL CONTINENTAL WATER CORPN.* (1886), 33 Ch. D. 314; 56 L. J. Ch. 189; 55 L. T. 47; 2 T. L. R. 850, C. A.

Annotations.—Consd. Re North Brazilian Sugar Factories (1887), 37 Ch. D. 83; *Re London & Lancashire Paper Mills Co.* (1888), 57 L. J. Ch. 766; *Re Great Kruger Gold Mining Co., Ex p. Barnard*, [1892] 3 Ch. 307.

6130. Commenced by liquidator Against third parties.]—*Re LONDON & NORTHERN BANK, Ex p. ARCHER*, No. 6110, *ante*.

6131. Adjournment—Power of examiner to adjourn—& recall witness—After depositions signed.]—After a witness has been examined before an examiner of the ct. & his depositions have been signed, the examiner has power to adjourn the examination, & the witness may be recalled & is bound to attend upon notice given to him that his attendance is required.—*Re METROPOLITAN (BRUSH) ELECTRIC LIGHT & POWER Co., Ex p. OFFOR* (1884), 51 L. J. Ch. 253; 51 L. T. 816.

(i) Production of Books.

6132. How obtained—Whether by subpoena or by summons.]—Where a co. is being wound up under the Companies Acts, & an examiner has been appointed, the proper mode of obtaining the production before the examiner of any books or documents relating to the co., in the custody or power of any officer or person, under 1862 Act,

PART III. SECT. 36, SUB-SECT. 10.— **B. (i).**

t. When ordered — Necessity for notice—Agent—Resident out of jurisdiction.]—The liquidator of a co. applied for an order under Cos. Act, 1862 (c. 89), s. 100, on a former agent of the co., who was resident in Canada, to deliver up books & papers in his possession, belonging to the co., & moved the ct. to pronounce the order without intimation. The ct. refused the order without intimation.—*BRITISH CANADIAN LUMBERING & TIMBER Co., LTD.* (1886), 14 R. (Ct. of Sess.) 160; 24 Sc. L. R. 151.—**SCOT.**

a. Refusal to produce books—Whether justified — Lien — Books in possession

of manager.]—G. was manager for the Ottawa district of a co. whose headquarters were in Edinburgh. The co. having gone into liquidation an order was obtained from the Ct. of Sessions in Edinburgh for the delivery of its books by the manager to the liquidator or to some person appointed by him. This order not having been obeyed an action was brought by the co. to recover possession of the books from G. who set up the defence that he had already given them up, & also that the co. had no *locus standi* to maintain the action. After proceedings in liquidation were commenced G. was dismissed as manager, whereupon he demanded an audit of the books which was commenced but

never completed, & G. swore that after handing over the books to the auditors he had never had possession of them. He also swore that they had never been in his control, having been kept in a safe of which a clerk of the co. & the new manager alone had the combination. Some time after the audit an agent of the liquidator went to Ottawa to get the books & saw G., who first agreed but afterwards refused to deliver them up, giving as the ground of his refusal that he was liable for rent of the office, & other debts of the co., & wished to retain what property of the co. he had to protect himself. The agent, with the assistance of G.'s landlord, then obtained access to the office where he

s. 115, is not by *subpœna* but by summons according to General Orders of Nov. 1862, sched. 3, form 54.—*CREDIT Co., LTD. v. WEBSTER* (1885), 53 L. T. 419.

6133. Discretion of court to order—Interference by Court of Appeal—Surveyor of taxes—Production of company's balance-sheet.]—Under 1862 Act, s. 115, the judge has a discretion as to making an order for the production of documents, & the Ct. of Appeal will not readily interfere with the exercise of his discretion, though it has jurisdiction to do so in a proper case.

The liquidator of a co., in order to obtain evidence in support of a misfeasance summons which he had issued against the directors of the co. & the auditors, applied under the above sect. for an order that the surveyor of taxes should attend for examination and produce some balance-sheets of the co. which had been delivered to him for the purpose of assessment of income tax. The surveyor objected to produce these documents, & the Board of Inland Revenue supported his objection by a resolution that their production would be "prejudicial & injurious to the public interests & service." On appeal from a refusal of an order for production:—*Held*: the exercise by the judge of his discretion ought not to be interfered with.—*Re HARGREAVES (JOSEPH), LTD.*, [1900] 1 Ch. 347; 69 L. J. Ch. 183; 82 L. T. 132; 48 W. R. 241; 16 T. L. R. 155; 44 Sol. Jo. 210; 7 Mans. 354; 4 Tax Cas. 173, C. A.

6134. When ordered — Cross-examination of secretary—On affidavit containing material collected from company's books.]—A petition for winding up a co. having been presented by a shareholder, the secretary filed an affidavit in opposition to the petition, & was cross-examined by petitioner before a special examiner. On his cross-examination, he was called on to produce the books of the co., which he refused to do. The judge, accordingly, on the application of petitioner, made an order that the co., by their secretary, should produce before the special examiner, upon the cross-examination of the secretary, the books & papers which they had had notice to produce:—*Held*: petitioner had a right to the production of the co.'s books & papers on the cross-examination of the secretary for the purpose of testing his evidence, but for no other purpose; & the order was right both in form & substance.—*Re EMMA SILVER MINING Co.* (1875), 10 Ch. App. 194; 44

saw some books which he took to belong to the co., & a safe in which he believed there were others, but G. coming in refused to allow him to remove them & ejected him from the office:—*Held*: the books having been shown to have been in the possession of G. at the date of the visit of the liquidator's agent to Ottawa, & deft. not having attempted to show what became of them after that date, & his testimony that he did not know what had become of them having been discredited by the trial judge, there was no reason for interfering with the order directing him to deliver the books & papers to the liquidator.—*GRANT v. BRITISH CANADIAN LUMBER Co.* (1890), 18 S. C. R. 708.—CAN.

6137 i. — — — Claimed by company's solicitors.]—On the motion of the official liquidator of a co., which was being wound up by the ct., the law-agents of the co. were ordained to produce all books, title deeds, papers & other deeds or documents in their custody relating to the co. without prejudice to the lien claimed by them.—*DONALDSON & Co., LTD. (LIQUIDATOR OF) v. WHITE & PARK*, [1908]

S. C. 309.—SCOT.

b. — *Powers of court—To grant warrant to search for & seize.]*—The official liquidator of a co., ordered to be wound up by the ct. under the provisions of the Cos. Acts, 1862 to 1900, presented a note to the Lord Ordinary to whom the liquidation had been remitted, stating that he had been unable to obtain possession of the books & papers of the co. from its secretary, & praying that a warrant be granted to officers of the ct. to search for & seize the books & papers of the co. The Lord Ordinary, while of opinion that a warrant ought to be granted, reported the note, being doubtful whether he had power to grant such a warrant, as Cos. Act, 1862 (c. 89), s. 115, did not specifically authorise a warrant to search for & seize books, etc.:—*Held*: a warrant must be granted to messenger at arms to search for & seize as craved.—*KER v. HUGHES*, [1907] S. C. 380; 44 Sc. L. R. 299; 14 S. L. T. 642.—SCOT.

c. *What documents must be produced—Only books & papers relating to the company.]*—On the examination

L. J. Ch. 456; 31 L. T. 816; 23 W. R. 300, L. JJ.

Annotation:—*Folld. Re Lisbon Steam Tram Co.*, [1875] W. N. 54.

6135. —.]—*LISBON STEAM TRAMWAYS Co.*, [1875] W. N. 54.

—.]—*See, also*, Nos. 6084, 6090, *ante*.

6136. Position of witness ordered to produce books.]—The liquidators of a co. desired to summon for examination the secretary of a banking co. with whom the account of G. who had acted as attesting witness to a transfer of shares in the co. in liquidation, & as agent between the transferor & transferee, had been kept. The transfer was suspected to be collusive, & it was alleged that G. had, after the transfer was executed, paid on behalf of the transferor various sums of money to the transferee to enable him to pay calls on the shares. It was desired to require the secretary of the banking co. to bring with him & produce the books of the banking co. containing the private account of G., in order that the liquidators might inspect that account with the view of tracing the payments alleged to have been made by G. to the transferee:—*Held*: a summons under 1862 Act, s. 115, might issue for these purposes, but when the witness attended & produced the books every objection as to the right of inspecting them would still be open to him & to the judge.

A witness so summoned, & required to produce books, stands in the same position as an ordinary witness served with a *subpœna duces tecum*.—*Re SMITH, KNIGHT & Co.*, (1869) 4 Ch. App. 421; 20 L. T. 206; 17 W. R. 510, L. JJ.

Annotation:—*Folld. Re Contract Corpn.* (1871), 19 W. R. 337.

Compare No. 6087, *ante*.

6137. Refusal to produce books—Whether justified—Lien—Claimed by company's solicitors.]—*Re MADRID & VALENCIA RY. Co.* (1850), 15 L. T. O. S. 273.

6138. — — — — —.]—Under 1862 Act, s. 115, the solrs. of a co. may be compelled, on a summons obtained by the official liquidator in the winding up of a co., to produce documents relating to the co., without prejudice to their lien for costs.—*Re SOUTH ESSEX ESTUARY & RECLAMATION Co.*, *Ex p. PAINE & LAYTON* (1869), 4 Ch. App. 215; 38 L. J. Ch. 305, L. C.

Annotations:—*Consd. Re Capital Fire Insee. Assocn.* (1883), 24 Ch. D. 408; *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1.

of a person under Companies Act, 1899, s. 123 (1), after the ct. has made an order for winding up a co. Such person can only be compelled to produce, for the purposes of examination, the books & papers relating to the co.—*Re MARRICKVILLE TIMBER Co.* (1921), 21 S. R. N. S. W. 643.—AUS.

d. *Order of foreign court — Enforceable by attachment only.]*—In the course of proceedings taken in Scotland for winding up pltf. co., an order was made by a Scottish ct. for delivery by deft., as one of the officers of the co., of certain books & papers said to be in his hands, & it was provided that in case of default the liquidator might proceed against deft., who lived in Ontario, in any ct. in Ontario having authority to compel delivery, & upon default this action was brought for that purpose:—*Held*: there was & could be no final adjudication of rights by the order, for it could only be operative by enforcing it against the person of deft. by attachment for disobedience, & such enforcement could not be of extra-territorial efficacy.—*BRITISH CANADIAN LUMBERING & TIMBER Co. v. GRANT* (1887), 12 P. R. 301.—CAN.

Sect. 36.—Winding up by court: Sub-sect. 10, B. (j)

j) Depositions.

6139. Purposes to which depositions taken may be put—May be used against person giving evidence.]—Evidence taken under 1862 Act, s. 115, may be used on the hearing of a summons against the person giving the evidence.—*Re HERCULES INSURANCE CO., PUGH'S CASE, SHARMAN'S CASE* (1872), L. R. 13 Eq. 566; 41 L. J. Ch. 580; 26 L. T. 274.

Annotations:—Mentd. Re Britannia Fire Assoon., Coventry's Case, [1891] 1 Ch. 202; Re Central Klondyke Gold Mining & Trading Co., Savigny's Case (1898), 5 Mans. 336; Re National Bank of Wales, Massey & Giffin's Case, [1907] 1 Ch. 582.

6140. — But not against persons in whose absence they were taken—Even if liquidator has specified portion he intends to use.]—Depositions taken, under 1862 Act, s. 115, by the liquidator of a co. which is being wound up are not admissible in evidence against persons in whose absence they have been taken, even though such persons have obtained an order requiring the liquidator to specify the depositions or parts of depositions on which he intends to rely against them, & he has accordingly specified the depositions which he desires to use.—*Re GREAT WESTERN FOREST OF DEAN COAL CONSUMERS' CO., LTD., CRAWSHAY'S & CARTER'S CASE* (1885), 54 L. J. Ch. 506; 33 W. R. 444.

6141. — May be disclosed to third parties by leave of court.]—*Re LONDON & NORTHERN BANK, LTD., HADDOCK'S CASE, HOYLE'S CASE*, No. 6120, *ante*.

6142. — May be used for cross-examination of person giving evidence—In action by liquidator for rescission of contract.]—*NORTH AUSTRALIAN TERRITORY CO. v. GOLDSBOROUGH, MORT & CO.*, No. 6067, *ante*.

6143. Inspection—By defendant in action brought by liquidator.]—*NORTH AUSTRALIAN TERRITORY CO. v. GOLDSBOROUGH, MORT & CO.*, No. 6067, *ante*.

6144. —.]—A person seeking to inspect depositions taken under 1862 Act, s. 115, must make out a special case, such depositions being since 1895 (Winding up) Rules, r. 1, private.

Directors of a co. had been separately examined by the voluntary liquidator under the above sect. Subsequently the liquidator, in the name of the co., commenced an action against the directors for misfeasance, & obtained leave to deliver

interrogatories to the directors who had put in separate defences. On the application of one of the directors for liberty to inspect & take a copy of his depositions:—*Held*: appct. had a *prima facie* right to inspect & take a copy of his depositions, & the mere fact that he was charged with something in an action against himself & other persons did not deprive him of that *prima facie* right unless it could be shown that there was a conspiracy to misrepresent the facts of the case, of which there was no evidence in the present case.—*Re MERCHANTS' FIRE OFFICE*, [1899] 1 Ch. 432; 68 L. J. Ch. 211; 80 L. T. 285; 47 W. R. 480; 15 T. L. R. 160; 43 Sol. Jo. 209; 6 Mans. 93.

6145. — By contributories & admitted creditors.]—In the winding up of a co., at any rate under a compulsory order, every contributory & every creditor whose claim or proof has been admitted, is entitled, as of right to inspect & take copies of all depositions of evidence taken at a private examination under 1862 Act, s. 115, whether the evidence was given by himself or by other persons.—*Re STANDARD GOLD MINING CO.*, [1895] 2 Ch. 545; 73 L. T. 285; 44 W. R. 63; 11 T. L. R. 527; 39 Sol. Jo. 672; 2 Mans. 463; 13 R. 692; *sub nom. Re STANDARD GOLD MINING CO., LTD., Ex p. MEE*, 64 L. J. Ch. 790.

Annotation:—Fold. Re Merchants' Fire Office, [1899] 1 Ch. 432.

6146. Filing—Time for—Liquidator's file of proceedings.]—*Re LONDON & LANCASHIRE PAPER MILLS CO., LTD.*, No. 6071, *ante*.

(k) Appeals from Order for Examination.

6147. Whether witness entitled to appeal.]—*Re GOLD CO.*, No. 6077, *ante*.

6148. — Order bad for want of jurisdiction.]—*Re SILKSTONE & DODWORTH COAL & IRON CO., WHITWORTH'S CASE*, No. 6112, *ante*.

6149. — By motion to discharge order.]—*Re LONDON & LANCASHIRE PAPER MILLS CO., LTD.*, No. 6071, *ante*.

C. Misfeasance Proceedings.

(a) In General.

See 1908 Act, s. 215.

6150. Effect of section.]—Two gentlemen were appointed, & for some time acted, as directors of a co. in which the qualification for a director was the holding 100 shares. Neither of them was the

PART III. SECT. 36, SUB-SECT. 10.—
C. (a).

6150 i. Effect of section.]—Companies (Consolidation) Act, 1908 (c. 69), s. 215, creates no new right, & only provides, as did Cos. Act, 1862 (c. 89), s. 165, a summary procedure for enforcing against directors or other officers of a co. liability for breach of trust or other misconduct which, prior to the Act, might have been enforced by action; & to bring a case within the sect. it is essential to show that pecuniary loss resulted to the co. from the acts or defaults constituting the alleged misfeasance.—*Re IRISH PROVIDENT ASSURANCE CO.*, [1913] 1 I. R. 352.—*IR.*

6150 ii. R. S. O. 1887, s. 23 (17)—Effect of section.]—The above sect. is not wide enough to authorise the setting aside as a breach of trust, on the summary application of the liquidator, of a sale of lands by the co. to a director, especially where the lands have, at the director's request, been conveyed by the co. to the director's wife.—*Re ESSEX CENTRE MANUFACTURING CO.* (1890), 19 A. R. 125.—*CAN.*

6150 iii. Winding-up Act, 1906, s. 123—Effect of section—De facto directors.]—The above sect. does not create liability; it relates to procedure only; the liability must be found outside of the sect. The sect. is wide in its application, it covers the case of a *de facto* director guilty of misfeasance while assuming to direct a co.'s affairs, although there may have been irregularity in the proceedings leading to his election as director; it does not lie in his mouth to criticise the method of his appointment.—*Re OWEN SOUND LUMBER CO.* (1915), 34 O. L. R. 528; 9 O. W. N. 103.—*CAN.*

h. — On proceedings in Court of King's Bench.]—The Ct. of K. B. has jurisdiction over an action by a liquidator in the name of a co. against its directors for misfeasance & breaches of trust, although summary proceedings are not taken under the above sect.—*NORTHERN TRUST CO. v. BUTCHART*, [1917] 2 W. W. R. 405; 35 D. L. R. 169.—*CAN.*

k. Extent of jurisdiction of court—To order costs.]—J., M. & I. were directors of a co. which was being

wound up voluntarily. In the course of the liquidation it appeared that cheques signed by J. & M. had been drawn against the bank account of the co. for purposes in which I. alone was interested; but that, on the whole account, lodgments had been made by I. to the credit of the co. to an amount larger than the sums drawn out upon the cheques so signed by J. & M. On a summons by the liquidator, under Cos. Act, 1862 (c. 89), s. 165, to determine whether these sums had been expended *ultra vires*, & in breach of trust, & if so, that the directors should repay the sums, it was found that no money loss had been sustained by the co., but the ct. decided that the directors were guilty of gross neglect & breach of duty, & that such neglect & breach of duty were the cause of the litigation, & ordered that the directors should pay the costs of the summons & inquiry:—*Held*: the ct. had jurisdiction to make the order that the directors should pay the costs, although the claim of the liquidator for repayment of money had failed.—*Re IRELAND & CO.*, [1905] 1 I. R. 133; 39 I. L. T. 34.—*IR.*

holder of any shares. No act of misfeasance was alleged against either of them for which he would have been liable if he had been a duly qualified director. The co. was now in course of being wound up. The liquidator applied under 1862 Act, s. 165, to charge them for misfeasance in acting as directors without qualification:—*Held*: the above sect. created no new right, but merely provided a summary mode of calling directors to account for acts of impropriety, for which they were liable to an action; to make a person liable under it, he must be shown to have been guilty of some misconduct by which the co. had suffered loss; & the application must, therefore, be dismissed.

Misfeasance in the above sect. means something in the nature of a breach of trust.—*Re CANADIAN LAND RECLAIMING & COLONIZING CO., COVENTRY & DIXON'S CASE* (1880), 14 Ch. D. 660; 42 L. T. 559; 28 W. R. 775, C. A.

Annotations:—*Consd. Re Anglo-French Co-op. Soc., Ex p. Pelly* (1882), 21 Ch. D. 492; *Re Western Counties Steam Bakeries & Milling Co.*, [1897] 1 Ch. 617. *Refd. Re Exchange Banking Co., Filiteroff's Case* (1882), 21 Ch. D. 519; *Re Liverpool & London Guarantee & Accident Insce., Gallagher's Case* (1882), 46 L. T. 54; *Re North Australian Territory Co., Archer's Case*, [1892] 1 Ch. 322; *Re Kingston Cotton Mill Co. (No. 2)*, [1896] 2 Ch. 279. *Mentd. R. v. Lawson*, [1905] 1 K. B. 541.

Whether proceedings applicable—To voluntary winding up.—*See Nos. 6998, 6999, post.*

6151. — To registered industrial society.—1890 (Winding up) Act, s. 10, is applicable to the winding up of registered industrial societies. Industrial & Provident Society Act, 1893 (c. 39), has not affected the jurisdiction of the county cts. as conferred by the preceding Act of 1876; except that proceedings pending at the time of the passing of the Act may be transferred to the High Ct. under the conditions imposed by the sect.—*Re FERNDAL INDUSTRIAL CO-OPERATIVE SOCIETY*, [1894] 1 Q. B. 828; 70 L. T. 448; 42 W. R. 430; 10 T. L. R. 325; 38 Sol. Jo. 309; 1 Mans. 303; 10 R. 199, D. C.

See, generally, INDUSTRIAL, PROVIDENT & SIMILAR SOCIETIES.

— After dissolution of company.—*See No. 6829, post.*

6152. When order will be made on misfeasance application—Whether only when misfeasance clearly made out—& no question of law to be determined.—Under 1862 Act, s. 165, no order will be made to compel a director or officer of a co. to refund any moneys he has misapplied or retained, unless the case against such director or officer be clearly & distinctly made out, & there is no question of law to be determined.—*Re ROYAL HOTEL CO. OF GREAT YARMOUTH* (1867), L. R. 4 Eq. 244; 16 L. T. 655; 15 W. R. 953.

Annotation:—*Dttd. Re Mercantile Trading Co., Stringer's Case* (1869), 4 Ch. App. 475.

6153. — Only in simple cases—Necessity for action when matter complicated.—The summary jurisdiction to make directors or other officers of a co. who have misapplied or retained moneys of the co. repay the money so misapplied or retained, given by 1862 Act, s. 165, is only applicable in cases of a simple character. Where the matter is complicated, the repayment must be enforced by bill.—*Re BRIGHTON BREWERY CO., HUNT'S CASE* (1868), 37 L. J. Ch. 278; 16 W. R. 472.

Annotation:—*Refd. Madrid Bank v. Pelly* (1869), L. R. 7 Eq. 442.

6154. Extent of jurisdiction of court—Will not decide question of rescission of contract—Or cancellation of allotment of shares.—The ct. will not order the rescission of a contract & the cancellation of shares on a summons taken out by the liqui-

dators of a co., even though the contract was made between the co. & some of its officers.

In June, 1910, N. & A. procured an option to obtain a lease of & the business of a butter factory in France. N. & A. subsequently formed a co., of which they were two of the directors, for the purpose of taking over the option. By an agreement dated Sept. 5, 1910, made between N. & A. & the co., N. & A. agreed to sell all their right, title & interest in the option to the co. for the consideration of £6,500, to be paid as to £500 in cash & £6,000 in fully-paid shares in the co. The shares were allotted to N. & A., but the lease & business of the butter factory were never conveyed to the co. By a judgment of the French ct. the said option was declared to be null & void. The co. was voluntarily wound up, & the liquidators issued this summons against N. & A. under 1908 Act, ss. 164, 193, 215, for an order that the agreement of Sept. 5, 1910, might be rescinded, & the 6,000 shares cancelled:—*Held*: even if the ct. had jurisdiction, it would not decide such a question on summons.—*Re CENTRIFUGAL BUTTER CO., LTD.*, [1913] 1 Ch. 188; 82 L. J. Ch. 87; 108 L. T. 24; 57 Sol. Jo. 211; 20 Mans. 34.

(b) *Who may Take Proceedings.*

6155. Liquidator.—*Re AGRA & MASTERMAN'S BANK, SHIPMAN'S CASE* (1868), cited in 4 Ch. App. 479, n.

Annotations:—*Consd. Re Mercantile Trading Co., Stringer's Case* (1869), 4 Ch. App. 479, n. *Refd. Re Mercantile Trading Co., Stringer's Case* (1869), 4 Ch. App. 475.

6156. — Duty to apply promptly.—The position of a liquidator making a claim against directors under 1862 Act, s. 165, for misapplication of moneys in improperly paying a dividend otherwise than out of profits is, with regard to the duty of promptitude, the same as that of an ordinary claimant. Where, therefore, the liquidator in a winding up which commenced in 1876 applied in 1879 for an order against directors to repay a dividend declared by them at the close of 1872 & paid soon after, the application was dismissed as a stale demand.—*Re MAMMOTH COPPEROPOLIS OF UTAH* (1880), 50 L. J. Ch. 11; 43 L. T. 754.

Annotations:—*Dttd. Re Alexandra Palace Co.* (1882), 21 Ch. D. 149. *Consd. Re Sharpe, Re Bennett, Masonic & General Life Assce. v. Sharpe*, [1892] 1 Ch. 154.

6157. — — ——Certain dividends (*see No. 3282, ante*) were paid in Jan. & July, 1874, & in Jan. & July, 1875. The order to wind up the co. was made in Nov. 1876. A liquidator was appointed in Dec. 1876; he afterwards retired, & his successor was appointed in Dec. 1878. The summons against the directors was issued in Feb. 1880:—*Held*: there had been no such delay as to disentitle the liquidator to make the application.—*Re ALEXANDRA PALACE CO.* (1882), 21 Ch. D. 149; 46 L. T. 730; 30 W. R. 771; *sub nom. Re ALEXANDRA PALACE CO., GOODSON'S CASE*, 51 L. J. Ch. 655.

Annotations:—*Consd. Re Sharpe, Re Bennett, Masonic & General Life Assce. v. Sharpe*, [1892] 1 Ch. 154. *Mentd. Guinness v. Land Corpn. of Ireland* (1882), 22 Ch. D. 349; *Moxham v. Grant* (1899), 68 L. J. Q. B. 283.

6158. — — ——By the arts. of assocn. of a co. incorporated in 1868, it was provided that interest on the money paid up on the shares should be paid to the shareholders until otherwise determined by the directors; & that no dividend or bonus should be payable except out of the profits. No profits were made by the co.; but the directors paid interest to the shareholders out of the capital of the co. until 1878, when the Board of Trade interfered, & the directors ceased to pay interest. B. was a director from 1869 till his

Sect. 36.—Winding up by court: Sub-sect. 10, C. (b),

death in 1883. In 1886 the co. was wound up; & in 1889 the liquidator commenced an action against the personal representatives of B., seeking to make his estate liable for the money paid as interest to the shareholders out of capital while he was a director:—*Held*: there was no such delay, either before or after the commencement of the winding up, as to render the claim of the liquidator a stale demand in the view of a ct. of equity.—*Re SHARPE, Re BENNETT, MASONIC & GENERAL LIFE ASSURANCE CO. v. SHARPE*, [1892] 1 Ch. 154; 61 L. J. Ch. 193; 65 L. T. 806; 40 W. R. 241; 8 T. L. R. 194; 36 Sol. Jo. 151, C. A. *Annotations*:—*Mentd.* *Soar v. Ashwell*, [1893] 2 Q. B. 390; *Lock v. Queensland Investment & Land Mortgage Co.*, [1896] 1 Ch. 397; *Re National Bank of Wales*, [1899] 2 Ch. 629; *Brooks v. Muckleston*, [1909] 2 Ch. 519; *Taylor v. Davies*, [1920] A. C. 636; *Re Claridge's Patent Asphalt Co.*, [1921] 1 Ch. 543.

6159. — Who entitled to decide as to taking of proceedings—Whether contributories or creditors—Creditors' liquidation.]—*Re RUBBER & PRODUCE INVESTMENT TRUST*, No. 6031, *ante*.

6160. — Of amalgamating company—Proceedings against directors of amalgamated company.]—Under an agreement between two cos., ratified by the shareholders on June 29, 1902, all the assets of co. A. were sold to co. B., there being issued to shareholders in co. A. stock in co. B. to the amount of a detailed valuation of the assets. At the same time \$30,000 were paid by co. B. to the directors of co. A.; this transaction not being disclosed to co. A. or to the shareholders in either co. In 1919 & 1920 actions were brought against the directors to recover the \$30,000. Pltfs. included (a) the liquidator of co. B., (b) a person suing on behalf of himself & all other shareholders in co. A., & of all shareholders in that co. prior to June 29, 1902, who transferred their shares pursuant to the agreement. Co. A. was not made a party to the actions:—*Held*: (1) the payment to the directors could not be justified as compensation for loss of their directorships, in the absence of a full disclosure of the facts; (2) the actions could not be maintained. The liquidator could not sue, because no claim had been made & transferred to co. B., & that co. was not a shareholder. The claim as representing the shareholders failed because if co. A. existed, it was a necessary party; if it did not, there was no claim. The claim as representing the shareholders on June 29, 1902, failed, because the directors acted as agents for the co. & not for the shareholders.—*CLARKSON v. DAVIES*, [1923] A. C. 100; 92 L. J. P. C. 27; 128 L. T. 452; [1923] B. & C. R. 42, P. C.

— **Position of liquidator on misfeasance summons.]—***See* Sub-sect. 10, C. (g), *post*.

6161. Contributory—In respect of fully-paid shares.]—In 1871, a partnership, consisting of resp. & five other persons, purchased certain coal areas for £5,500. In 1873 a co. was formed for the purchase of these coal areas at a price, as fixed in the arts. of assocn., not exceeding £42,000—that is, £12,000 in cash & £30,000 in shares. The directors of whom resp. was one, effected the purchase at the above maximum price. The co. was ordered to be wound up in 1875, & in 1878 the coal areas were sold with other property for £14,500. Applt., a contributory, as holder of paid-up shares, applied under 1862 Act, s. 165, to make resp. liable for misfeasance or breach of trust, on the ground that he had joined in purchasing the coal areas for the co. at an overvalue, & without disclosing his interest to the other directors:—*Held*: (1) it had not been proved that

the price paid by the co. was excessive, nor that resp. had concealed his interest; & the onus of proof lay upon applt.

Semble: (2) if misfeasance had been made out, relief could have been obtained against resp., notwithstanding that rescission of the purchase by the co. had become impossible; (3) a person who is merely a contributory in respect of shares fully paid-up has no *locus standi* to apply under the above sect. unless he can show that he might derive some benefit thereby.—*CAVENDISH BENTINCK v. FENN* (1887), 12 App. Cas. 652; 57 L. J. Ch. 552; 57 L. T. 773; 36 W. R. 641, H. L.; *affg.* S. C. *sub nom.* *Re CAPE BRETON CO.* (1885), 29 Ch. D. 795, C. A.

Annotations:—*As to* (1) *Appld.* *Ladywell Mining Co. v. Brookes*, *Ladywell Mining Co. v. Huggons* (1887), 35 Ch. D. 400. *Consd.* *Re Liverpool Household Stores Assocn.* (1890), 59 L. J. Ch. 616. *Distd.* *Re North Australian Territory Co.*, *Archer's Case*, [1892] 1 Ch. 322; *Re Leeds & Handley Theatres of Varieties*, [1902] 2 Ch. 809. *Refd.* *Lydney & Wigpool Iron Ore Co. v. Bird* (1886), 33 Ch. D. 85; *Grant v. Gold Exploration & Development Syndicate*, [1900] 1 Q. B. 233; *Re Lady Forrest (Murchison) Gold Mine*, [1901] 1 Ch. 582; *Re Brazilian Rubber Plantations & Estates*, [1911] 1 Ch. 425; *Kregor v. Hollins* (1913), 109 L. T. 225. *As to* (2) *Refd.* *Re Olympia*, [1898] 2 Ch. 153. *Generally, Mentd.* *Re Liberator Permanent Benefit Bldg. Soc.* (1894), 10 T. L. R. 537; *Re Kingston Cotton Mill Co. (No. 2)*, [1896] 2 Ch. 279; *Burland v. Earle*, [1902] A. C. 83; *North American Land & Timber Co. v. Watkins* (1904), 91 L. T. 425; *Omnium Electric Palaces v. Baines*, [1914] 1 Ch. 332; *Jacobus Marler Estates v. Marler* (1916), 85 L. J. P. C. 167, n.

6162. — Of amalgamated company.]—*CLARKSON v. DAVIES*, No. 6160, *ante*.

6163. Official receiver—Who entitled to decide as to taking of proceedings—Whether Board of Trade or court.]—Whether or not proceedings under 1890 (Winding up) Act, s. 10, for misfeasance ought to be instituted by the official receiver against the directors or officers of a co., is a matter for the determination of the ct. & not of the Board of Trade.—*Re NEW ZEALAND LOAN & MERCANTILE AGENCY CO., LTD.* (1894), 71 L. T. 693; 39 Sol. Jo. 61; 2 Mans. 82; 13 R. 197.

6164. Person using official receiver's name—On giving indemnity—Propriety of application.]—*Re ANGLO-SARDINIAN ANTIMONY CO.* (1894), 38 Sol. Jo. 682.

(c) *Against Whom Proceedings may be taken.*

6165. Executor of deceased director or officer.]—The discretionary power conferred by 1862 Act, s. 165, of dealing summarily with delinquent directors & other officers of a co., applies only to cases in which the individual sought to be charged with the alleged misfeasance is living & cannot be exercised against his representatives if he be dead.

In the winding-up of a co., under the above Act, a summons was taken out by the official liquidators against the living directors of the co., & the exors. of such as were dead, to enforce against them the summary remedy provided by the above sect., in respect of certain alleged misfeasances on the part respectively, of themselves or their testators. On summons by the exors. of a deceased director, for a stay of proceedings on the former summons:—*Held*: though unusual, it was a legitimate form of disputing the jurisdiction; the summary relief could not be had against them; & both living & deceased directors being implicated in the charges made, & the adjustment of all rights in the winding up requiring all parties to be made jointly liable, the remedy must be by suit.—*Re EAST OF ENGLAND BANK, FELTOM'S EXECUTORS' CASE* (1865), L. R. 1 Eq. 219; 35 L. J. Ch. 196; 13 L. T. 741; 12 Jur. N. S. 201; 14 W. R. 247.

Annotations:—*Fold.* *Re British Guardian Life Assce. Co.* (1880), 14 Ch. D. 335. *Refd.* *Re Imperial Land Co. of*

Marseilles (1870), 22 L. T. 598. *Mentd. Re United English & Scottish Assce. Co., Ex p. Hawkins* (1868), 3 Ch. App. 787.

6166. —.]—The exors. of a director, deceased, not being officials of a co., cannot be proceeded against by summons taken out under the provisions of 1862 Act, s. 165. A co. in 1872 passed a resolution that for the better security of the policy holders 50 per cent. of the premiums paid on whole life policies should be invested in Govt. securities in the names of trustees, & representations were made by the directors of the manner in which the investments were made; but in the winding up of the co. it was discovered that premiums had been received & investments had not been made, as represented; & that the investments of premiums which had been made had been sold out, & the proceeds applied towards the general purposes of the co. On summons by the liquidator & a whole life policy holder jointly, under the above Act, for a declaration that the directors were liable to account to the co. for a moiety of the premiums received:—*Held*: the summons was maintainable as against the surviving directors; the directors were liable, as for a breach of trust, for a moiety of the premiums which ought to have been invested; & the policy holder was a creditor of the co. & rightly joined with the liquidator in the summons.—*Re BRITISH GUARDIAN LIFE ASSURANCE CO.* (1880), 14 Ch. D. 335; 49 L. J. Ch. 446; 28 W. R. 945.

Annotation:—*Refd. Re Cardiff Savings Bank, Davies' Case* (1890), 45 Ch. D. 537.

Officer—Who is.—*See* Sect. 29, sub-sect. 1, A., *ante*.

6167. Promoter—For money received to use of company.—Where it was sought to make a promoter of a co. account to the co. under 1890 (Winding up) Act, s. 10, for promotion money received by him from the vendor:—*Held*: on the facts deft. was under no obligation to account to the co.

Semble: money had & received to the use of the co., but not its property till received by the promoter, is included in the term "moneys or property of the co." in the above sect.—*Re SALE HOTEL & BOTANICAL GARDENS, LTD., Ex p. HESKETH* (1898), 78 L. T. 368; 46 W. R. 617; 14 T. L. R. 344; 42 Sol. Jo. 416, C. A.

Annotation:—*Refd. Re Olympia* (1898), 78 L. T. 159.

Liquidator.—*See* Sub-sect. 10, C. (d), iv., *post*.

(d) *What amounts to Misfeasance.*

i. *In General.*

6168. Not mere non-feasance—Neglect to recover debts.—A director of a co. who has knowledge of a fraud, breach of trust, or misfeasance committed before he was a director of or connected with the co. by which the co.'s money was lost, is not liable under 1862 Act, s. 165, or otherwise, for not communicating such knowledge to

the co., or for not instituting proceedings for the recovery of the money lost.

But where there has been no fraud or dishonesty & a director has omitted to get in a debt due to the co. by not suing at the proper time, or when the debtor was solvent at one time and not at another, it appears to me that it by no means follows as a matter of course, as it might in the case of ordinary trustees that the directors ought to be made liable (JESSEL, M.R.).—*Re FOREST OF DEAN COAL MINING CO.* (1878), 10 Ch. D. 450; 40 L. T. 287; 27 W. R. 594.

Annotations:—*Fold. Re Wedgwood Coal & Iron Co.* (1882), 31 W. R. 181. *Apld. Re Liverpool Household Stores Assocn.* (1890), 59 L. J. Ch. 616. *Refd. Re Exchange Banking Co., Flitcroft's Case* (1882), 21 Ch. D. 519; *Re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141; *Re Cardiff Savings Bank, Bute's Case*, [1892] 2 Ch. 100; *Re National Bank of Wales*, [1899] 2 Ch. 629. *Mentd. Re Lands Allotment Co.*, [1894] 1 Ch. 616; *Percival v. Wright*, [1902] 2 Ch. 421.

Neglect to recover money wrongly paid.—Directors of a co. in liquidation cannot be made liable, under 1862 Act, s. 165, for acts of mere non-feasance.

An agreement for an underlease of mines was assigned for value to T. by A., who at the same time agreed to deduce a good title. A co., called the W. Co., was afterwards formed to work in the mines. T. declared himself to be a trustee for the co. of the benefit of the agreement, & A. became chairman. It was afterwards found that the consent of a rival co., owners of the head lease, was necessary to the underlease; & a formal licence was accordingly obtained from them by the W. Co., by payment of £5,400. A. who was in pecuniary difficulties at the time, did not pay this money himself, but it was raised by the W. Co. by the issue of debentures, for some of which A. himself subscribed. The W. Co. having gone into liquidation, & A. having become bankrupt, the official liquidator took out a summons against the directors, other than A., seeking to make them liable, under the above sect., to replace the £5,400, on the ground that they had been guilty of a misfeasance, or breach of trust, or at least of wilful default (1) in allowing the money to be so applied at all, (2) in not recovering it from A., (3) at any rate in not keeping his subscription, & refusing to give him his debentures:—*Held*: they had been guilty of no misfeasance, but only of mere nonfeasance, & they could not therefore be made liable under the sect.—*Re WEDGWOOD COAL & IRON CO.* (1882), 47 L. T. 612; 31 W. R. 181.

Annotations:—*Consd. Re Liverpool Household Stores Assocn.* (1890), 59 L. J. Ch. 616. *Refd. Re Kingston Cotton Mill Co. (No. 2)*, [1896] 2 Ch. 279.

6170. Something in nature of breach of trust.—*Re CANADIAN LAND RECLAIMING & COLONIZING CO., COVENTRY & DIXON'S CASE*, No. 6150, *ante*.

By liquidator.—*See* Sub-sect. 10, C. (d) iv., *post*.

PART III. SECT. 36, SUB-SECT. 10.—
C. (d) i.

6170 i. Something in nature of breach of trust.—The misfeasance of a director is a breach of trust, & not a mere personal default.—*NEW FLEMING SPINNING & WEAVING CO. v. KESSOWJI NAIK* (1885), 1 L. R. 9 Bom. 373.—*IND.*

6170 ii. —.]—A co. was formed to take over the business of P. & B. Among the assets to be taken over were certain book debts, which the co. agreed to purchase at a price to be fixed by valuation. The valuation was never made, but P. & B., who were directors of the co., ten months after

the co. had commenced business, but only a few weeks before the date of a winding-up order, passed a resolution that the book debts, amounting to £366 4s. 8d., should be taken over by the co. for the sum of £279:—*Held*: such a resolution was a misfeasance & breach of trust by P. & B., & must be set aside.—*Re CANTERBURY AUCTIONEERING, REAL ESTATE, FRUIT & PRODUCE CO.* (1904), 23 N. Z. L. R. 1.—*N.Z.*

i. *Misrepresentation—As to state of company's finances—Money deposited for investment used to pay debts—Liability for misprision of co-directors.*—Where directors of a trust co., which is hopelessly insolvent, by representa-

tions as to its soundness procure money to be deposited with the co. for investment, & use that money to pay debts of the co. & continue to dissipate the assets of the co., they are each liable for repayment of the sums so procured, & an order for repayment may be made on a misfeasance summons under Winding-up Act, 1906, s. 123. Directors are liable for the misprisions of their co-directors where they are under the duty of finding out & knowing & preventing such misprisions, & where under the evidence they are to be regarded as having assented to such representations.—*Re TRADER'S TRUST CO., LTD., Re KORY* (1915), 33 W. L. R. 352; 9 W. W. R. 538.—*CAN.*

Sect. 36.—Winding up by court: Sub-sect. 10, C. (d) ii., iii. & iv. & (e).]

ii. *As regards Promotion of Company.*

Acceptance of gifts from vendor or promoter.]—See Sect. 1, sub-sect. 5, A. (a), iii.; Sect. 28, sub-sect. 6, C., D., *ante*.

Acceptance of qualification shares.]—See Sect. 28, sub-sect. 6, C. (a), *ante*.

6171. — Distinction between liability in misfeasance proceedings & liability to pay for shares.]—The directors of a co., in its name, entered into an agreement with H. that the capital of the co. should be increased, & that he should endeavour to obtain subscribers for the new shares to be issued. He was to receive, by way of remuneration, a large commission on the nominal value of the new shares taken up, & also a number of shares issued as fully paid-up to him or his nominees, of which 1,000 were to be issued as soon as the directors had accepted four persons to be nominated by him as directors or trustees of the co. This agreement was registered. The co. afterwards passed a special resolution to increase the capital to the extent mentioned in the agreement. R., on the nomination of H., agreed to become a director, on the understanding that he was to be qualified by holding 200 fully paid-up shares, which were to be found for him by H. R. was afterwards elected a director, & acted as such. After his election a second agreement was entered into between the co. & H., by which it was arranged that 2,000 specified shares should be allotted to him or his nominees, as part of the consideration to which he was entitled under the first agreement. The second agreement was also registered. After this 200 of the specified shares were, at the request of H., allotted to R., & were with his consent registered in his name as fully paid-up. Nothing was, in fact, paid for them. The co. was afterwards ordered to be wound up:—*Held*: (1) the arrangement with H. was fraudulent, & *ultra vires*, but as R. had never agreed to take any but paid-up shares, he could not be placed on the list of contributories in respect of the 200 shares; (2) R. had been guilty of a misfeasance in relation to the co., & the ct. could, under 1862 Act, s. 165, order him to pay to the liquidator the value of the 200 shares which he had obtained.—*Re BRITISH PROVIDENT LIFE & GUARANTEE ASSOCN., DE RUVIGNE'S CASE* (1877), 5 Ch. D. 306; 46 L. J. Ch. 360; 36 L. T. 329; 25 W. R. 476, C. A.

Annotations:—*As to* (1) *Consd. Re Eskern Slate & Slab Quarries Co., Clarke & Helden's Cases* (1877), 37 L. T. 222; *Re Eupion Fuel & Gas Co., Aspinall's Case* (1877), 36 L. T. 362; *Re Patent Davit & Boat Detaching Co., Ranken's Case* (1879), 39 L. T. 664. *Refd. Re Church & Empire Fire Insce. Co., Pagin & Gill's Case* (1877), 6 Ch. D. 681; *Re Englefield Colliery Co.* (1878), 8 Ch. D. 388; *Re Macdonald*, [1894] 1 Ch. 89. *As to* (2) *Refd. Re Caerphilly Colliery Co., Ormerod's Case* (1877), 37 L. T. 244; *Re Ambrose Lake Tin & Copper Mining Co., Ex p. Moss, Ex p. Taylor* (1880), 49 L. J. Ch. 457.

iii. *Improper Conduct of Company's Affairs.*

6172. General rule.]—A summons seeking to make directors of a co. liable for misfeasance under 1890 (Winding up) Act, s. 10, should give some information as to the grounds upon which the application is based.

To make directors of a co. liable for misfeasance or breach of trust in relation to the co. on the ground of negligence in performing an act which is within their powers, it must be shown that they did not really exercise their judgment & discretion in the matter as agents of the co.—*Re NEW MASHONALAND EXPLORATION CO., [1892]*

3 Ch. 577; 61 L. J. Ch. 617; 67 L. T. 90; 41 W. R. 75; 8 T. L. R. 738; 36 Sol. Jo. 683.

Annotation:—*Refd. Re Sale Hotel & Botanical Gardens, Ex p. Hesketh* (1898), 78 L. T. 368.

6173. —.]—Where an officer of a co. has committed a breach of his duty to the co., the direct consequence of which has been a misapplication of its assets, for which he could be made responsible in an action, such breach of duty is a "misfeasance" for which he may be summarily proceeded against under 1890 (Winding up) Act, s. 10, & it is not necessary that an action should be brought.

For some years before a co. was wound up, balance-sheets signed by the auditors were published by the directors to the shareholders in which the value of the co.'s stock-in-trade at the end of each year was grossly false, given by J., one of the directors who was also manager, as to the value, of the stock-in-trade. Dividends were paid for some years on the footing that the balance-sheets were correct; but if the stock-in-trade had been stated at its value it would have appeared that there were no profits out of which a dividend could be declared. If the auditors had compared the different books & added to the stock-in-trade at the beginning of the year the amounts purchased during the year, & deducted the amounts sold, they would have seen that the statement of the stock-in-trade at the end of the year was so large as to call for explanation; but they did not do so:—*Held*: it being no part of the duty of the auditors to take stock, they were justified in relying on the certificates of the manager, a person of acknowledged competence & high reputation, & were not bound to check his certificates in the absence of anything to raise suspicion, & they were not liable for the dividends wrongfully paid.

An auditor is not bound to be suspicious where there are no circumstances to arouse suspicion; he is only bound to exercise a reasonable amount of care & skill.—*Re KINGSTON COTTON MILL CO.* (No. 2), [1896] 2 Ch. 279; 65 L. J. Ch. 673; 12 T. L. R. 430; 40 Sol. Jo. 531; 3 Mans. 171; *sub nom. Re KINGSTON COTTON MILL CO., LTD., Ex p. PICKERING & PEASEGOOD* (No. 2), 74 L. T. 568, C. A.

Annotations:—*Consd. Squire Cash Chemist v. Ball, Baker, Mead v. Ball, Baker* (1911), 106 L. T. 197. *Refd. Re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139; *Dixon v. Kennaway*, [1900] 1 Ch. 833.

6174. Payment by directors to themselves.]—*Re LIVERPOOL & LONDON GUARANTEE & ACCIDENT INSURANCE CO., GALLAGHER'S CASE*, No. 6728, *post*.

— **Whether fraudulent preference.]—**See Sub-sect. 15, *post*.

6175. Acts ultra vires—Payments made after commencement of winding up—Not in ordinary course of business.]—After the presentation of a petition for the winding up of a co. on the ground that it had not commenced business within a year from its incorporation, the directors issued new shares, & made payments for the purpose of presenting the appearance of business being carried on. The co. was ordered to be wound up, & in the winding up the official liquidator applied for payment by the directors of all moneys of the co. expended by them since the presentation of the petition:—*Held*: the combined effect of 1862 Act, ss. 153 & 165, was to make the directors *prima facie* liable for all moneys of the co. expended by them, not in the ordinary course of business, since the commencement of the winding up, & an account of moneys so expended must be taken.—*Re NEATH HARBOUR SMELTING & ROLLING*

WORKS (1887), 56 L. T. 727; 35 W. R. 827; 3 T. L. R. 568.

—.]—See, also, No. 6172, *ante*, No. 6205, *post*.

6176. Conduct reckless & without excuse.—The applications for shares in a co. fell short of expectation, & although the whole amount payable on the shares would be inadequate to purchase certain property without which the co. could not proceed to business, & although certain directors named in the prospectus had resigned, still the remaining directors resolved on allotting, & entered into contracts for purchasing & repairing the property. In proceedings against the directors under 1862 Act, s. 165, for the invalid & improper allotment of shares:—*Held*: the allotment could not be made a subject of complaint under that sect., as no loss was occasioned to the co. by an act, the only direct result of which was that money was paid on the shares to the credit of the co.'s banking account.

Numerous actions were brought against the co. by shareholders for rescission of their contracts to take shares. The directors, thinking the co. to be unduly attacked thereby, brought actions against those shareholders for calls unpaid:—*Held*: though in so doing the conduct of the directors seemed to border on the reckless, still, as they had considered the matter as there had been no proof adduced of want of honesty in the line of conduct they had seen fit to adopt, they were not liable under the above sect.

Actions were successfully brought against officers of the co. for the costs of which they were entitled to indemnity from the co. The directors, thinking the co. wronged by these actions, brought actions in the name of these officers against a firm of solrs. for damages for maintenance of the previous actions. The officers had to pay the costs of these new actions, but were reimbursed out of the co.'s moneys:—*Held*: the conduct of the directors had been reckless & without excuse, & in paying the costs of the new actions out of the co.'s moneys they had been guilty of misfeasance within the above sect. for which they were liable.—*Re LIVERPOOL HOUSEHOLD STORES ASSOCN., LTD.* (1890), 59 L. J. Ch. 616; 62 L. T. 873; 2 Meg. 217.

Annotations:—*Consd. Re North Australian Territory Co., Archer's Case*, [1892] 1 Ch. 322. *Mentd. Finch v. Oake* (1896), 60 J. P. 309.

Omission to observe & neglect to enforce rules—By Directors of Savings Bank.—See BANKERS & BANKING, Vol. III., p. 136, Nos. 103, 104.

Improper payment of dividends.—See Sect. 28, sub-sect. 6, E. (f), *ante*.

6177. — When repayment ordered—Not where persons receiving refunded money would be same persons as those who received dividend.—*Re TILLING (G. J.) & SONS, LTD.* (1906), *Times*, May 16.

— **Jurisdiction of court to give leave to directors to serve notice—On shareholders claiming contribution.**—See No. 6198, *post*.

Issue of shares to directors at discount or under-value.—See Sect. 28, sub-sect. 6, E. (a), *ante*.

PART III. SECT. 36, SUB-SECT. 10.—
C. (d) iv.

m. Disposing of assets without providing for debt—Personal liability—Goods supplied to company during liquidation.—S. supplied goods to a co. in course of liquidation. Applt. was the liquidator of the co., & he carried on the business in the co.'s name for some years, & C. was manager of the branch to which the goods were supplied. S. sued C. for the price of the goods & in that suit applt. was

made a party, as well as his assignees. Judgment went against the assignees, on the ground that they had given an indemnity to applt. to pay all the debts of the co. that appeared in their books of account. This debt was not in the ordinary books of account, but was in a letter-book, in a letter that had been sent to applt. The assignees appealed & C. was ordered to pay the amount. He paid the amount into ct., & commenced an action against applt. for indemnity, but applt. set

Whether absent director liable for acts of co-directors.—See Sect. 28, Sub-sect. 7, E., *ante*.

Powers, duties & liabilities of directors generally.—See Sect. 28, sub-sects. 5, 6, *ante*.

Powers, duties & liabilities of secretary & other officers generally.—See Sect. 29, sub-sects. 1, D., 2, C., D., *ante*.

iv. *Misfeasance by Liquidator.*

6178. Allegation by single contributory—Of breach of duty against liquidator—In failing to procure allotment to which contributor entitled under reconstruction scheme.—The ct. has not, under 1862 Act, or 1890 (Winding up) Act, & Rules of 1890 made thereunder, jurisdiction upon a summons taken out by a contributory in the winding up of a co. to deal with a claim made by the contributory against the liquidator of the co. for damages for alleged breach of contract or breach of duty on his part in failing, when acting under 1862 Act, s. 161, to procure an allotment to the contributory of certain shares in a new co. in pursuance of a scheme of reconstruction.—*Re HILL'S WATERFALL ESTATE & GOLD MINING CO.*, [1896] 1 Ch. 947; 12 T. L. R. 316; *sub nom. Re HILL'S WATERFALL ESTATE & GOLD MINING CO., LTD.*, *Ex p. BAYLISS*, 65 L. J. Ch. 476; 74 L. T. 341; 3 Mans 158.

6179. Disposing of assets without providing for debt—Income tax.—Liquidators pay away all the assets to contributories & others without making provision for a Crown debt for Income Tax:—*Held*: the liquidators misapplied the assets within the meaning of 1890 (Winding up) Act, s. 10, & must pay the amount of the Crown debt; & in default of payment, a writ of attachment is issuable as a matter of right, the ct. having no discretion in the matter.—*Re WATCHMAKERS' ALLIANCE & ERNEST GOODE'S STORES, LTD.* (1905), 5 Tax Cas. 117.

6180. — — ——The liquidator of a co. which was being wound up for the purpose of the sale of its undertaking to a new co. distributed the assets of the old co. without providing for income tax due to the Crown:—*Held*: he had been guilty of misfeasance within 1890 (Winding up) Act, s. 10, & must pay the amount due to the Crown.—*Re NEW ZEALAND JOINT STOCK & GENERAL CORPN., LTD.* (1907), 23 T. L. R. 238.

(e) *Defences to Misfeasance Proceedings.*

Proceedings out of time.—See Nos. 3376, 3444, 156, *ante*, No. 6183, *post*.

6181. Acquiescence of shareholders.—In 1899 two brothers, R. I. & J. I., who had certain patent rights, arranged with six shipowners to form a private co., & to sell to such co. their business & patent rights for £6,000, payable as to £3,000 in cash & as to £3,000 in fully-paid shares. It was arranged (1) that the capital of the co. should be £25,000, divided into 2,500 shares of £10 each; (2) that the vendors should take 300 fully paid-up shares as the balance of their purchase-money; (3) that the six shipowners should take & pay

up the defence that he was not personally liable, as he was only liquidator, & that at the time he was sued the liquidation had ceased:—*Held*: there was a statutory duty resting upon the liquidator to see that all claims were paid before he distributed the assets, & he must have known of the debt; even if he were not to be deemed a liquidator, but a private individual, he was responsible to C., his servant or agent.—*BROWN v. COWAN* (1912), 31 N. Z. L. R. 1219.—N.Z.

Gregory, Shephard v. Brown & Gregory, Andrews v. Brown & Gregory, [1904] 1 Ch. 627; *Re Rhodesia Goldfields*, Partridge v. Rhodesia Goldfields, [1910] 1 Ch. 239. *Reid. Re Peruvian Ry. Construction Co.*, [1915] 2 Ch. 144; *Re National Live Stock Insce.*, *Re National General Insce.*, [1917] 1 Ch. 628. *Generally, Mentd. Rainford v. Keith & Blackman Co.*, [1905] 1 Ch. 296.

6190. Sums recovered by misfeasance proceedings—Effect of reconstruction—Whether shareholders of old company entitled.]—Upon a reconstruction scheme under which the assets of the old co. were transferred to a new co. & the shareholders of the old co. were entitled to take shares, partly paid-up, in the new co., the order sanctioning the scheme reserved the right of the liquidator of the old co. to take misfeasance proceedings under 1890 (Winding up) Act, s. 10, against the officers of the old co. & others, & the proceeds of any such proceedings were to be held by the liquidator for the benefit of the shareholders of the old co. Misfeasance proceedings were taken & a large sum was recovered:—*Held*: this sum belonged to the shareholders of the old co. whether they came in under the scheme or not.—*Re OLYMPIA, LTD.* (1900), 16 T. L. R. 564.

6191. Money due as damages for misfeasance—Set off against money due to same person by company.]—*Re ANGLO-FRENCH CO-OPERATIVE SOCIETY, Ex p. PELLY*, No. 6182, *ante*.

6192. ———.]—*Re LEEDS & HANLEY THEATRES OF VARIETIES, LTD.*, No. 6445, *post*.

(g) Procedure.

6193. Form of summons—Grounds of application should be stated.]—*Re NEW MASHONALAND EXPLORATION CO.*, No. 6172, *ante*.

6194. ——— Joinder of alternative claims for relief.]—W., M., & others, who carried on business as cab proprietors & livery-stable keepers, became desirous of turning their business into a limited co., & a contract was entered into between them, as representing the vendors, & the co., in which all the vendors became shareholders, for the sale of the business for £46,300. This agreement was duly filed before the issue of any shares. The co. afterwards getting into difficulties was ordered to be wound up compulsorily. The figure at which the coaches, horses, etc., were set down in the books of the co. at its formation was about £11,000 less than the sum allocated to this item in the agreement, & the official receiver sought by this summons to recover this amount from the vendors on the ground that to this extent the consideration was a sham. The summons was twofold: the first portion claiming the amount from the vendors as damages for their misfeasance as officers of the co.; the second seeking to make them liable as contributories for the amount as unpaid on their shares. Preliminary objections were taken both to the joinder of the two different charges in one summons, & to the attempt to obtain such a declaration of liability as was asked for in the second branch of the summons instead of following the procedure laid down by the rules under 1890 (Winding up) Act:—*Held*: (1) while the joinder of the alternative claims for relief in one summons was inconvenient, it was

not in this case embarrassing, & the objection failed; (2) while the claim for relief adopted in the second branch of the summons was not in accordance with the ordinary practice, there was no reason why this case should not be dealt with in this form, & this objection also failed; (3) there being admittedly no damages proved, the claim for misfeasance failed; and (4) the official receiver having failed to establish that there was no contract here capable of registration under 1867 Act, s. 25, & having made out no case on the facts to induce the ct. to go behind the registered contract & draw the conclusion that the consideration here, so far as is related to the £11,000, was merely a colourable consideration, the second branch of his summons also failed.—*Re WRAGG, LTD.*, [1897] 1 Ch. 796; 66 L. J. Ch. 419; 75 L. T. 652; 4 Mans. 179; *affd.* [1897] 1 Ch. 818, C. A.

Annotations:—As to (4) Reid. Re London Health Electrical Institute (1896), 75 L. T. 658; *Re Kharaskhoma Exploring & Prospecting Syndicate*, Pyke & Gibson's Case (1897), 77 L. T. 82; *Mosely v. Koffyfontein Mines*, [1904] 2 Ch. 108. *Generally, Mentd. Gardner v. Iredale*, [1912] 1 Ch. 700; *Hong-Kong & China Gas Co. v. Glen*, [1914] 1 Ch. 527; *I. R. Comrs. v. Blott*, *I. R. Comrs. v. Greenwood*, [1921] 2 A. C. 171.

6195. Claim for declaration of liability.]—*Re WRAGG, LTD.*, No. 6194, *ante*.

6196. Service of summons—Out of jurisdiction.]—Leave was given to serve out of the jurisdiction a summons taken out by the liquidator of a co. under 1862 Act, ss. 100, 165, & the parties were allowed a time for appearance as upon service of a bill or suit.—*Re BRITISH IMPERIAL CORPN.* (1877), 5 Ch. D. 749; 25 W. R. 583.

Annotations:—Mentd. Re Busfield, Whaley v. Busfield (1886), 32 Ch. D. 123; *Re A Foreigner*, (1886), 2 T. L. R. 238.

6197. ———.]—*Re HOUSEHOLD INSURANCE CO.*, [1878] W. N. 26.

6198. Service of notice on third parties—Improper payment of dividends—Service of notice on shareholders to whom dividends paid—& by whom contribution claimed.]—On a misfeasance summons under 1890 (Winding up) Act, s. 10, to render directors liable for dividends paid out of capital, the ct. has no jurisdiction, by analogy to the third party procedure in an action, to give leave to the directors to serve notice on shareholders, who have received the dividends, claiming contribution.—*Re LAND SECURITIES CO.* (1895), 2 Mans. 127; 13 R. 341.

6199. Position of liquidator on summons—Whether obliged to state what parts of affidavit intended to be read against particular party.]—(1) The official liquidator of a co. applied, under 1862 Act, s. 165, to make a number of gentlemen, some of whom were, & others had been, directors, responsible for acts of misfeasance. The alleged acts were 107 in number. E. had been a director only during the period in which the first eleven of these acts were done, & it was not sought to make him liable in respect of any others. The liquidator filed an affidavit of 1150 folios, including all the cases. E., who appeared alone, applied for an order that the liquidator might state what paragraphs he intended to read against E. It

veyance to the U. Co., all right & title "in & to any other heritable or movable properties & rights & privileges of every description pertaining to our business of coalmasters" were transferred:—*Held*: the present claim was not to "property" within that description as it did not fall within the going business of coalmasters but appeared to be general assets which remained with the liquidator; & the liquidator alone had the right to

vindicate it.—*DAVIDSON (LARKHALL COLLIERIES, LTD., LIQUIDATOR) v. HAMILTON* (1906), 14 S. L. T. 202.—*SCOT*.

PART III. SECT. 36, SUB-SECT. 10.—C. (g).

61931. Form of summons—Grounds of application should be stated.]—Where it is sought to make an officer of a co. liable for misapplication of the funds of a co. or for misfeasance or

breach of trust in relation to its affairs, the sum sought to be recovered should be definitely stated in the summons, & the grounds upon which the application is based should be fully & adequately set out in an affidavit or affidavits.—*Re JEHANGIR KARANI & Co.* (1894), 1 L. R. 19 Bom. 88.—*IND*.

p. Form of order—By district registrar—Should contain rights obtainable in Supreme Court action.]—Appeal

Sect. 36.—Winding up by court: Sub-sect. 10, C. (g) & D., E. (a) i. & ii.]

appeared that E.'s solr. had borrowed the affidavit, & was, on his own showing, able to make out what parts of the affidavit affected E.:—*Held*: E.'s application must be refused, for although the ct. would interfere if the cases against different parties were mixed up together in a way which was oppressive, a deft. must, as a general rule, ascertain for himself what part of pltf.'s evidence affects him, & there were no circumstances in the present case to take it out of the general rule.

(2) E. applied that the official liquidator might be ordered to make the usual affidavit as to documents in his possession:—*Held*: such an order ought not to be made, for the official liquidator, being an officer of the ct. is not, even in proceedings under sect. 165, in the position of an ordinary litigant, & will not, in the absence of special circumstances, be required to make an affidavit as to documents in his possession, though he is bound to produce to the adverse litigant the documents which the latter requires to see.—*Re MUTUAL SOCIETY* (1883), 22 Ch. D. 714; 52 L. J. Ch. 621; 48 L. T. 651; 31 W. R. 872, C. A.

6200. — Whether required to make affidavit of documents.]—*Re MUTUAL SOCIETY*, No. 6199, *ante*.

6201. — Security for costs—Whether court will order.]—The ct. has jurisdiction to order an official receiver, who, acting as liquidator, initiates misfeasance proceedings & fails therein, to pay the costs of such proceedings personally. On that ground he will not be ordered to give security for the costs of such proceedings, even though there are no assets of the co. remaining.—*Re POWELL (W.) & SONS*, [1896] 1 Ch. 681; 65 L. J. Ch. 454; 74 L. T. 220; 44 W. R. 618; 12 T. L. R. 287; 40 Sol. Jo. 374; 3 Mans. 53.

Annotations:—Distd. Re Tweddle, [1910] 2 K. B. 67. *Refd. Re Strand Wood Co.*, [1904] 2 Ch. 1.

6202. — — — — —.]—The ct. has no jurisdiction to require the liquidator of a co. which is in course of being wound up to give security for the costs of an application against directors of the co. for misfeasance under 1890 (Winding up) Act, s. 10. But an order for payment of costs by the liquidator personally will be made in a proper case.—*Re STRAND WOOD CO., LTD.*, [1904] 2 Ch. 1; 73 L. J. Ch. 550; 90 L. T. 800; 11 Mans. 291, C. A.

Annotation:—Mentd. Rainbow v. Kittoe, [1916] 1 Ch. 313.

— Whether personally liable for costs.]—*See* Nos. 6201, 6202, *ante*.

6203. Setting down summons.] — PRACTICE NOTE, [1922] W. N. 294.

6204. Transfer of summons—From county court —When ordered.]—An order had been made in the county ct. for the winding up of a co.; & the liquidator, by a motion in the winding-up proceedings which was in the nature of a misfeasance summons, charged resp. with misfeasance or breach of trust involving a large sum of money. The affidavits sworn on the motion were voluminous, & the county ct. judge could not give the case a continuous hearing. In the event of an appeal from the county ct. the appeal would be first to a divisional ct., & the appeal to that ct. would be excluded if the motion were transferred to the High Ct. On an adjourned summons in co.'s winding up issued by resp. for the transfer

of the proceedings to the High Ct.:—*Held*: (1) the proceedings must be transferred to the High Ct.; (2) the matter should be taken before the registrar in the winding up, who should direct, that before any further affidavits were filed points of claim & defence be delivered, & lists of documents or cross-orders for discovery made.—*Re VESTAL HOSIERY CO.*, (1922), 91 L. J. Ch. 627; 126 L. T. 631; 66 Sol. Jo. 334; [1922] B. & C. R. 155.

6205. Hearing of summons—On affidavit evidence—Cross-examination upon affidavits.]—The liquidators of a co. which was in course of being wound up took out a summons, under 1862 Act, s. 165, seeking to make the directors liable for misfeasance & breach of trust. Numerous affidavits were filed for & against the summons. The liquidators applied to the chief clerk to have the summons entered in the list of deponents taken in ct. at the hearing; but the chief clerk made an order refusing the application. The liquidators accordingly moved to discharge that order, on the ground that it would be much more convenient to have the summons treated as a witness action; & that, if the cross-examination took place before the chief clerk, or one of the examiners of the ct., a great deal of irrelevant matter would be gone into, & much time thus unnecessarily occupied:—*Held*: the application to discharge the chief clerk's order must be refused; unless a special case was shown, summonses of this nature were to be heard as summonses on affidavit evidence, & any cross-examination upon the affidavits must take place before one of the examiners of the ct.; & the present case was one which ought to go before an examiner of the ct.—*Re FAURE ELECTRIC ACCUMULATOR CO., LTD.* (1888), 58 L. T. 42.

6206. — — — — Case of real dispute, complexity or difficulty.]—PRACTICE NOTE (1921), 66 Sol. Jo. 157.

Annotation:—Refd. Re Vestal Hosiery Co. (1922), 91 L. J. Ch. 627.

6207. On whom burden of proof.] CAVENDISH BENTINCK *v.* FENN, No. 6161, *ante*.

6208. Costs—Personal liability—Official receiver acting as liquidator.]—*Re POWELL (W.) & SONS*, No. 6201, *ante*.

6209. — — — — —.]—*Re STRAND WOOD CO., LTD.*, No. 6202, *ante*.

6210. — Taxation—Costs of official receiver's report.]—A report of the official receiver or a liquidator in support of a misfeasance summons is not on taxation to be treated as equivalent to a pleading or affidavit.

On the hearing of a misfeasance summons adjourned into ct. & heard on oral evidence—as between party & party—(1) costs for official receiver's report were allowed as for drawing & copying a statement of facts; (2) cost of instructions for brief were disallowed; (3) fees, & costs of third counsel were allowed; (4) refreshers to counsel were held to be within the taxing officer's discretion; (5) costs & fees of further consultations beyond the first under the circumstances of the case disallowed.—*Re ANGLO-AUSTRIAN PRINTING & PUBLISHING UNION*, [1894] 2 Ch. 622; 63 L. J. Ch. 632; 71 L. T. 331; 42 W. R. 648; 38 Sol. Jo. 513; 1 Mans. 361; 8 R. 510.

6211. Enforcement of order—For repayment —Default in payment—Liability to imprisonment.]

from the settlement by district registrar on terms of an order under a misfeasance summons pursuant to Winding-up Act, 1906, s. 123, against certain directors of the co. for alleged misapplication of trust funds. The

directors were seeking a term in the order by which they should be enabled to have the same rights of discovery by *viva voce* examination, delivery of interrogatories & discovery of documents, as if the application had been

an action or actions in the Supreme Ct.:—*Held*: the order should contain a term giving discovery as asked, & the appeal should be allowed.—*Re TRADERS TRUST CO.* (1915), 8 W. W. R. 1080.—CAN.

—A director of a co. was ordered under 1862 Act, s. 165, to pay the full value of shares received by him from the promoter, upon which no money had been paid:—*Held*: upon motion to commit him to prison for non-payment of the money, that his case was not that of a defaulting trustee within Debtors Act, 1869 (c. 62), s. 4, but of a shareholder who had paid the full amount due from him. Motion to commit refused.—*Re* DIAMOND FUEL CO., METCALFE'S CASE (1880), 13 Ch. D. 815; 49 L. J. Ch. 347; 42 L. T. 178; 28 W. R. 435.

Annotation:—*Refd.* *Re* Bourne, Davey v. Bourne, [1906] 1 Ch. 697.

6212. Appeal—Time for—Extension of—To enable liquidator to consult creditors & shareholders.]—A misfeasance summons taken out against directors by the liquidator of a co. was dismissed on Nov. 29, 1910. The liquidator received the opinion of counsel as to the chance of the success of an appeal on Dec. 16, & on Dec. 21, sent a circular to the shareholders & creditors acquainting them with the opinion & asking for funds to prosecute the appeal. In response to this circular an insufficient sum was promised, & on Jan. 5, 1911, he sent a second circular & applied to the ct. to extend the time for appealing to Jan. 31, the time for appealing having expired on Dec. 13, 1910:—*Held*: the liquidator had taken a proper course in consulting the creditors & shareholders, & under the circumstances the time for appealing ought to be extended.—*Re* BRAZILIAN RUBBER PLANTATIONS & ESTATES, LTD. (1911), 103 L. T. 882, C. A.

D. Relation back of Liquidator's Title.

See Sub-sect. 4, B., *ante*.

E. Contributories.

(a) Who are.

i. In General.

Of insurance companies.]—*See* Part V., Sect. 8, sub-sect. 3, *post*.

Of unregistered companies.]—*See* Part VII., Sect. 2, sub-sect. 5, *post*.

Of cost-book companies.]—*See* Part VIII., Sect. 1, sub-sect. 6, C., *post*.

ii. Present Members.

See, now, 1908 Act, ss. 123–128.

When liable as contributory—In general.]—*See* Sect. 7, sub-sect. 6, A., Sect. 12, *ante*.

—**Shares taken subject to conditions.]**—*See* Sect. 17, sub-sect. 1, B., sub-sect. 3, D., *ante*.

—**Contract to take shares induced by misrepresentation or fraud.]**—*See* Sect. 8, sub-sect. 3; Sect. 17, sub-sect. 1, G., *ante*.

—**Shares held by agents.]**—*See* Sect. 17, sub-sect. 2, B., *ante*.

—**Shares taken in fictitious name or in name of another.]**—*See* Sect. 12, sub-sect. 5; Sect. 17, sub-sect. 2, C., *ante*.

—**Shares held by executors.]**—*See* Sect. 21, sub-sect. 4, B. (c); Sect. 17, sub-sect. 2, D., *ante*.

—**Shares held by trustees.]**—*See* Sect. 12, sub-sect. 5, B.; Sect. 17, sub-sect. 2, E., *ante*.

—**Shares taken by persons under incapacity.]**—*See* Sect. 12, sub-sect. 2; Sect. 17, sub-sect. 2, F., sub-sect. 3, D. (e), *ante*.

—**Shares held by bankrupts.]**—*See* Sect. 24, sub-sect. 2, *ante*; BANKRUPTCY & INSOLVENCY, Vol. IV., pp. 586, 587, Nos. 5365–5367.

—**Shares held by directors—Qualification shares.]**—*See* Sect. 28, sub-sect. 2, C., *ante*.

Allotment of shares defective or delayed.]

See Sect. 17, sub-sect. 3, C., D. (c) & (d), *ante*.

6213. — Shares fully-paid.]—*Re* LONDON ARMOURY CO., LTD., No. 5492, *ante*.

6214. — — No circumstances importing fraud.]—The holders of fully-paid shares in a limited co. are not, in the absence of any circumstances importing fraud in the allotment to them, liable to be placed on the list of contributories, although no actual money has been paid on the shares.—*Re* BRITISH & FOREIGN CORK CO., LEIFCHILD'S CASE (1865), L. R. 1 Eq. 231; 13 L. T. 267; 11 Jur. N. S. 941; 14 W. R. 22.

Annotations:—*Refd.* *Re* Britannia Permanent Bldg. Soc. (1891), 65 L. T. 196; *Re* Wragg, [1897] 1 Ch. 796. *Mentd.* *Re* Baglan Hall Colliery Co. (1870), 5 Ch. App. 349, n.

6215. — —.]—A holder of fully paid-up shares in a limited co. is a "contributory" within 1862 Act. Therefore, where, under the winding up of such a co. all debts had been provided for:—*Held*: the liquidators were justified in making a call upon the partly paid-up shareholders for the purpose of adjusting the rights between them & the fully paid-up shareholders.—*Re* ANGLESEA COLLIERY CO. (1866), 1 Ch. App. 555; 35 L. J. Ch. 809; 15 L. T. 127; 30 J. P. 692; 12 Jur. N. S. 696; 14 W. R. 1004, L. JJ.

Annotations:—*Apld.* *Re* Coed Madog Slate Co., [1877] W. N. 190. *Consd.* *Re* Sheppard's Corn Malting Co., *Ex p* Lowenfeld (1893), 70 L. T. 3. *Apld.* *Re* Osmondthorpe Hall Freehold Garden & Building Allotment Soc. (1913), 58 Sol. Jo. 13. *Refd.* *Re* National Savings Bank Asscn. (1866), 1 Ch. App. 547; *Re* Barned's Banking Co., Andrew's Case (1867), 3 Ch. App. 161; *Re* Imperial Mercantile Credit Asscn., Chapman & Barker's Case (1867), L. R. 3 Eq. 361; *Re* Hodges Distillery Co., *Ex p* Maude (1870), 6 Ch. App. 51; *Sheppard v. Scinde, Punjaub & Delhi Ry. & Abbott* (1887), 56 L. J. Ch. 558; *Birch v. Cropper, Re* Bridgewater Navigation Co. (1889), 14 App. Cas. 525; *Re* Driffield Gas Light Co., [1898] 1 Ch. 451.

6216. — —.]—*Re* NATIONAL SAVINGS BANK ASSCN., No. 5493, *ante*.

6217. — — Member otherwise indebted to company.]—A holder of fully paid-up shares in a co., although indebted to the co., cannot be put on the list of contributories.—*Re* MARLBOROUGH CLUB CO. (1868), L. R. 5 Eq. 365; 37 L. J. Ch. 296; 18 L. T. 46; 16 W. R. 668.

Annotations:—*Consd.* *Re* Britannia Permanent Benefit Bldg. Soc. (1891), 65 L. T. 196. *Refd.* *Re* Maria Anna & Steinbank Coal & Coke Co., Maxwell's Case (1874), L. R. 20 Eq. 585. *Mentd.* *Re* Dronfield Silkstone Coal Co. (No. 2) (1883), 23 Ch. D. 511.

—**Shares issued or credited as fully or partly paid.]**—*See* Sect. 20, *ante*.

6218. — Depositor of money with company—Depositor entitled to be given stock vouchers by company.]—The deed of settlement of a co. provided that all persons holding any stock in the asscn. should (among other persons) be members. The deed defined two classes of stock—mutual stock & the capital stock. The mutual stock was to be of unlimited amount, & was to bear interest, payable only out of profits & not exceeding £5 per cent. After some time the co. assumed the title of bank of deposit, & issued a prospectus inviting deposits, & stating that stock vouchers would be given for all sums deposited, but not stating anything from which it could fairly be inferred that depositors would become shareholders or share in profits. D. deposited a sum with the asscn. & received a certificate that she was entitled to a corresponding amount of "investment stock":—*Held*: (1) D. was not the holder of any such stock as was contemplated by the deed, was not entitled to share in profits, & was not a contributory; (2) D. was entitled to proceed in an action for the purpose of making the

Sect. 36.—Winding up by court: Sub-sect. 10, E. (a) ii.,

co. bkpt.—*Re* NATIONAL INSURANCE & INVESTMENT ASSOCN., DAVIES'S CASE, ABERCORN'S (LORD) CASE (1862), 4 De G. F. & J. 78; 31 L. J. Ch. 828; 7 L. T. 225; 8 Jur. N. S. 951; 10 W. R. 548; 45 E. R. 1112, L. JJ.

Annotations.—Mentd. *Re* National Assoe. & Investment Assocn., *Ex p.* Cotterell (1862), 32 L. J. Ch. 66; *Re* Great Northern & Midland Coal Co., Currie's Case (1863), 3 De G. J. & Sm. 367; *Re* Llanharry Hematite Iron Ore Co., Roney's Case, Stock's Case (1864), 4 De G. J. & Sm. 426; *Re* Waterloo Life Assoe. Co., Saunderson's Case (1864), 10 L. T. 3; *Re* Life Assocn. of England, Blake's Case (1865), 34 Beav. 639; *Re* General International Agency Co., Chapman's Case (1866), L. R. 2 Eq. 567; *Henderson v. Lacon* (1867), L. R. 5 Eq. 249; *Re* International Contract Co., Levita's Case (1867), 3 Ch. App. 36; *Ilfracombe Ry. v. Nash* (1870), 18 W. R. 431; *Re* Great Oceanic Telegraph Co., Harward's Case (1871), L. R. 13 Eq. 30; *Re* Metropolitan Public Carriage & Repository Co., Brown's Case (1873), 9 Ch. App. 102; *Re* Freehold & General Investment Co., Green's Case (1874), L. R. 18 Eq. 428; *Re* British Provident Life & Guarantee Assocn., De Ruvigne's Case (1877), 5 Ch. D. 306; *Re* Colombia Chemical Factory Manure & Phosphate Works, Hewitt's Case, Brett's Case (1883), 25 Ch. D. 283; *Arnison v. Smith* (1889), 41 Ch. D. 348; *Re* Printing Telegraph & Construction Co. of Agence Havas, *Ex p.* Cammell, [1894] 2 Ch. 392.

iii. Past Members.

See, now, 1908 Act, ss. 123, 124.

6219. To what companies 1862 Act, s. 38, applicable—Company compulsorily registered.]—An insurance co. registered under 7 & 8 Vict. c. 110, was afterwards registered under sect. 209 of above Act, which obliges such cos. so to register themselves "in the manner & subject to the regulations" thereinbefore contained. On the co. being wound up, a person who had parted with his shares in the co. within a year before the winding up resisted being placed on the list of contributories as a past member, on the ground that sect. 38, which makes past members liable, applied in terms only to co. formed under the Act, & that the words in sect. 209 "subject to the regulations hereinbefore contained" did not import it into a case of compulsory registration:—*Held*: the effect of the Act was to put a co. compulsorily registering itself under sect. 209 in the same position as if the registration had been voluntary, & sect. 38 applied to such a co.—*Re* EUROPEAN ASSURANCE SOCIETY, RAMSAY'S CASE (1876), 3 Ch. D. 388; 35 L. T. 654; 25 W. R. 279; *sub nom.* *Re* EUROPEAN SOCIETY ARBITRATION ACTS, RAMSAY'S CASE, 46 L. J. Ch. 411, C. A.

Annotation:—Refd. *Boaler v. Brodhurst* (1892), 8 T. L. R. 398.

6220. — All companies formed under Act—Company limited by guarantee.]—Above sect., which is reproduced in 1908 Act, s. 123, applies to all cos. formed under the Act. Therefore the past members of a co. limited by guarantee, as well as the past members of a co. limited by shares, who have ceased to be members within a year before the commencement of the winding up of the co., are not liable to contribute to the assets of the co., unless it appears to the ct. that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act.—*Re* PREMIER UNDERWRITING ASSOCN., LTD. (No. 1), [1913] 2 Ch. 29; *sub nom.* *Re* PREMIER UNDERWRITING ASSOC., LTD., *Ex p.* GREAT BRITAIN MUTUAL MARINE INSURANCE ASSOCN., LTD., 82 L. J. Ch. 383; 108 L. T. 824; 57 Sol. Jo. 594; 20 Mans. 189.

6221. When liable as contributory—General rule.]—In the winding up of a joint-stock co. a past member who ceased to be a member within a year before the commencement of the winding up

cannot be placed on the list of contributories until it is proved, first, that there was at the date of the winding-up order some existing debt or liability of the co. contracted before he ceased to be a member; & secondly, in the case of a limited co., that the shares formerly held by him have not been fully paid up.—*Re* CONTRACT CORPN., WESTON'S CASE (1868), L. R. 6 Eq. 17; 37 L. J. Ch. 617; 32 J. P. 548.

6222. — Exhaustion of "A" list.]—The arts. of assocn. of a co. provided that the forfeiture of a share should involve the extinction of all interest in, & all claims against, the co. in respect of the share; but that any member whose shares had been forfeited should be liable to pay to the co. all calls owing on such shares at the time of such forfeiture:—*Held*: the former owner of forfeited shares could not be placed on the list of contributories as a present member, in respect of the calls owing on his shares at the time of forfeiture. No person can be settled on the list of contributories as a past member until it has been actually ascertained that the present members are unable to satisfy the contributions required to be made by them.—*Re* BLAKELY ORDNANCE CO., NEEDHAM'S CASE (1867), L. R. 4 Eq. 135; 36 L. J. Ch. 665; 16 L. T. 472.

Annotations:—Refd. *Ladies Dress Assocn. v. Pulbrook*, [1900] 2 Q. B. 376. **Mentd.** *Aberaman Ironworks v. Wickens* (1868), 18 L. T. 305; *Re* Goy, *Farmer v. Goy* (1900), 83 L. T. 309.

6223. — —.]—Where it appeared that the persons who were members of a limited co. at the time when the order was made for winding it up would be not able to pay enough to satisfy the debts of the co. if the whole amount of the shares were called up:—*Held*: past members of the co., who had not ceased to be members for one year prior to the winding up, must be placed on the list of contributories.

In the winding up of a co. the list of contributories, as past members should be settled as soon as conveniently may be, but not in such a manner as to determine any question as to the extent of the liability of such contributories respectively. As a general rule, costs in contributories' cases ought to follow the result.—*Re* BARNED'S BANKING CO., ANDREW'S CASE (1867), 3 Ch. App. 161; 37 L. J. Ch. 87; 17 L. T. 305; 16 W. R. 113, L. J.

Annotation:—Refd. *Re* Contract Corpn., *Weston's Case* (1868), L. R. 6 Eq. 17.

6224. — —.]—HELBERT *v.* BANNER, *Re* BARNED'S BANK, No. 6283, *post*.

6225. — —.]—All persons who have been members of a co. within twelve months prior to the date of winding up are liable to be placed on B. list as soon as it is apparent that the contributories on A. list are exhausted.—*Re* LAND CREDIT CO. OF IRELAND, HUMBY'S CASE (1872), 26 L. T. 936; 20 W. R. 718.

6226. — Effect of compromise by liquidator with transferee.]—A., a contributory, who was a holder of shares at the date of the winding up, being unable to pay the calls, an agreement was entered into, under the sanction of the ct., by which certain sums of money & a transfer of all the contributory's interest in the co. were to be accepted by the liquidator in full discharge of all claims against the contributory. The agreement contained a stipulation that nothing therein contained should prejudice the right of the co., or of its liquidator, or creditors, against any other contributories of the co., whether as present or past members thereof, or otherwise. After this a list of contributories or past members was made out, & the name of H., a former holder of A.'s shares, was placed on the list of contributories as a past

member:—*Held*: the compromise with A. did not take away the liability of H. to the co., & H. was rightly placed on the list as a past member.—*Re NATAL INVESTMENT CO., NEVILL'S CASE* (1870), 6 Ch. App. 43; 40 L. J. Ch. 1; 23 L. T. 577; 19 W. R. 36, L. JJ.

Annotations:—*Extd.* *Re Contract Corp'n., Hudson's Case* (1871), L. R. 12 Eq. 1. *Appld.* *Roberts v. Crowe* (1872), L. R. 7 C. P. 629. *Refd.* *Kellock v. Enthoven* (1874), L. R. 9 Q. B. 241.

6227. ———.]—H. sold & transferred fifty shares in a co. to D., who, on the co. being wound up within a year after the transfer, was placed on the list of contributories. The liquidator, with the sanction of the ct., entered into a compromise with D., & on payment of half the amount due for calls, released him from liability without any reservation of rights against third parties, & placed H. on the B. list of contributories for the amount remaining due on the same shares:—*Held*: this was not a case of principal & surety, but only of statutory liability; & H. was, notwithstanding the compromise with D., still liable as a contributory.—*Re CONTRACT CORPN., HUDSON'S CASE* (1871), L. R. 12 Eq. 1; 40 L. J. Ch. 444; 24 L. T. 534; 19 W. R. 691.

Annotation:—*Consd.* *Roberts v. Crowe* (1872), L. R. 7 C. P. 629.

6228. ———.]—*HELBERT v. BANNER, Re BARNED'S BANK*, No. 6283, *post*.

6229. ———.]—The discharge of a contributory in class A., under 1862 Act, s. 160, does not release him from his implied contract to indemnify the transferor, who has been placed a contributory in class B., the co. having been wound up within twelve months after the transfer. Deft., a holder of shares at the date of the winding up of a co., being unable to pay the calls in full, an agreement was entered into between him & the liquidator, with the sanction of the ct., by which a certain sum & a transfer of all the contributory's interest in the co. were to be accepted by the liquidator in full discharge of all calls, claims, etc., which the co. or liquidator had or thereafter might have against him. The agreement contained a proviso that "nothing herein contained shall in any way prejudice or affect the rights or remedies of the co., or the liquidator or the creditors thereof, against any other contributories of the co., whether as present or past members thereof or otherwise, & that the liability of such members to contribute to the assets of the co. shall remain the same as if this agreement had not been made, save only to the extent of the sum paid" under the agreement. Subsequently, the name of pltf., the former holder of deft.'s shares, was placed upon the list of class B. contributories, as a past member, the winding up of the co. having taken place within twelve months after the registration of the transfer to deft.:—*Held*: the compromise with the liquidator did not absolve deft. from his implied contract to indemnify pltf. against future calls. The relation between transferor & transferee is not that of principal & surety, but one of primary & secondary liability.—*ROBERTS v. CROWE* (1872), L. R. 7 C. P. 629; 41 L. J. C. P. 198; 27 L. T. 238.

Annotations:—*Refd.* *Kellock v. Enthoven* (1874), L. R. 9 Q. B. 241. *Mentd.* *Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc.*, [1899] 1 Q. B. 161.

6230. ——— *Purchase of debts by past member—In respect of which member called on to contribute.*—Where a past member of a co., after he had been settled on the list of contributories, & a call had been made upon him, bought up the debts in respect of which he was liable to contribute to the co.:—*Held*: he was not liable to contribute to the

costs of winding up the co., except as to so much of such costs as were incurred in settling the "B" list of contributories, & that he was not even liable to contribute to those if the liquidator had, at the time of settling that list, sufficient money in hand to pay them.—*Re GREENING & CO., MARSH'S CASE* (1871), L. R. 13 Eq. 388; 41 L. J. Ch. 111; 25 L. T. 651; 20 W. R. 87.

6231. ——— *Due on termination of membership—& remaining due when winding-up order made.*—*Re BLAKELY ORDNANCE CO., BRETT'S CASE, Re ORIENTAL COMMERCIAL BANK, MORRIS' CASE*, No. 6050, *ante*.

—— *Winding up of company before registration of transfer.*—*See* Sect. 23, sub-sect. 2, C. (c), *ante*.

—— *Contract for sale of shares voidable for misrepresentation or fraud.*—*See* Sect. 23, sub-sect. 2, C. (d), *ante*.

—— *Transfer not in compliance with formalities.*—*See* Sect. 23, sub-sect. 3, C. (b); sub-sect. 14, *ante*.

—— *Consent or approval of directors to transfer withheld.*—*See* Sect. 23, sub-sect. 5, *ante*.

—— *Transfer irregular or fraudulent.*—*See* Sect. 23, sub-sect. 12, E., *ante*.

—— *Transfer by & to persons under incapacity.*—*See* Sect. 23, sub-sect. 15, *ante*.

—— *Forfeiture of shares on default by transferee.*—*See* Sect. 27, sub-sect. 2, C., *ante*.

—— *Shares purchased by company.*—*See* Sect. 31, sub-sect. 2, B., *ante*.

(b) *Liability of Contributories generally.*

Nature of liability generally.—*See* Sect. 12, sub-sect. 4, B. (b), *ante*.

6232. *Question of fact.*—The liability of a person as a contributory under the winding-up Acts is not a question of law, but of fact. The test of his liability in equity is his liability at law.—*BRIGHT v. HUTTON, HUTTON v. BRIGHT* (1852), 3 H. L. Cas. 341; 7 Ry. & Can. Cas. 325; 19 L. T. O. S. 249; 10 E. R. 133; *sub nom.* *BRIGHT v. HUTTON, HUTTON v. BRIGHT, Re DIRECT BIRMINGHAM OXFORD READING & BRIGHTON RY. CO.*, 16 Jur. 695, H. L.

Annotations:—*Folld.* *Burbidge v. Morris* (1865), 3 H. & C. 664. *Refd.* *Re Rugby Warwick & Worcester Ry., Preece & Evans's Case* (1852), 2 De G. M. & G. 374; *Re Midland Union Burton-upon-Trent Ashby de la Zouch & Leicester Ry., Lucy's Case* (1853), 4 De G. M. & G. 356; *Re Direct Birmingham Oxford Reading & Brighton Ry., Spottiswoode's Case, Amsinck's Case* (1855), 6 De G. M. & G. 345. *Mentd.* *Quartermaine v. Bittleston* (1853), 13 C. B. 133; *Paul v. Joel* (1858), 3 H. & N. 455; *Hebbert v. Purchas* (1871), L. R. 3 P. C. 664; *I. R. Comrs. v. Harrison* (1874), L. R. 7 H. L. 1; *The Vera Cruz* (No. 2) (1884), 9 P. D. 96; *London Tram. Co. v. L. C. C.* (1898), 78 L. T. 361.

6233. *Commencement of liability—From date of contract under which contributory becomes member.*—Where a co. is being wound up under 1862 Act, an order to pay calls, which is made after, but in respect of shares accepted before, the passing of the Bkpcy. Act, 1861, c. 134, does not constitute a debt contracted after the passing of the latter Act; the effect of 1862 Act, s. 75, being to carry the debt back to the date of the original contract.—*Re VAUGHAN, Ex p. CANWELL* (1864), 4 De G. J. & Sm. 539; 4 New Rep. 39; 10 L. T. 316; 10 Jur. N. S. 480; 12 W. R. 698; 46 E. R. 1028, L. C.

Annotation:—*Expld.* *Re General Estates Co., Hastie's Case* (1869), 4 Ch. App. 274.

6234. ———.]—Under Bkpcy. Act, 1861 (c. 134), s. 90, no debt incurred by a non-trader is sufficient to found an adjudication of bkpcy. against him, unless it was contracted by him after the period at which the contracting of debts by a non-trader made him liable to the bkpt. laws,

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namely, after the passing of above Act. Liability to the debts of a joint-stock co., incurred in 1849 by a person then becoming a shareholder of the co., & signing the deed of settlement, which expressly created that liability, made him a debtor at the moment the debts were contracted by the co.: & calls made on him in 1862 & 1863, under the authority of a winding-up order to pay money in respect of those debts, did not themselves constitute a debt contracted after the passing of above Act, but amounted merely to an enforcement of the liability incurred when he became a shareholder.—*WILLIAMS v. HARDING* (1866), L. R. 1 H. L. 9; 35 L. J. Bcy. 25; 14 L. T. 139; 12 Jur. N. S. 457; 14 W. R. 503, H. L.; *reusg.* on other grounds, S. C. *sub nom.* *Re WILLIAMS, Ex p. HARDING* (1864), 3 New Rep. 693.

Annotations:—Expld. Re General Estates Co., Hastie's Case (1869), 4 Ch. App. 274. *Consd. Re Dalzell, Ex p. Rashleigh* (1875), 2 Ch. D. 9. *Refd. Re Portsmouth Banking Co., Helby's, Stokes' & Horsey's Cases* (1866), L. R. 2 Eq. 167; *Martin's Anchor Co. v. Morton* (1868), L. R. 3 Q. B. 306; *Re Pickering, Ex p. Pickering* (1868), 19 L. T. 369; *City Discount Co. v. Lloyd* (1871), 24 L. T. 512; *Re Blakely Ordnance Co., Brett's Case, Re Oriental Commercial Bank, Morris' Case* (1873), 8 Ch. App. 800; *Re Winterbottom, Ex p. Winterbottom* (1886), 18 Q. B. D. 446; *Re Athlunney, Ex p. Wilson*, [1898] 2 Q. B. 547. *Mentd. Financial Corpn. v. Lawrence* (1869), 38 L. J. C. P. 305.

6235. — No debt until call actually made.]—A residuary legatee assigned the residue to his wife, K., for her separate use. The residue comprised some shares not fully paid-up in a joint-stock co. The exors. handed over to K. the certificates of the shares, but did not transfer them, & they paid over to her the cash balance of the residue. After this a call was made on the shares which the exors. were compelled to pay. K. refused to indemnify them:—*Held*: if K. had been a *feme sole*, she would have been liable to refund at the suit of the exors., for the liability on the shares did not constitute a debt at the time of paying away the residue, & though the exors. would have had no right to call on the residuary legatee to refund for payment of a debt of which they had notice when they paid away the residue, they did not lose the right to refunding, by paying it away with notice of a liability which had not become a debt.—*WHITTAKER v. KERSHAW* (1890), 45 Ch. D. 320; *sub nom. Re KERSHAW, WHITTAKER v. KERSHAW*, 60 L. J. Ch. 9; 63 L. T. 203; 39 W. R. 22, C. A.

Annotations:—Mentd. Braumstein v. Lewis (1891), 7 T. L. R. 246; *Hoare v. Niblet*, [1891] 1 Q. B. 781; *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 559; *Hosegood v. Pedler* (1896), 66 L. J. Q. B. 18.

PART III. SECT. 36, SUB-SECT. 10.—E. (b).

q. Extent of liability—Irregular increase of capital.]—*Re ONTARIO EXPRESS & TRANSPORTATION CO.* (1893), 24 O. R. 216.—CAN.

r. Evidence of liability—Register of members.]—The evidence adduced by the official liquidator to show that deft. was a member of the co. & so liable as a contributory consisted of the register of members, a letter written by the objector, a reply thereto written by a managing director of the co., & the oral testimony of the director himself. The objector adduced no evidence at all:—*Held*: the official liquidator might, if he had chosen to do so, have put the register in evidence & waited before giving any further evidence until the objector had given some to displace the *prima facie* evidence afforded by the register or to impugn the character of the register;

but his case must be looked at as a whole, & having taken the line which he did he must take the consequence of his evidence contradicting or impugning the *prima facie* evidence of the register, & notwithstanding that the objector gave no evidence, the register was not conclusive.—*RAM DAS CHAKARBATI v. COTTON GINNING CO., LTD., CANNPORE (OFFICIAL LIQUIDATOR)* (1887), 1 L. R. 9 All. 366.—IND.

PART III. SECT. 36, SUB-SECT. 10.—E. (c).

s. Who may settle list—Officer of supreme court—Powers of officer.]—Where, under an order of a high ct. judge, a reference has been directed to an officer of the supreme ct. of judicature to take all necessary proceedings for the due winding up of a co., & delegating to him for such purpose the powers conferred on the ct. therefor by the Winding-up Act, such officer

6236. Extent of liability—Debts contracted before membership.]—*HELBERT v. BANNER, Re BARNED'S BANK*, No. 6283, *post*.

6237. — Debts contracted before re-registration of company.]—(1) A co. of unlimited liability registered under 7 & 8 Vict. c. 110, after carrying on business, was registered as a limited co. under 1856 Act, & was afterwards ordered to be wound up:—*Held*: the same must be done under the jurisdiction in bkpcy., both as to matters before as well as after registration, under 1856 Act.

(2) A call can be made by the Ct. of Bkpcy. upon shareholders at the time of re-registration to discharge debts of the co. then due, whenever they accrued.—*Re LIVERPOOL TRADESMAN'S LOAN CO., LTD., Ex p. STEVENSON* (1862), 32 L. J. Ch. 96; 7 L. T. 453; 11 W. R. 131, L. J.

Annotations:—As to (2) Apld. Garnett & Moseley Gold Mining Co. v. Sutton (1865), 34 L. J. Q. B. 118. *Refd. Lanyon v. Smith* (1863), 3 B. & S. 938.

Generally.]—*See* Sect. 12, sub-sect. 4, B. *ante*.

6238. Termination of liability—Composition—Presumption of validity after twenty years.]—When a co. is wound up & contributories are discharged from further liability on a composition & a period of twenty years supervenes, every intendment must be made in favour of what was done twenty years before as having been lawfully & properly done.

In 1882 the A. co. took over the whole assets & rights of the G. bank, which had gone into liquidation in 1878. In 1901 & 1902 the A. co. brought actions against trustees & beneficiaries of two contributories who had in 1879 been discharged of their liabilities to the bank on compromises with the liquidator, asking for a reduction of the compromises on the ground that the contributories in negotiating with the liquidator concealed or failed to disclose a portion of their property:—*Held*:—having regard to the circumstances of the case coupled with the delay, no concealment or untrue statement of assets had been proved or could at this distance of time be assumed.—*WATT v. ASSETS CO., BAIN v. ASSETS CO.*, [1905] A. C. 317; 74 L. J. P. C. 82, H. L.

Nature of call made in winding up.]—*See* Sub sect. 10, E. (e), *post*.

(c) Settlement of List of Contributories.

6239. Who may settle list—Official receiver acting as provisional liquidator.]—*Re ENGLISH BANK OF THE RIVER PLATE*, No. 5878, *ante*.

6240. At what time list should be settled—"B" list.]—*Re BARNED'S BANKING CO., ANDREWS' CASE*, No. 6223, *ante*.

has jurisdiction, in settling the list of contributories, to inquire into & decide as to whether stockholders, holding certificates declaring the stock to have been duly paid up, have in fact paid anything thereon.—*Re CORNWALL FURNITURE CO., LTD.* (1909), 18 O. L. R. 101; 13 O. W. R. 137.—CAN.

t. Who may be put on list—General rule.]—The proper test to apply, in considering whether a party should be retained on the list of contributories is not whether he would be liable to the creditors of the bank, if sued by them, but whether, having regard to the rights of the shareholders, *inter se*, he ought to be on the list. A party may be liable at law to the creditors of the co., & yet should not be placed on the list of contributories; & *vice versa*, a party may not be liable at law to the creditors of the co., & yet ought to be placed on the list.—*Re*

6241. Notice of appointment to settle—Service—Out of jurisdiction.]—A notice under the General Order of Nov. 11, 1862, r. 30, of an appointment to settle the list of contributories of a co. may be served out of the jurisdiction in manner provided by r. 60.—*Re NATHAN, NEWMAN & Co.* (1887), 35 Ch. D. 1; 56 L. J. Ch. 752; 56 L. T. 95; 3 T. L. R. 363; 35 W. R. 293, C. A.

*Annotations:—***Appld.** *Re Liebig's Cocoa & Chocolate Works* (1888), 59 L. T. 315. **Mentd.** *Re Rathbone, Ex p. Paterson*, (1887), 4 Morr. 270; *Re Cliff, Edwards v. Brown* (1895), 2 Ch. 21.

6242. Hearing—Right of party put on list to question winding-up order.]—A co. was formed without any deed of settlement or incorporation. Script certificates were issued for the shares, & these passed by delivery without any other transfer. A. bought several new shares on the Stock Exchange, received dividends, & paid calls. A winding-up order was made against the co. The official manager proposed to place A., as the holder of the certificates, on the list of contributories:—*Held*: A. by his acts, was precluded from raising a question as to the illegality of the issue of these shares. On a motion to place a person on the list of contributories, it is not competent for him to raise the question whether the winding-up order is correct; but liberty will be given him to do so by a substantive application to the ct.—*Re MEXICAN & SOUTH AMERICAN MINING CO., BARCLAY'S CASE* (1858), 26 Beav. 177; 27 L. J. Ch. 660; 32 L. T. O. S. 46; 4 Jur. N. S. 1042; 53 E. R. 865.

*Annotation:—***Refd.** *Re Overend Gurney, Ex p. Oakes & Peek* (2) (1867), 36 L. J. Ch. 413.

6243. — Duty of court—Name on register.]—It appearing that an alleged shareholder had never agreed directly or indirectly to take shares in the co., by an original motion in ch., & by way of appeal in bkpcy. his name was struck off the list of contributories & the public register: *Semble*: where the name of a person appears on the public register as a shareholder, although he is not one in fact, the comr. is bound to put him on the list of contributories.—*Re ANGLO-FRENCH AGRICULTURAL TRADING CO., LTD., Ex p. DUNLOP* (1863), 8 L. T. 846, L. C.

6244. What may be put on list—Statement of circumstances in which shares bought.]—A contributory, in respect of shares purchased shortly before a banking co. stopped payment, applied to have his liability limited to the time at which he bought the shares; but the ct., taking into consideration the terms of the deed of transfer, declined, but offered to place on the master's book a statement of the circumstances under which the

shares were purchased.—*Re NORTH OF ENGLAND JOINT-STOCK BANKING CO., DODGSON'S CASE* (1849), 3 De G. & Sm. 85; 14 L. T. O. S. 207; 14 Jur. 386; 64 E. R. 391.

*Annotations:—***Appld.** *Re Pennant & Craigwen Consolidated Lead Mining Co., Ex p. Fenn* (1853), 1 Eq. Rep. 344. **Refd.** *Re Monmouthshire & Glamorganshire Joint-Stock Banking Co., Ex p. Cape's Exor.* (1852), 22 L. J. Ch. 601; *Re North of England Joint-Stock Banking Co., Bernard's Case* (1852), 5 De G. & Sm. 283; *Re Royal British Bank, Brockwell's Case* (1857), 4 Drew. 205; *Re Royal British Bank, etc., Nichol's Case* (1859), 3 De G. & J. 387; *Re Portsmouth Banking Co., Helby's, Stokes' & Horsey's Cases* (1866), L. R. 2 Eq. 167. **Mentd.** *Western Bank of Scotland v. Addie, Addie v. Western Bank of Scotland* (1867), L. R. 1 Sc. & Div. 145.

6245. Notice of settlement of list—Objection to sufficiency of notice—Waiver—Attendance to dispute liability.]—On a notice to a person that her name was inserted in the list as a contributory in a particular character, she attended before the master, by her solr., to oppose the insertion of her name altogether:—*Held*: she did not thereby waive any objection to the sufficiency of the notice, for the purpose of enabling the master to decide that she was a contributory without qualification; & the master who had so decided upon such a notice was directed to review his report. *Qu.*: whether, in such a case, a new notice can be effectually given.—*Re NORTH OF ENGLAND BANKING CO., HUTCHINSON'S CASE* (1849), 1 De G. & Sm. 563; 63 E. R. 1196.

6246. List improperly settled—Effect—Consequent call invalid.]—In 1851 a managing director of a provisionally registered projected railway co. submitted to be placed on the list of contributories under the winding-up Acts. On a call being made in 1854 on him & other contributories for the costs of winding up the co., he appealed, & at the same time moved that his name might be removed from the list of contributories on the ground of the law being changed by *Bright v. Hutton*, No. 6232, ante. The V.-Ch. directed the notice of motion to be served on the other contributories & creditors who had proved, & made an order staying all proceedings under the winding-up order:—*Held*: (1) such an order could not properly be made on the motions before the V.-Ch., some of the persons served not having appeared. (2) *Bright v. Hutton*, having been decided in 1852, the application of the contributory in 1854 to be relieved from his submission to be placed on the list was made too late. (3) The call for costs would have been properly made if there had been a proper list of contributories; but, (4) there being no list properly settled, but merely one having in many instances informal abbreviations placed opposite the names

TIPPERARY JOINT-STOCK BANK, Ex p. GINGER (1856), 5 I. C. L. R. 174; 8 Ir. Jur. 373.—IR.

a. — *Not person previously adjudged not to be a shareholder.]—*A previous judgment to the effect that the person sought to be settled on the list of contributories is not a shareholder, estops the liquidator from setting up that debt. was a shareholder.—*Re ONTARIO SUGAR CO., MCKINNON'S CASE* (1910), 17 O. W. R. 1038; 2 O. W. N. 496; 22 O. L. R. 621.—CAN.

b. — *Holder of fully-paid shares—On own application.]—*A holder of fully paid-up shares of the capital stock of an incorporated co. is entitled, upon his own application, to be placed upon the list of contributories in winding-up proceedings.—*Re COLONIAL ASSURANCE CO.* (1916), 34 D. L. R. 489; 10 W. W. R. 555.—CAN.

*obtained by subscription.]—*Shareholders in a co. who have not subscribed for their shares, but have obtained them as fully paid—**J.—VOL. X.**

up by transfer from the original allottee cannot be placed on the list of contributories in an action by the liquidator.—*NATIONAL TRUST v. FRANK*, [1917] 3 W. W. R. 43; 10 Sask. L. R. 256.—CAN.

d. *List improperly settled—Effect—Rectification.]—*An application to place the name of a contributory on the list of contributories in respect of a call made at an earlier date than the call in respect of which the name appears on the list is, in effect, an application to rectify the register, & the ct., in dealing with such application, will go into the facts of the case, & treat the register as if it contained the entries which, upon the facts, ought to have been made therein from time to time.—*Re NENTHORN CONSOLIDATED QUARTZ-MINING CO., LTD., McRAE'S CASE* (1893), 11 N. Z. L. R. 408.—N.Z.

e. *Judge's order—Only prima facie evidence.]—*A judge's order settling the list of contributories is only *prima facie* evidence of liability, & debt., in an

action brought against him to recover a call on the stock, may give evidence to show that he is not a stockholder.—*MCKENZIE (WESTMORELAND BANK CURATOR) v. SCOVIL* (1869), 1 Han. 621.—CAN.

f. *Duties of official liquidator—In regard to estates of deceased shareholder.]—*The official liquidator need not take out letters of administration to the estate of a deceased shareholder before settling the list of contributories. There is nothing in Cos. Act, 1882, ss. 126 & 144, requiring the official liquidator to place on the list all the persons who may, as representatives, be liable to contribute in discharge of the liability of a deceased shareholder as contemplated by sect. 126. Nor can the liability, under that sect., of a person who has been placed on the list as his representative be affected by omission of the official liquidator to do so.—*SORABJI JAMSETJI v. ISHWARDAS JUGJIWANDAS* (1895), 1 L. R. 20 Bom. 654.—IND.

Sect. 36.—Winding up by court: Sub-sect. 10, E. (c) & (d) i., ii. & iii.]

in the list, & in others marks importing that the case of the person named was adjourned, without showing that it could not have been disposed of, no call could in that state of the proceedings be properly made. (5) Persons who have notice of a compromise between the official manager & any contributories must, if they wish to disturb it, take proceedings at once for that purpose.—*Re EASTERN COUNTIES JUNCTION & SOUTHEAST RY. CO., UNDERWOOD'S CASE* (1854), 5 De G. M. & G. 677; 23 L. J. Ch. 943; 24 L. T. O. S. 65; 2 W. R. 652; 43 E. R. 1033, L. J.J.

Annotation:—Mentd. *Re London Marine Insce. Assocn., Smith's Case* (1869), 4 Ch. App. 611.

6247. Costs — Settlement of "B" list.] — Re GREENING & CO., MARSH'S CASE, No. 6230, ante.

— **Applications for rectification of list of contributories.]—See Sub-sect. 10, E. (d), post.**

(d) *Rectification of List of Contributories.*

i. *In General.*

6248. Power of court to rectify—Before & after date of winding-up order.]—The ct. has power to rectify the list of contributories as well after as before the date of the order for winding up.—REESE RIVER SILVER MINING CO. v. SMITH (1869), L. R. 4 H. L. 64; 39 L. J. Ch. 849; 17 W. R. 1042, H. L.; *affg. S. C. sub nom. Re REESE RIVER SILVER MINING CO., SMITH'S CASE* (1867), 2 Ch. App. 604, L. J.J.

Annotations:—Folld. *Henderson v. Lacon* (1867), L. R. 5 Eq. 249. **Consd.** *Re Overend, Gurney, Oakes v. Turquand & Harding, Peek v. Same* (1867), L. R. 2 H. L. 325. **Distd.** *Kent v. Freehold Land & Brick-Making Co.* (1868), 3 Ch. App. 493. **Apld.** *Re Estates Investment Co., Pawle's Case* (1869), 4 Ch. App. 497; *Re British Burmah Land Co.* (1888), 4 T. L. R. 631. **Consd.** *Re General Ry. Syndicate, Whiteley's Case*, [1899] 1 Ch. 770. **Folld.** *Re Sussex Brick Co.*, [1904] 1 Ch. 598. **Consd.** *Re Pacaya Rubber & Produce Co., Burns' Appln.*, [1914] 1 Ch. 542. **Refd.** *Re Cleveland Iron Co., Ex p. Stevenson* (1867), 16 W. R. 95; *Re Canadian Native Oil Co., Fox's Case* (1868), L. R. 5 Eq. 118; *Peek v. Gurney* (1871), L. R. 13 Eq. 79; *Re Ruby Consolidated Mining Co., Askew's Case* (1874), 31 L. T. 55; *Re Coal Economising Gas Co., Gover's Case* (1875), L. R. 20 Eq. 114; *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413; *Lodwick v. Perth* (1884), 1 T. L. R. 76; *Re British Burmah Lead Co., Ex p. Vickers* (1887), 56 L. T. 815; *Cocksedge v. Metropolitan Coal Consumers Assocn.* (1891), 64 L. T. 826; *Mair v. Rio Grande Rubber Estates*, [1913] A. C. 853; *First National Reinsurance v. Greenfield*, [1921] 2 K. B. 260. **Mentd.** *A.-G. v. Ray* (1874), 9 Ch. App. 402, n.; *Eaglesfield v. Londonderry* (1876), 4 Ch. D. 693; *Schroeder v. Mendl* (1877), 37 L. T. 452; *Redgrave v. Hurd* (1881), 20 Ch. D. 1; *Mathias v. Yetts* (1882), 46 L. T. 497; *Nash v. Wooderson* (1884), 52 L. T. 49; *Smith v. Reed* (1886), 2 T. L. R. 442; *Derry v.*

PART III. SECT. 36, SUB-SECT. 10.— E. (d) i.

g. Power of court to rectify—After confirmation of list of contributories.]—The ct. has power to rectify a limited co.'s register of members even after confirmation of the list of contributories.—SETA DIAMONDS, LTD. (LIQUIDATOR) v. KNOX, [1915] W. L. D. 109.—S. AF.

h. Conflict between share register & list of contributories.]—Where on the share register of a co. the names of two partners appear as holding shares in severalty, but in winding up their names appear in the list of contributories jointly, the ct. will not disturb the list of contributories if it be shown that the original arrangement with the co. was that the shares were to be held jointly.—Re MATHIESON BROTHERS (1885), 3 N. Z. L. R. 367.—N.Z.

k. List settled by the court—Is a judgment.]—An order for the winding up of a co. was made, & a list of contributories was settled by the ct. An

application was subsequently made to the ct. by L., one of the contributories, to have this list amended, one ground of the application being that a call had been made by the directors which they had resolved should not be sued for, in order that all the shareholders should be placed on the forfeit list preparatory to liquidation. This call, it was contended, was *ultra vires* of the directors, & therefore a nullity. No decision was given on this point, & the application was dismissed upon another ground. A summons was then taken out by the liquidator of the co., calling upon certain of the shareholders to show cause, as in L.'s previous application, why the list of contributories as settled by the ct. should not be amended. The ground of this application was the same as the one previously taken but not decided, viz., that the call made by the directors was a nullity.—*Held*: dismissing the application, the list already settled was, in effect, a judgment of the ct., & to make a fresh list of contributories would be equivalent to setting aside the

Peek (1889), 14 App. Cas. 337; *Abram S.S. Co. v. Westville Shipping Co.*, [1923] A. C. 773.
See, further, Sect. 13, B. (a)-(c), ante.

ii. *When Granted.*

6249. Allegation that winding-up order invalid—Winding-up order still in force.]—The ct. cannot entertain an application to remove a name from the list of contributories in the winding up of a co., made on the ground that there is no valid co. or valid winding-up order, until the winding-up order has been discharged.—Re OVEREND, GURNEY & CO., LTD. (1867), 16 L. T. 148; 15 W. R. 528.

See, further, Sect. 13, sub-sect. 5, B. (d), ante.

iii. *Practice and Procedure.*

6250. How application made—Motion in winding up—Pendency of substantive proceedings for same purpose.]—Any application under 1862 Act, s. 87, for leave to continue proceedings against a co. in process of winding up must be made in that branch of the ct. in which the winding-up order has been pronounced, & not in that in which the proceedings have been instituted. Any application to take a contributory off the list must be made by motion under the winding up, notwithstanding the pendency of substantive proceedings for that purpose.—WILSON v. NATAL INVESTMENT CO. (1867), 36 L. J. Ch. 312; 15 L. T. 658.

6251. In whose name application made.]—(1) If the name of a person is improperly on the register of shareholders of a co., it is upon the register without sufficient cause within 1862 Act, s. 35.

(2) Though there may be no jurisdiction under above sect., in a case of a successful application by a co. to rectify the register, to make resp. pay costs, yet, if this application be made in a winding up, there is jurisdiction to make the unsuccessful resp. pay costs; (3) such an application, however, in a winding up ought to be made in the name of the co., not in the name of the liquidator.—*Re BANK OF HINDUSTAN, CHINA & JAPAN, Ex p. KINTREA* (1869), 5 Ch. App. 95; 39 L. J. Ch. 193; 21 L. T. 688; 18 W. R. 197, L. J.

Annotations:—As to (2) Refd. *Re Diamond Rock Boring Co., Ex p. Shaw* (1877), 2 Q. B. D. 463. *As to (3) Refd.* *Re Pyle Works* (1890), 44 Ch. D. 534. **Generally, Mentd.** *Re Imperial Mercantile Credit Assocn., Payne's Case* (1869), L. R. 9 Eq. 223; *Re Bank of Hindustan, China & Japan, Harrison's Case* (1871), 6 Ch. App. 286; *Re Bank of Hindustan, China & Japan, Rogers' Case* (1871) 25 L. T. 406.

6252. Test case—Similar cases—Only one case

judgment pronounced in the case of L.—*Re EUROPEAN GOLD-MINING CO., LTD. (IN LIQUIDATION)* (1898), 17 N. Z. L. R. 790.—N.Z.

PART III. SECT. 36, SUB-SECT. 10.— E. (d) iii.

1. To whom application made.]—Persons placed on list of contributories by order of a judge applied to have the judgment set aside & to be allowed to show why they should not be placed on the list:—*Held*: the application must be made to the judge who made the order, & to him in ct.—Re WADE (D.) CO., LTD. (1909), 10 W. L. R. 527; 2 Alta. L. R. 117.—CAN.

m. Necessary preliminary—Application for removal from list of shareholders.]—Where a shareholder in a co. desires to have his name removed from the list of contributories he should first apply to have his name removed from the list of shareholders.—Re AUCKLAND CO-OPERATIVE DRAPERY & CLOTHING CO., LTD., FRASER'S CASE (1887), 5 N. Z. L. R. 59.—N.Z.

need be heard.]—A. & others, who all stood in the same position, were placed on the list of contributories. A. appealed, & the order as to him was reversed:—*Held*: it was unnecessary to rehear the cases of the others, as they would, in chambers, be struck off the list.—*Re NATIONAL ASSURANCE & INVESTMENT ASSOCN., Ex p. MUNDAY* (1862), 31 Beav. 206; 54 E. R. 1117.

6253. Who may appear—Liquidator—When separate appearance necessary.]—When in the winding up of a co. application is made to the ct. to substitute one person for another on the list of contributories, & both parties are equally solvent, so that it is a matter of indifference to the creditors & contributories which of them is made a contributory, it is the duty of the liquidator to appear by one counsel only, & to take no part in the argument. *Semble*: in such cases the unsuccessful party will be ordered to pay the costs of the liquidator.—*Re OVEREND, GURNEY & Co., MUSGRAVE & HART'S CASE* (1867), L. R. 5 Eq. 193; 37 L. J. Ch. 161; 17 L. T. 313; 16 W. R. 247.

Annotations:—*Mentd.* *Re Hydraulic Tube-Drawing & Steel Ordnance Co.* (1868), 16 W. R. 572; *Paine v. Hutchinson* (1868), 3 Ch. App. 388; *Re Heaton Steel & Iron Co., Simpson's Case* (1869), L. R. 9 Eq. 91; *Re Hercules Insee., Lowe's Case* (1870), L. R. 9 Eq. 589; *Re Diamond Rock Boring Co., Ex p. Shaw* (1877), 2 Q. B. D. 463.

6254. Creditors' representative.]—The creditors' representative is not always entitled to appear separately on an appeal by the official manager as to placing a contributory on the list. Though the creditors' representative appeared & was heard, part only of his costs was allowed.—*COTTERELL'S CASE* (1862), 8 Jur. N. S. 1083, L. J.

Annotation:—*Mentd.* *Re Waterloo Life, etc. Co., Ex p. Saunders* (1863), 3 New Rep. 58.

6255. Evidence—Conflict on issue of agency to subscribe.]—In a case where a promoter of a co. swore that he had authority from an alleged contributory to subscribe for shares on his behalf, & was met by a direct denial on the part of the contributory, the judge, being of opinion that in such a case there must be more evidence than the affidavits of the parties to the dispute in order to render the contributory liable, directed the removal of his name from the list. But an action having been begun by the co. to recover the amount of calls made upon the shares:—*Held*: the effect of the evidence would be best ascertained in that action, & the order must be discharged.—*Re SOUTH KENSINGTON HOTEL CO., LTD., BRAGINTON'S CASE* (1865), 12 L. T. 259, L. J.

Annotation:—*Mentd.* *Re Bank of Hindustan, China & Japan, Ex p. Los* (1865), 11 Jur. N. S. 661.

6256. Summons to obtain further evidence.]—*Re OVEREND, GURNEY & Co., Ex p. MUSGRAVE*, No. 6075, *ante*.

6257. Affidavit of documents by liquidator—Contents.]—Where an official liquidator sought to place a person on the list of contributories as a past member, upon the application of the latter that the official liquidator should make the usual affidavit as to documents:—*Held*: the proper affidavit to be made was an affidavit of documents relating to the particular shares as to which it was sought to make the alleged contributory liable.—*Re CONTRACT CORPN., GOOCH'S CASE* (1872), 7 Ch. App. 207; 41 L. J. Ch. 338; 26 L. T. 177; 20 W. R. 345, L. J.

Annotations:—*Reid.* *Re Sir John Moore Gold Mining Co.* (1877), 37 L. T. 242. *Mentd.* *R. v. Curzon, Re Leslie* (1882), 46 L. T. 159.

6258. Who may be heard—Counsel for creditors.]—(1) Where summonses were taken out by A. & B. to have their names respectively removed from

the list of contributories of a co., counsel appeared for creditors in A.'s case, & asked for costs:—*Held*: only one set of costs could be allowed, namely the liquidator's.

(2) In B.'s case counsel for creditors, though admitting that he must appear at his own expense, contended that under General Ord., 1862, r. 60, he was entitled to be heard:—*Held*: the judge had a discretion, in the exercise of which he declined to hear any one in opposition to the summons except the liquidator.—*Re ANGLO-INDIAN & COLONIAL INDUSTRIAL & COMMERCIAL INSTITUTION, LTD., MONTAGU'S (LORD) CASE, GREY'S CASE* (1888), 59 L. T. 208; 4 T. L. R. 580; *affd.* on other grounds, *sub nom. Re ANGLO-ITALIAN & COLONIAL INDUSTRIAL & COMMERCIAL INSTITUTION, LTD., GREY'S CASE*, 5 T. L. R. 60, C. A.

6259. Who may begin—Summons by liquidator against contributory to show cause—Admission by counsel that contributor *prima facie* liable.]—(1) The prospectus & memorandum of assocn. of a limited co. stated that the capital was divided into shares of £20 each, & that the first issue would be of £20 shares. The memorandum & arts. of assocn. contained a provision for consolidating the £20 shares into shares of larger amount. Upon the faith of the prospectus & memorandum of assocn., G. applied for 25 shares in the co. Subsequently to his application, in pursuance of the provisions in that behalf, all the shares of the co., before any of them had been issued, were converted from £20 shares to £40 shares. Twenty £40 shares were allotted to G. He was not aware of the alteration in the amount of the shares till some time afterwards, & never acquiesced in the alteration. On a summons by the official liquidator of the co. for G. to show cause why he should not be settled upon the list of contributories:—*Held*: G. was a contributory to the co. in respect of twenty shares of £20 each.

(2) Upon G.'s counsel admitting that he was *prima facie* a shareholder in the co.:—*Held*: he had a right to begin on a summons in the form above mentioned.—*Re EUROPEAN CENTRAL RY. CO., GUSTARD'S CASE* (1869), L. R. 8 Eq. 438; 38 L. J. Ch. 610; 21 L. T. 196; 17 W. R. 875.

Annotation:—*As to* (1) *Reid.* *Union Debenture Co. v. Fletcher* (1895), 59 J. P. 708.

6260. Discharge of order—Settlement of list by commissioner—Jurisdiction of commissioner to reverse his own order.]—A comr., under the winding up in bkpcy. of a co., having found the name of a shareholder on the register, settled it on the list of contributories. Upon a rehearing, having been informed that the shareholder had died before the date of the winding-up order, the comr. reversed his former order & erased the name from the list:—*Held*: the comr. had jurisdiction to reverse his own order & was perfectly right in so doing.—*Re SOUTHAMPTON, ISLE OF WIGHT & PORTSMOUTH IMPROVED STEAM BOAT CO., LTD., HOPKINS' EXECUTRIX' CASE* (1864), 4 De G. J. & Sm. 342; 4 New Rep. 4; 33 L. J. Bcy. 40; 10 L. T. 283; 10 Jur. N. S. 529; 12 W. R. 778; 46 E. R. 951, L. C.

6261. Appeal—Time for appealing.]—As a general rule an application to discharge an order made in chambers to place a person on the list of contributories of a co. in liquidation ought to be made within three weeks, which is the time limited by 1862 Act, s. 124, for bringing an appeal.—*Re ELHAM VALLEY RY. CO., DICKSON'S CASE* (1879), 12 Ch. D. 298; 48 L. J. Ch. 766; 41 L. T. 184; 27 W. R. 880.

Annotations:—*Appld.* *Heatley v. Newton* (1881), 19 Ch. D.

Sect. 36.—Winding up by court: Sub-sect. 10, E. (d)

326. *Consd. Re Liverpool Household Stores Assocn., Ex p. Weld-Blundell* (1890), 63 L. T. 383.

6262. ———.]—Where the chief clerk had refused a summons by an official liquidator for rectification of the register, but no certificate had been drawn up, & the chief clerk had refused an application made three months afterwards to adjourn the summons into ct.:—*Held*: the ct. would be guided by the analogy of the rules, which fix 21 days as the limit for appealing, & the liquidator could not, by a fresh summons, obtain the opinion of the judge upon the chief clerk's refusal of the first summons.—*Re NORWICH EQUITABLE FIRE ASSURANCE CO., BRASNETT'S CASE* (1884), 51 L. T. 620; 33 W. R. 270.

6263. ———.]—R. S. C., Ord. 55, r. 70, does not apply to a certificate settling a list of contributories in a winding up. Where a person has been settled by a registrar upon the list of contributories, the limit of 21 days within which an appeal from any order or decision is to be brought under 1862 Act, s. 124, is not absolutely binding upon the ct., & where no injury has been caused by the delay, an application may be entertained after the 21 days.—*Re LIVERPOOL HOUSEHOLD STORES ASSOCN., Ex p. WELD-BLUNDELL* (1890), 63 L. T. 383.

6264. *Jurisdiction of Court of Appeal—To alter order against one contributory—Although no opportunity of altering order against another contributory affected by alteration.*]—A., B. & C. agreed with a co. to take 1,400 £1 shares, to be equally divided among them, in respect of which shares £310 had been paid generally. The co. having been afterwards ordered to be wound up, an order was made putting A. on the list of contributories for 157 shares, B. for 466, & C. for 467. A. was put on the list for 157 shares only, because the judge considered that under an arrangement between the parties the £310 was to be attributed to A.'s shares, so that 310 of them were fully paid-up. B. appealed generally from this order, serving only the official liquidator. The Ct. of Appeal was of opinion that B. was properly put on the list, but that the £310 was attributable to all the 1,400 shares:—*Held*: (1) a direction crediting B. with one-third of the £310 ought to be made, though there was now no opportunity of altering the order as against A.

(2) The costs of shorthand notes of evidence in the ct. below are not to be allowed as a matter of course upon an appeal, but only where a case is made for such allowance.—*Re DUCHESS OF WESTMINSTER SILVER LEAD ORE CO.* (1878), 10 Ch. D. 307; 40 L. T. 300; 27 W. R. 539, C. A.

6265. Costs—General rule.]—The general rule of the ct. that costs follow the result applies in the absence of special circumstances to cases of contributories under a winding up who have unsuccessfully opposed application to place them on the list.—*Re BIRKBECK LIFE ASSURANCE CO., Ex p. BARRY'S REPRESENTATIVES* (1865), 2 Drew.

n. Costs—Liability of liquidator—When more than one respondent.]—Where a number of parties who had substantially the same interests were called as resps. in a petition to settle the list of contributories brought by the official liquidator of a limited co., & where the latter was unsuccessful in his contention, the ct. found the resps. entitled to expenses but declined to allow more than one set of these to be charged against petitioner.—*Con-*

SOLIDATED COPPER CO. OF CANADA, LTD. v. PEDDIE (1877), 5 R. (Ct. of Sess.) 393; 15 Sc. L. R. 274.—SCOT.

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E. (d) iv.

o. Delay—Applicant acquiescing in issue of partly-paid, in lieu of fully-paid, shares.]—A contributory who had an equity to be removed from the list on the ground that shares on which a

& Sm. 321; 5 New Rep. 299; 11 L. T. 691; 11 Jur. N. S. 76; 13 W. R. 380; 62 E. R. 643.

Annotation:—Folld. Re London & Provincial Starch Co., Gowers' Case (1868), L. R. 6 Eq. 77.

6266. ———.]—*Re BARNED'S BANKING CO., ANDREW'S CASE*, No. 6223, *ante*.

6267. ———.]—A contributory who has unsuccessfully opposed an application by the official liquidator to have his name put on the list of contributories, will be ordered to pay the liquidator's costs.—*Re LONDON & PROVINCIAL STARCH CO., GOWERS' CASE* (1868), L. R. 6 Eq. 77; 18 L. T. 317; 16 W. R. 751.

6268. ———.]—(1) Where persons in a fiduciary position, as directors of a co., are called on to exercise a discretionary power, & refrain from exercising it out of regard to their own interests, the ct. will hold them to all the consequences which would have ensued had the power been properly exercised.

(2) There is no inherent power in directors apart from the provisions of the arts., to refuse to register any proper & valid transfer which may be submitted to them.

(3) In almost all contributory cases, the party who fails ought to bear the costs of the litigation.—*Re NATIONAL PROVINCIAL MARINE INSURANCE CO., GILBERTS' CASE* (1870), 5 Ch. App. 559; 39 L. J. Ch. 837; 23 L. T. 341; 18 W. R. 938, L. J. *Annotations:—As to* (1) *Consd. Re Cawley* (1889), 42 Ch. D. 209. *Refd. Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56. *Generally, Mentd. Re Societe des Bains de Mer de la Mer du Nord*, [1900] 2 Ch. 56. *Generally, Mentd. Re Societe des Bains de Mer de la Mer du Nord*, [1900] 2 Ch. 56.

6269. ——— *Liability of liquidator—By whom litigation originated.*]—*Re KILBRICKEN MINES CO., LIBRI'S CASE*, No. 6013, *ante*.

6270. ——— *Parties settled on list appearing to contest liability—Costs of attendance given out of estate—Although master refused to proceed owing to irregularity in list.*]—Where an irregular list of contributories had been carried into the master's office, & the persons whose names appeared therein, having had notice, attended to contest their liability, but an objection having been taken to the list of contributories, the master refused to proceed thereon, & ordered the persons who attended as contributories to be paid their costs out of the estate:—*Held*: the master had power to give costs out of the estate, but he had no power to award costs to parties improperly summoned to be paid by the official manager.—*Re CAMBRIDGE & COLCHESTER RY. CO., Ex p. MARSH* (1849), 1 Mac. & G. 302; 1 H. & Tw. 578; 19 L. J. Ch. 161; 13 Jur. 995; 41 E. R. 1281; *sub nom. Re COLCHESTER & CAMBRIDGE RY. CO., Ex p. MARSH*, 14 L. T. O. S. 124, L. O.

6271. ——— *Creditors' representative—Appearing separately—Part only of costs allowed.*]—*COTTERELL'S CASE*, No. 6254, *ante*.

6272. ——— *Counsel for creditors.*]—*Re ANGLO-INDIAN & COLONIAL INDUSTRIAL & COMMERCIAL INSTITUTION, LTD., MONTAGU'S (LORD) CASE, GREY'S CASE*, No. 6258, *ante*.

iv. Loss of Right to Rectification.

See, further, Sect. 13, sub-sect. 5, B. (f), ante.

6273. Delay—Applicant wrongly advised as to

liability existed had been issued to him in lieu of fully-paid shares will have lost such equity if he has permitted himself to be treated as a shareholder or performed acts of ownership, & he will be treated as if he had agreed to take such partly-paid shares & will be placed on the list of contributories accordingly.—*Re ROSEMOUNT GOLD MINING SYNDICATE (IN LIQUIDATION)* (1905), T. H. 169.—S. AF.

law.]—Leave given to a person to dispute his liability to be placed on the list of contributories after he had, acting under wrong advice as to the law, suffered the time appointed for that purpose by the master to elapse.—*Re LIVERPOOL & MANCHESTER SAW MILLS & TIMBER JOINT STOCK CO., HOLT'S CASE* (1849), 3 De G. & Sm. 99; 13 L. T. O. S. 422; 13 Jur. 694; 64 E. R. 398.

6274. — Satisfactory explanation.]—Upon a satisfactory explanation to the ct. of the reasons for a person, to whom shares had been allotted in a co., not going in at the proper time before the master to dispute his liability to be placed upon the list of contributories, he was permitted, although the time had long since passed, to go in before the master for the purpose of disputing his liability.—*Re LIVERPOOL & MANCHESTER SAW MILLS & TIMBER JOINT-STOCK CO., Ex p. ASH-BURNER* (1849), 13 L. T. O. S. 297; 13 Jur. 691.

6275. — Reasonable misapprehension as to liability—Belief that no further call would be made.]—A person placed on the list of contributories paid a call made by the master, believing that he would have no further payment to make. Another call was made nearly a year afterwards. The contributory, from decisions which had then taken place, believed that he had grounds for an appeal against being placed on the list. Leave to appeal given.—*Ex p. HOLROYD* (1851), 15 Jur. 696.

6276. — Two years' delay—Application on ground of change in law.]—*Re EASTERN COUNTIES JUNCTION & SOUTHBEND RY. CO., UNDERWOOD'S CASE*, No. 6246, *ante*.

6277. — Liquidator must show reasonable grounds—& that fresh information only recently obtained.]—Where a co. has been in the course of winding up for many years, the ct. will not allow the validity of a transfer, made previously to the winding-up order, to be questioned by the official manager unless it is satisfied that there are reasonable grounds for setting aside the transfer, & that the official manager has but recently obtained information of the fact.—*Re CAMERON COALBROOK CO., HUNT'S CASE* (1863), 32 Beav. 387; 2 New Rep. 50; 8 L. T. 377; 9 Jur. N. S. 998; 11 W. R. 655; 55 E. R. 152.

6278. — No loss sustained to estate by delay.]—A person allowing his name to remain for a length of time on the list of contributories of a co. without making any objection does not raise an equity against his applying to have it removed, where no loss is sustained by the estate which would have been avoided if the application had been made earlier. *Qu.*: whether, even in the case of such loss being sustained, any such equity would arise.—*Re MEXICAN & SOUTH AMERICAN CO., SHEWELL'S CASE* (1867), 2 Ch. App. 387; 36 L. J. Ch. 353; 16 L. T. 194; 15 W. R. 541, L. J.J.

Annotation:—*Appld. Re Alexandra Park Co., Hart's Case* (1868), L. R. 6 Eq. 512.

6279. — After unsuccessful application on ground of fraud—Subsequent application on ground of mistake.]—Where a creditor of a co. had been settled on the list as a contributory, & had applied to have his name removed on the ground of fraud, & failed, & having lain by several months without doing anything, applied to have his name removed on account of its being there by mistake:—*Held*: his name could not be removed: *Semble*: negligence alone is not sufficient to retain a man's

name as contributory.—*Re LAND SHIPPING COLLIERY CO., JONES'S CASE* (1869), 17 W. R. 983.

(e) *Calls*.

i. *In General*.

Calls generally.]—*See Sect. 21, ante*.

6280. Nature of call—Whether specialty debt—In respect of shares for which transfer executed.]—By the deed of settlement of a joint-stock co. every person acquiring shares & not executing was to be liable as a shareholder, though not entitled to the benefits of one. A person bought twenty shares, & five were assigned to him, & he covenanted, on demand, to execute the deed, & declared that he held the shares subject to the provisions of the deed. He bought altogether 173 shares, but no deed of transfer was executed of more than five. The whole 173 were transferred into his name in the co.'s books, & he received dividends. He died, & the co. was ordered to be wound up. Calls were made on the shares, his exors. being on the list of contributories. The official manager claimed to stand as a specialty creditor against the estate of the deceased shareholder in respect of the calls on the 173 shares:—*Held*: he was only so as to the five shares, & was a simple contract creditor as to the remaining 168 shares.—*HAY v. WILLOUGHBY* (1852), 10 Hare, 242; 68 E. R. 916; *sub nom.* *HAY v. WILLOUGHBY, HAY v. FLINTOFF, Re NORTH OF ENGLAND JOINT-STOCK BANKING CO., Ex p. HARRISON*, 22 L. J. Ch. 249; *sub nom.* *Re NORTH OF ENGLAND JOINT-STOCK BANKING CO., HAY v. WILLOUGHBY, Ex p. HENDERSON*, 20 L. T. O. S. 321; *sub nom.* *HAY v. WILLOUGHBY, Ex p. HENDERSON (OFFICIAL MANAGER OF NORTH OF ENGLAND BANKING CO.)*, 17 Jur. 13.

Annotation:—*Refd. Re Royal Bank of Australia, Robinson's Exor's Case* (1856), 6 De G. M. & G. 572.

6281. — —.]—A., a shareholder in a joint-stock co., executed the co.'s deed of settlement, in which was contained a covenant that each of the shareholders should be liable to the losses of the co. in proportion to his shares. A. died before the passing of 11 & 12 Vict. c. 45. An order was made in 1850 for winding up the co., & A.'s exors. were placed on the list of contributories. A call being made by the master in respect of A.'s shares:—*Held*: the amount of the call was not a specialty, but a simple contract debt only.—*Re ROYAL BANK OF AUSTRALIA, ROBINSON'S EXECUTOR'S CASE* (1856), 6 De G. M. & G. 572; 26 L. J. Ch. 95; 28 L. T. O. S. 167; 2 Jur. N. S. 1173; 5 W. R. 126; 43 E. R. 1356, L. C. & L. J.J.

Annotations:—*Consd. Buck v. Robson* (1870), L. R. 10 Eq. 629. *Refd. Williams v. Harding* (1866), L. R. 1 H. L. 9; *Re Pyle Works* (1890), 44 Ch. D. 534. *Mentd. Re Warwick & Worcester Ry., Parbury's Case* (1861), 3 De G. F. & J. 80.

6282. — —.]—The liability to a contributory to pay calls made since a winding up is a debt by specialty which binds the heirs of the contributory.—*BUCK v. ROBSON* (1870), L. R. 10 Eq. 629; 39 L. J. Ch. 821; 23 L. T. 391.

— —.]—*See, also*, No. 7684, *post*.

— **Whether debt provable in bankruptcy.]**—*See, further, BANKRUPTCY & INSOLVENCY, Vol. IV., pp. 302 et seq.*

— **Whether part of company's assets.]**—*See Nos. 6047, 6050, 6051, ante*.

6283. Power of court to make call—Discretion of

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E. (e) 1.

p. Power of court to make call—
Practice in regard to costs.—In making

calls upon contributories, summonses will be granted by a judge to the several parties requiring the amounts for which they are liable to be paid

within a specified time without costs unless resisted.—*Re NASH BRICK & POTTERY MANUFACTURING CO.* (1873), 9 N. S. R. 254.—*CAN.*

Sect. 36.—Winding up by court: Sub-sect. 10, E. (e) i., ii. & iii., (f) & (g) i.]

court.]—By 1862 Act, s. 38, all “past members” of a co. which is being wound up are liable to contribute to the debts & liabilities of the co., subject to the conditions imposed by three sub-sects. of that sect.; (1) that the person has only ceased to be a member within the year; (2) that the debts must have been contracted before he ceased to be a member; & (3) that the “present members” are unable to satisfy the contributions required to discharge the debts of the co.—Making a call is within the discretion of the ct.; & the call will not be made if the ct. is satisfied that there are sufficient assets in the hands of the liquidators, but it will be made if there are only outstanding assets the realisation of which is doubtful both as to amount & time.—The affidavits to satisfy the ct. that a call ought to be made, need not enter into minute details to show why the liquidators declare themselves only able to realise a certain sum, but must state reasonable grounds for that opinion of the liquidators.—Past members who deem the statements of liquidators on a winding up to be insufficient to justify calls being made on them, must not wait till after a decision has been pronounced on those statements, & has been made the subject of appeal, but must at the time of those statements being made submit them to the process of a cross-examination.—Compromises with some of the existing members of a co. under a winding up, effected by the liquidators with the sanction of the ct., cannot operate as a release to the past members. The two classes of persons do not stand to each other in the relation of principal & surety.—*HELBERT v. BANNER, Re BARNED'S BANK* (1871), L. R. 5 H. L. 28; 40 L. J. Ch. 410; 20 W. R. 63, H. L.; *affg. S. C. sub nom. Re BARNED'S BANKING CO., HELBERT'S CASE* (1868), L. R. 6 Eq. 509.

6284. — Unlimited company.]—In the winding up of an unlimited co. the ct. has power to make a call under 1862 Act, s. 102, on a proper case shown by the official liquidator; & the debts of the co. not having been paid, an affidavit by the liquidator that the call was required for “the adjustment of the rights & liabilities of the members amongst themselves” was held to imply that the call was necessary for the payment of debts, & to be a sufficient compliance with form 33 of General Ord. of Nov. 1862, r. 33.—*Re NORWICH EQUITABLE FIRE ASSURANCE CO., MILLER'S CASE* (1884), 54 L. J. Ch. 141; 51 L. T. 619; 33 W. R. 271.

6285. — On refusal of committee of inspection to sanction call.]—*Re NORTH-EASTERN INSURANCE CO., LTD., No. 6038, ante.*

6286. Grounds for making call.]—A creditor of a co., which was in the course of being wound up, established his debt against the official manager. The ct. refused to allow the creditor to proceed directly against the contributories to recover the amount under 11 & 12 Vict. c. 45, s. 56, thinking that the proper course was to pay the debt by means of a call.—*Re CAMERON COALBROOK, ETC. Co.* (1861), 30 Beav. 216; 9 W. R. 684; 54 E. R. 871.

6287. — Affidavit in support—Contents.]—*HELBERT v. BANNER, Re BARNED'S BANK, No. 6283, ante.*

6288. — .]—*Re NORWICH EQUIT-*

ABLE FIRE ASSURANCE CO., MILLER'S CASE, No. 6284, ante.

6289. Position of contributory disputing liability — Cannot resist making of call—Right to apply for suspension of operation of call.]—*Re BARNED'S BANKING CO., LTD., No. 5305, ante.*

6290. Discharge of order for call—Contributories struck off list on appeal.]—*Re OXFORD & WORCESTER EXTENSION & CHESTER JUNCTION RY. CO.* (1852), 19 L. T. O. S. 214.

6291. — Invalid call set aside.]—*Re HOLBECK MINING CO.* (1887), 4 T. L. R. 98.

6292. Agreement by shareholder to endeavour to obtain postponement of call—Legality.]—An agreement by a shareholder in a co. that is being compulsorily wound up that, in consideration of a pecuniary equivalent he will endeavour to postpone the making of a call, or will support the claim of a creditor, is illegal, as being contrary to the policy of the winding-up Acts. A. & B. were shareholders in a co. then being compulsorily wound up under the provisions of 1862 Act, & B. was also a creditor of the co. An agreement was entered into between them, by which A. agreed to use his influence to obtain the postponement of a call then about to be made, & to support B.'s claim, & B. in consideration thereof agreed to pay all calls made on A.'s shares. In an action by A. against B. on this agreement for not paying certain calls made on his shares, B. pleaded that the agreement was made without the knowledge of the Ct. of Ch., or the other shareholders or creditors, & with the intent to obtain a postponement of the call & payment of dividends on the whole of B.'s debt to the prejudice of the other shareholders & creditors, though A. knew that B.'s claim was disputed, & believed that only a portion of it was due:—*Held*: plea was good as showing that the agreement was contrary to the policy of the winding-up Acts, & therefore void: *Semble*: that the agreement to support B.'s claim was also void as being within the spirit of the law against maintenance.—*ELLIOTT v. RICHARDSON* (1870), L. R. 5 C. P. 744; 39 L. J. C. P. 340; 22 L. T. 858; 18 W. R. 1157.

Annotation:—Mentd. Lound v. Grimwade (1888), 39 Ch. D. 605.

Where uncalled capital charged to debenture-holders.]—*See Sect. 34, sub-sect. 5, ante.*

Set-off against calls.]—*See Sub-sect. 11, C. (a), post.*

6293. Proceeds of call—Whether attachable.]—The proceeds of a call made to provide for the payment of a debt of a co. in the course of being wound up, may be attached in the hands of the official manager, under the C. L. P. Act, 1854 (c. 125), to answer a judgment against the creditor.—*Re WARWICK, ETC. RY. CO., PRICHARD'S CLAIM, Ex p. TURNER, Ex p. SMITH* (1860), 2 De G. F. & J. 354; 30 L. J. Ch. 92; 3 L. T. 389; 6 Jur. N. S. 1172; 45 E. R. 658, L. JJ.

Annotations:—Consd. Spence v. Coleman, [1901] 2 K. B. 199. *Reid. Re Greensill* (1872), L. R. 8 C. P. 24; *Re Cowan's Estate, Rapier v. Wright* (1880), 14 Ch. D. 638.

ii. Time and Amount of Calls.

6294. Discretion of court—Interference by appellate court.]—The 1862 Act, s. 102, does not oblige the ct. to put off making a call until the claims made against a co. which is in course of winding up have been established as debts. The Ct. of Appeal will not, unless a strong case is made,

q. Position of contributory disputing liability—Judge's order prima facie evidence of liability.]—In an action against a stockholder for calls under Winding-up Act, the order of a judge

of the Supreme Ct., authorising such calls, is *prima facie* evidence of debt's liability.—*McKENZIE (WESTMORELAND BANK CURATOR) SCOVIL* (1870), 2 Han. 6.—CAN.

r. — Effect of Winding-up Act, s. 49.]—*VICTORIA-MONTREAL FIRE INSURANCE CO. v. HYDE* (1904), Q. R. 29 S. C. 282.—CAN.

interfere with the discretion of the judge to whose ct. the winding up is attached, by reducing the amount of a call ordered by him.—*Re CONTRACT CORPN.* (1866), 2 Ch. App. 95; 15 L. T. 201; *sub nom. Re CONTRACT CORPN., LTD., Ex p. BOYER & Co.*, 36 L. J. Ch. 69; *sub nom. Re CONTRACT CORPN., LTD., Ex p. BOWERBANK*, 31 J. P. 4; 12 Jur. N. S. 931; *sub nom. Re CONTRACT CORPN., LTD., Ex p. BOWERBANK, Ex p. BOYCE, Ex p. KING*, 15 W. R. 49, L. JJ.

Annotations:—*Consd. Re BARNED'S BANKING Co.* (1867), 36 L. J. Ch. 215; *Re Law Guarantee Trust & Accident Soc.* (1910), 26 T. L. R. 565. *Mentd. Helbert v. Banner, Re BARNED'S BANK* (1871), L. R. 5 H. L. 28.

6295. ———. ———.]—*Re BARNED'S BANKING Co., LTD.*, No. 5305, *ante*.

6296. Time of call—General rule.]—*Re BARNED'S BANKING Co., LTD.*, No. 5305, *ante*.

6297. ——— Before debts established.]—*Re CONTRACT CORPN.*, No. 6294, *ante*.

6298. ——— Power of liquidator to make immediate call—For whole of unpaid balance on shares—Although shares payable by instalments.]—A co. was formed for the purpose of carrying into effect a contract for the purchase of the business of an existing co. Under this contract—which in due course became binding on the new co.—shareholders in the old co. were entitled to shares in the new co., & payments in respect of such shares were to be made by certain specified instalments. Several shareholders in the old co. accepted shares in the new co. under the contract. Before the periods fixed for payment of some of the instalments had arrived, the new co. was wound up:—*Held*: the contract for payment by instalments was determined by the winding up, & by 1862 Act, ss. 7 & 102, the liquidator was entitled to make an immediate call for the amount remaining unpaid in respect of the shares.—*Re CORDOVA UNION GOLD Co.*, [1891] 2 Ch. 580; 60 L. J. Ch. 701; 64 L. T. 772; 39 W. R. 536.

Annotation:—*Refd. London Provident Bldg. Soc. v. Morgan*, [1893] 2 Q. B. 266.

6299. Amount of call—Rate of interest on unpaid calls.]—The arts. of a co. provided that calls should be made at the discretion of the directors, & that no calls should exceed £2 per share; and that in default of payment of a call for 28 days, £10 per cent. interest should be paid thereon. The liquidators made a call of £3 per share, to be paid by a certain day, but did not state whether or not interest would be charged in default. On default being made by some shareholders, the liquidators claimed the call with £10 per cent. interest:—*Held*: the art. as to calls referred to calls by the directors only, & the liquidators were entitled to the call of £3 per share, with interest at £5 per cent. under 3 & 4 Will. 4, c. 42, s. 28.—*Re WELSH FLANNEL & TWEED Co.* (1875), L. R. 20 Eq. 360; 44 L. J. Ch. 391; 32 L. T. 361; 23 W. R. 558.

iii. Payment of Calls.

6300. By instalments—Out of income.]—Upon a motion by the official liquidator of a co., the ct.,

under the provisions of Debtors' Act 1869 (c. 62), s. 5, ordered a contributory upon whom calls had been made, & who had an income of upwards of £2,000 per annum, to pay the amount of calls with interest by half-yearly instalments of £250.—*Re IMPERIAL MERCANTILE CREDIT ASSOCN., LTD., LEWIS'S CASE* (1873), 42 L. J. Ch. 379; 28 L. T. 396; 21 W. R. 505.

6301. ———.]—On an application to rescind or vary an order directing the liquidators of a co. to make a call of £5 per share on July 1, 1910, so that the order should provide for the call being payable in ten instalments of 10s. each, commencing on July 1 & recurring every six months:—*Held*: (1) as to those shareholders who were able to pay but required time to realise securities & who were willing to pay an instalment of £2 per share on July 1 or within 30 days of that date, & further instalments of 30s. each with interest on Jan. 1 & July 1, 1911, or within 30 days of these dates, respectively, the liquidators could accept payment by those instalments without requiring an affidavit of means; & (2) as to those shareholders who satisfied the liquidators that they were unable to pay by larger instalments than 10s. half-yearly with interest, the liquidators could properly accept payment by such instalments.—*Re LAW GUARANTEE TRUST & ACCIDENT SOCIETY, LTD.* (1910), 26 T. L. R. 565.

Balance order.]—See Sub-sect. 10, E. (g) i., *post*.

How enforced.]—See Sub-sect. 10, E. (g) ii., *post*.

(f) Rights of Contributories in regard to Debts due from or to Company.

See Sub-sect. 11, C. (a), *post*.

(g) Orders against Contributories.

i. Balance Order.

6302. Nature—Whether in nature of judgment.]—Where under 1862 Act, ss. 76, 103, & General Ord. Nov. 1862, r. 35, a balance order has been obtained by the official liquidator of a co. against the legal personal representative of a deceased contributory for payment of a call made after the death, the order being in accordance with form 39, sched. 3 of above order, & directing the legal personal representative to pay the call "out of the assets of deceased in his hands as such legal personal representative to be administered in due course of administration," such an order is not in the nature of a judgment so as to constitute the liquidator a judgment creditor; it is to be treated simply as analogous to a common administration judgment, or as a step to the administration judgment which may be obtained by the liquidator under 1862 Act, s. 105, & which is his proper remedy in case the legal personal representative has failed to comply with the order; & therefore the order, whether followed by an administration judgment or not, leaves untouched all priorities & rights usually existing in the due course of the administration of the estate of a

PART III. SECT. 36, SUB-SECT. 10.—E. (e) ii.

6296 i. Time of call—General rule.]—The liability of a contributory to pay for shares under Winding-up Act commences on the date when a call is made, & until that time Stat. Limitations does not begin to run against the co.—*Re JOHNSTON BROTHERS, LTD.* (1920), 29 B. C. R. 183.—CAN.

s. Amount of call—Action on foreign judgment—Construction of call order.]—Deft., who was resident in the colony, was the holder of 200 shares in the N. Z. Banking Corp., Ltd.,

a co. formed under English Cos. Act, 1862. An order was made by the Ct. of Ch. to wind up the co., & deft. was afterwards included in the list of contributories as the holder of 200 shares. The list was approved of & adopted by the Ct. of Ch. An order was afterwards made, reciting that the contributories had been duly summoned & had not appeared, & directing that a call of £5 per share should be made upon each contributory, & that each contributory should pay to the official liquidator, etc. "the amount which will be due from him in respect of such call after crediting him with all sums of money,

if any, which he has paid in respect of calls on the shares held by him." An action having been afterwards brought by the official liquidator in the Supreme Ct. of New Zealand to recover from deft. the amount of a call of £5 per share, less £332 10s. credited on account of sums previously paid:—*Held*: the call order was equivalent to a final judgment of a foreign ct.; it was not rendered uncertain or inconclusive, nor its finality impaired by the clause directing credit to be given for sums paid; & the action was maintainable.—*NEW ZEALAND BANKING CORPN. v. REYNOLDS*, Mac. 965.—N.Z.

Sect. 36.—Winding up by court: Sub-sect. 10, E. (g) i. & ii. & F.]

deceased person, including an exor.'s right of retainer. Thus, the order, if obtained against exors., does not give the liquidator priority over a debt due to one of them from the testator, & therefore retained by that exor. out of the assets, even though the order be prior in date to notice of the retainer.—*Re HUBBACK, INTERNATIONAL MARINE HYDROPATHIC CO. v. HAWES* (1885), 29 Ch. D. 934; 54 L. J. Ch. 923; 52 L. T. 908; 33 W. R. 666, C. A.

Annotations:—*Refd.* *Re Marvin, Crawter v. Marvin*, [1905] 2 Ch. 490. *Mentd.* *Re Rhoades, Ex p. Rhoades*, [1899] 1 Q. B. 905.

6303. ———.]—An action lies by the liquidator in the name of the co. against a contributory for calls made before the winding up notwithstanding that the liquidator has obtained a balance order for payment of the same moneys under 1862 Act, s. 101.

The debt is the debt of the co., but the balance order is an administrative remedy given to the liquidator. This is a technicality, but the substance of the case is that this order is not of the nature of a judgment between the co. & its debtor, but is an administrative remedy for the better collection of the assets in the winding up of the co. (*BOWEN, L.J.*).—*WESTMORELAND GREEN & BLUE SLATE CO. v. FEILDEN*, [1891] 3 Ch. 15; 60 L. J. Ch. 680; 65 L. T. 428; 40 W. R. 23; 7 T. L. R. 585, C. A.

Annotations:—*Refd.* *Pritchett v. English & Colonial Syndicate*, [1899] 2 Q. B. 428. *Mentd.* *Chamberlyn v. Allen* (1892), 36 Sol. Jo. 348.

6304. ———. **Whether “final judgment”**—To support bankruptcy notice.]—A balance order in respect of calls made on a contributory in the winding up of a co. is not a “final judgment” within Bkpcy. Act, 1883 (c. 52), s. 4 (1) (g), & a bkpcy. notice cannot be issued in respect of such an order.—*Re TENNENT, Ex p. GRIMWADE* (1886), 17 Q. B. D. 357; 55 L. J. Q. B. 495; 3 Morr. 166, C. A.

Annotation:—*Refd.* *Westmoreland Green & Blue Slate Co. v. Feilden*, [1891] 3 Ch. 15.

—————.]—*See, also*, No. 6920, *post*.

6305. Effect.]—*Re HUBBACK, INTERNATIONAL MARINE HYDROPATHIC CO. v. HAWES*, No. 6302, *ante*.

Enforcement.]—*See* No. 6303, *ante*, No. 6314, *post*.

ii. Enforcement of Orders.

6306. Application of bankruptcy rules—Service of four-day peremptory order to pay—Warrant for committal on non-compliance.]—In enforcing the order of this ct. against a contributory for payment of a call, the practice of the Ct. of Ch. under

11 & 12 Vict. c. 45, & 12 & 13 Vict. c. 108, & the rules in bkpcy., so far as the same are applicable, must be strictly followed. The proper course, therefore, is to serve the four-day peremptory order to pay, under above Acts, upon the party to be affected thereby, & that not being complied with, the ct. will sign the warrant for his committal.—*Re LONDON UNADULTERATED FOOD CO., LTD., Ex p. OFFICIAL LIQUIDATOR* (1859), 32 L. T. O. S. 395.

6307. Absconding contributory—Issue of writ of sequestration—Without first issuing writ of attachment.]—The ct. will grant a writ of sequestration against the estate of a contributory who has left this country, without first issuing an attachment.—*EAST OF ENGLAND BANK, Re HALL*, (1864), 2 Drew. & Sm. 284; 11 L. T. 410; 10 Jur. N. S. 1093; 13 W. R. 128; 62 E. R. 629.

Annotation:—*Refd.* *Miller v. Miller* (1870), L. R. 2 P. & D. 54.

6308. Order for seizure of goods—When arrest ordered.]—Upon evidence that a contributory was about to sell off his goods & chattels for the purpose of evading payment of a call, the ct., reading 1862 Act, s. 118, alternatively, made an order for the seizure of his goods, etc., but declined to order his arrest upon a mere hearsay statement of his intention to leave the United Kingdom.—*Re IMPERIAL MERCANTILE CREDIT CO.* (1867), L. R. 5 Eq. 264; 16 L. T. 314; 32 J. P. 341; 16 W. R. 244.

—*See, also*, No. 6921, *post*.

6309. Writ of fieri facias—When available.]—When there has been an order on a contributory to pay money into a bank to the account of the official liquidator, & it is desired to enforce that order by issuing a writ of *fi. fa.*, the official liquidator, or other person seeking to enforce the order, must follow the course prescribed by Ord. 38, of Nov. 11, 1862, *i.e.*, he must obtain an order for payment of the sum in question to the official liquidator himself.

This order may be obtained without notice at any time after the order has been made for payment of the money in question into the bank. There seems no reason why, if before any order has been made for payment into a bank, the ct. is satisfied that the issuing of a writ of *fi. fa.* must eventually be resorted to, the ct. should not at once, and in the first instance, make an order for payment to the official liquidator (*LORD CRANWORTH, C.*).—*Re LEEDS BANKING CO.* (1866), 1 Ch. App. 150; 35 L. J. Ch. 311; 12 Jur. N. S. 304; *sub nom.* *Re LEEDS BANKING CO., Ex p. OFFICIAL LIQUIDATOR* 14 W. R. 269, L. C.

6310. ———. Form.]—A *fi. fa.* to enforce a call under 1862 Act, s. 102, must follow the terms of

PART III. SECT. 36, SUB-SECT. 10.—
E. (g) ii.

6308 i. Absconding contributory—Order for seizure of goods—When arrest ordered.]—Upon affidavits by official liquidator & his solr. stating that certain contributories, one of whom was a director of the co. charged with breaches of trust, had transferred their shares, were selling off their property, & as deponents were informed & believed, were about to quit the country, for the purpose of evading payment of a call & their responsibility to the co.; & that it would be necessary to examine these persons for the elucidation of the affairs of the co.; the ct. made an order for seizure & arrest, under Cos. Act, 1862, s. 118.—*Re ULSTER LAND, BUILDING & INVESTMENT CO., LTD.* (1887), 17 L. R. Ir.

t. Foreign order.]—The cts. in India treat a call order made by the Ct. of Ch. in England upon a contributory of a co. registered in England, & being wound up under the authority of the Ct. of Ch. as a foreign judgment, & will not allow the liability of a debt, sued upon such order to be disputed, unless it be shown that the ct. had no jurisdiction to make the order, or that debt. had no notice of it, or that it is not in its nature a final order.—*LONDON, BOMBAY & MEDITERRANEAN BANK, LTD. v. HORMASJI P. FRAMJI* (1871), 8 Bom. O. C. 200.—**IND.**

a. ———.]—A co., registered in England, was being wound up by the English ct., & an order had been made giving official receiver & liquidator leave to make a call upon the contributories of the co. Certain Irish contributories had failed to pay the amount of the call. On an *ex p.*

application, leave was given to official receiver & liquidator to enforce the order of the English ct. by issuing & serving on the defaulting Irish contributories an originating summons requiring them to pay the amounts in which they were respectively in default.—*Re BANK OF EGYPT, LTD.*, [1913] 1 I. R. 502; 47 I. L. T. 167.—**IR.**

b. ———.]—An order made by the Ct. of Ch. in England directing a contributory to pay a call to the official liquidator in the winding-up matter was lodged with the registrar of the Ct. of Ch. in Ireland, & registered under 7 & 8 Vict., c. 90. The call having been paid, the ct. ordered the registration to be vacated.—*Re ALEXANDRA PARK CO., Ex p. FERMOY* (LORD) (1871), 5 I. R. Eq. 351.—**IR.**

c. ———.]—To enforce in Ireland an order to pay calls made by the Ct.

the balance order & may direct payment of the amount of the call & the costs of the *fi. fa.* to the account of the official liquidator at the bank.—*Ex p.* WATERLOO LIFE, ETC., ASSURANCE CO. (OFFICIAL LIQUIDATOR) (1864), 4 New Rep. 207; 14 W. R. 269.

6311. Foreign order—Order made by Court of Session in Scotland.]—Order made *ex p.*, under 21 & 22 Vict. c. 60, ss. 12, 13, for the inrolment of an order of the Ct. of Session in Scotland directing payment by contributories of a sum of money, or in default attachment.—*Re* WESTERN BANK OF SCOTLAND (1859), 1 De G. F. & J. 1; 1 L. T. 19; 8 W. R. 1; 45 E. R. 259, L. C.

6312. ———.]—Where, in the winding up of a co. by the Ct. of Session in Scotland, an order for a call has been made by that Ct., & it has become necessary to enforce the call against contributories resident in England, the order must be made an order of the Ch. Div. in England.—*Re* CITY OF GLASGOW BANK (1880), 14 Ch. D. 628; 43 L. T. 279.

6313. ——— Order made by Court of Bankruptcy in Ireland.]—An order for a call was made by the Ct. of Bkpcy. in Ireland in a winding up remitted to it by the Ct. of Ch. in Ireland:—*Held*: for the purpose of enforcing the call against contributories resident in England, the order must be made an order of the Ct. of Ch. in England, & there was no jurisdiction to make it an order of the Ct. of Bkpcy. in England.—*Re* HOLLYFORD COPPER MINING Co. (1869), 5 Ch. App. 93; 21 L. T. 734; 18 W. R. 157, L. J.

6314. Balance order—Whether enforceable by action.]—By a balance order made in the winding up of a co., deft., who was a shareholder & director of the co., was ordered to pay a sum of £252 due in respect of calls to the official liquidator of the co. The liquidator brought an action against deft. for the sum due under the balance order, & deft. claimed to set off a sum due to him from the co.:—*Held*: the action must be dismissed, as no action can be brought upon a balance order.—*CHALK, WEBB & Co., LTD. v. TENNENT* (1887), 57 L. T. 598; 36 W. R. 263.

Annotation:—*Folld. Westmoreland Green & Blue Slate Co. v. Feilden*, [1891] 3 Ch. 15.

6315. ——— Action of debt.]—*WESTMORELAND GREEN & BLUE SLATE CO. v. FEILDEN*, No. 6303, *ante*.

of Ch. in England under Cos. Act, 1862, it is not necessary that it should be made an order of the Ct. of Ch. in Ireland by formal order.—*Re HERCULES INSURANCE CO.* (1871), 6 L. R. Eq. 207.—*IR.*

d. ———.]—In the winding up of an English co. under Joint-Stock Cos. Winding-up Acts, 1848 & 1849, a domiciled Scotchman had been placed on the list of contributories & an order calling upon him to make payment of a call, which had been pronounced in Chancery, had been served upon him. This order not having been implemented, was registered in the books of the Ct. of Sessions, which registration gives the order the force of a bond with a clause of registration; & letters of horning were thereupon obtained, & on them the contributory was charged to pay. In a suspension of this charge:—*Held*: objections that suspender had been wrongly placed on the list of contributories, & had not received the proper statutory notice were questions for the determination of the Ct. of Ch. & could not be entertained by that Ct.; although a domiciled Scotchman, suspender, being a contributory, was in this matter

subject to Ct. of Ch.; & diligence by letters of horning was a proper form of diligence on the order.—*MOYES v. WHINNEY* (1864), 3 Macph. (Ct. of Sess.) 183; 37 Sc. Jur. 89.—*SCOT.*

e. Extra-provincial order.]—A call made by the Supreme Ct., New South Wales, in the winding up of a co. incorporated in that colony under Cos. Act, 1874, is enforceable by action in South Australia against shareholders resident in South Australia.—*EVELEEN SILVER MINING Co. v. PADMAN*, [1899] S. A. L. R. 56.—*AUS.*

f. ———.]—The correct practice in order to enforce an order or judgment of the Ct. of another province made under Winding-up Act & produced to registrar pursuant to sect. 126, is to enter such order as a judgment of this Ct. under the rules made under the Act by this Ct. in Trinity Term, 1888, without any formal motion to that effect.—*Re SOVEREIGN BANK OF CANADA* (1915), 43 N. B. R. 519.—*CAN.*

g. Liquidator domiciled abroad.]—Where the liquidator of a Scotch joint-stock co. appointed under Cos. Acts, 1862 & 1867, had gone to reside in England, in the course of the liquidation:—*Held*: he was entitled

F. Realisation of Property.

See 1908 Act, ss. 151 (2), (3), 158 (3).

6316. Sale of assets by liquidator—General rule.]—*Re AGRA & MASTERMAN'S BANK* (1866), L. R. 12 Eq. 509, n.; 15 L. T. 408; *sub nom. Re AGRA & MASTERMAN'S BANK, Ex p. POLLOCK*, 15 W. R. 554.

Annotations:—*Consd. Re Cambrian Mining Co.* (1882), 48 L. T. 114. *Refd. Re Albert Life Assce. Co.* (1871), 6 Ch. App. 381; *Re Irrigation Co. of France, Ex p. Fox* (1871), 6 Ch. App. 176; *Re Tunis Rys.* (1874), 22 W. R. 639.

6317. ———.]—(1) Sect. 95 of 1862 Act, enables the official liquidator of a co. in course of winding up, with the sanction of the Ct., to sell the whole of the assets of the co. *en bloc*.

(2) Although, as a general rule, when a liquidator is proposing to sell the assets of the co. with the sanction of the Ct., it is proper to obtain a valuation of the property to be sold, yet the Ct. will, in the absence of such a valuation, sanction a sale under peculiar circumstances—*e.g.* when an early sale is desirable & the assets are large, in distant & different parts of the world, & of fluctuating value.

(3) When asked to sanction a contract for the sale of the assets of a co. in liquidation, the Ct. is justified in acting principally on the information of the Ct. & the liquidator in the winding up, without requiring strict proof of all the circumstances.

(4) It is a strong ground for ordering an early sale of the assets that the liquidator, by retaining possession of the assets, is, by reason of their peculiar character, carrying on a speculation which may involve the creditors in loss, or greatly diminish their chances of being paid.

(5) The judge to whose Ct. a winding up is attached has a judicial discretion as to sanctioning a sale of the co.'s assets under the above sect.

(6) Although an appeal lies from the exercise of such discretion yet the Ct. of Appeal will only interfere when the judge has decided on a matter not within his discretion; or when his assumed discretion has been exercised on wrong principles; or when some great loss will be occasioned by a clearly erroneous exercise of discretion.

(7) When the Ct. has sanctioned a conditional private contract for the sale of the assets of a co., the Ct. ought not to entertain a subsequent, even

to obtain decree under Cos. Act, 1862, ss. 121, 138, against contributories who had failed to make payment of calls.—*ROBERTSON v. NORTHERN COUNTIES FIRE OFFICE* (1875), 3 R. (Ct. of Sess.) 17; 13 Sc. L. R. 4.—*SCOT.*

h. Effect of Act of Sederunt, 1883.]—The Act of Sederunt of June 21, 1883 providing for the enforcement in Scotland of orders made by a Ct. in England or Ireland in the course of winding up a co. under Cos. Act, 1862, applies only to orders for payment of a sum of money. Therefore where the liquidator of an English co. had obtained from the English Ct. an order to seize the money & goods of a contributory residing in Scotland, & to keep the same in safe custody until the further order of the Ct., & had registered this order in the Bill Chamber in the register of English judgments kept in pursuance of Act of Sederunt, & then proceeded to seize goods alleged to belong to the contributory, the Lord Ordinary on the Bills granted interdict against his seizure or retaining the goods.—*JOHNSTONE'S TRUSTEES v. ROOSE* (1884), 12 R. (Ct. of Sess.) 1; 22 Sc. L. R. 5.—*SCOT.*

Sect. 36.—Winding up by court: Sub-sect. 10,

higher offer from another person, as such a practice is within the principle condemned by Sale of Land by Auction Act, 1867 (c. 48).—*Re ORIENTAL BANK* (1887), 56 L. T. 868; 3 T. L. R. 659, C. A.

Whether valuation of property necessary—Where assets in different countries abroad.]—*Re ORIENTAL BANK CORPN.*, No 6317, *ante*.

6319. — Provisional contract to sell—Subsequent better offer—Whether court will sanction sale by public auction.]—The official liquidators of a bank entered into a provisional contract with B. to sell him property belonging to the bank for £16,000. At a meeting before the chief clerk this contract was submitted for the approval of the judge, when it was objected to by the solrs. for the creditors, who stated that C., another purchaser, would give a higher price. At another meeting C. offered £17,600, & an order was made that on his paying £1,600 into the bank & engaging to bid £17,600 the property should be put up to public auction. B. moved to have this order rescinded:—*Held*: although the chief clerk was right in not adopting the provisional contract with B. if a larger sum could be obtained, the order for the sale of the property by public auction could not be supported, because it dealt with the property as if sold in a suit. The official liquidators

must, therefore, carry out the contract with C. for £17,600.—*Re NORTHUMBERLAND & DURHAM DISTRICT BANKING CO.* (1861), 4 L. T. 633; 9 W. R. 584.

6320. — — — — — After sanction by court to provisional contract.]—*Re ORIENTAL BANK CORPN.*, No. 6317, *ante*.

6321. — — — — — When early sale necessary—Nature of assets speculative.]—*Re ORIENTAL BANK CORPN.* No. 6317, *ante*.

6322. — — — — — Consideration other than cash—Promissory notes of purchasing company.]—*Re AGRA & MASTERMAN'S BANK* (1866), L. R. 12 Eq. 509, n.; 15 L. T. 408; *sub nom. Re AGRA & MASTERMAN'S BANK, Ex p. POLLOCK*, 15 W. R. 554. *Annotations*:—*Consd. Re Cambrian Mining Co.* (1882), 48 L. T. 114. *Re Albert Life Assco.* (1871), 6 Ch. App. 381; *Re Irrigation Co. of France, Ex p. Fox* (1871), 6 Ch. App. 176; *Re Tunis Rys.* (1874), 22 W. R. 639.

6323. — — — — — Payment of debts by instalments—Whether court will sanction sale.]—Where a co. is being wound up compulsorily, the ct. has no power, under 1862 Act, s. 95, to authorise a transfer of the co.'s business to a new co. in consideration of the new co.'s paying the debts of the creditors by instalments.—*Re GENERAL EXCHANGE BANK* (1867), 15 W. R. 477.

6324. — — — — — Consideration lump sum—Assets & contributories abroad—Difficulty in realising assets & recovering calls.]—In the compulsory winding up of a limited co. formed to construct a railway in

PART III. SECT. 36, SUB-SECT. 10.— F.

k. *Sale of assets by liquidator—Whether valuation of property necessary—In sale under private contract.*—The chancery practice in sale cases applies to sales under Dominion Winding-up Act; & under such practice it is usual before offering property for sale to have an inquiry whether a sale by auction, or under private contract, would be the most advantageous to the estate. When a sale by private contract is directed, an affidavit of the actual value of the property should be produced, so that such value may be compared with the price offered.—*Re BOLT & IRON CO.* (1885), 10 P. R. 437.—CAN.

l. — — — — — *Sale to directors—When valid.*—Upon the appointment of a liquidator for a co. being wound up under R. S. C., c. 129, the Winding-up Act, if the powers of the directors are not continued as provided by sect. 34 of the Act, their fiduciary relations to the co. or its shareholders are at an end, & a sale to them by the liquidator of the co. is valid.—*CHATHAM NATIONAL BANK v. MCKEEN* (1895), 24 S. C. R. 348.—CAN.

m. — — — — — *Sale "free from incumbrances"—Outstanding claim.*—Deft., L., was liquidator of D. L. Mills, which by an order of Ontario High Ct. in Jan. 1906, was declared to be insolvent & liable to be wound up. Some time before the making of this order the co. had hypothecated its principal assets, including its stock of manufactured linens to the C. Bank to secure advances, & the bank had taken possession. By order of ct. the business was allowed to be carried on as a going concern by liquidator, & advances to be procured from the bank for wages, etc., to be repaid out of the first moneys coming into his hands. While so carrying it on, he advertised for tenders for purchase of the assets, & in Apr. 1906, an agreement was entered into between deft. & T., by which the latter became purchaser of the property of the co. "free from incumbrances" & transferred the same shortly after to pltf., a new co. formed to take over the business. Deft. received \$5,800 on account of

the purchase-money &, by direction of pltf., & on their undertaking to hold him harmless, paid it over to the C. Bank. It appeared that the insolvent co. used to send their goods to Scotland to be bleached, & a quantity was there when the winding-up order was made. The bleaching firm wrote to deft., stating the amount of their account in respect to their goods & asking for instructions. After some further correspondence liquidator wrote them full information as to what had been done, & stating that the proceeds of sale of the assets would hardly pay the bank's claim. He ended his letter by saying: "I, as liquidator, have no objection to your disposing of the goods on the highest market, applying the proceeds of such sale on your claim & advising me accordingly." Under the law of Scotland the bleachers had no right to sell the goods to satisfy their lien without complying with certain formalities, which they did not do. Pltf. brought action against liquidator, claiming damages for conversion of the goods so sold &, at the trial, were allowed to amend by adding a claim for breach of the contract to sell the assets of the insolvent co. "free from incumbrances":—*Held*: what liquidator had done fell far short of a legal conversion, & a liquidator by agreement is entitled to be held harmless by pltf., & therefore they cannot compel him to pay under the circumstances; pltf. treated & regarded the goods as delivered as far as deft. was concerned, & the claim upon the contract also failed as deft.'s letter quoted above did not amount to instructions to sell, & there was no breach of contract, as the term "free from incumbrances," as used in the contract with T., was not intended to apply to the charges for bleaching, but to the mtge. on the buildings & liens on the stock.—*DOMINION LINEN MANUFACTURING CO. v. LANGLEY* (1911), 23 O. W. R. 318; 46 S. C. R. 633.—CAN.

n. — — — — — *Where judgment recovered before winding up.*—Prior to the commencement of winding-up proceedings a judgment was recovered against the co. which was duly registered to bind lands under the provisions of the Nova Scotia Registry Act, R. S. N. S. (1900), c. 137, s. 1

After the commencement of the winding-up proceedings application was made to the ct. by the liquidator for an order permitting him to sell & dispose of the lands of the co. free from any lien or incumbrance so far as the recorded judgment was concerned:—*Held*: liquidator was entitled to the order applied for, subject to the condition that judgment creditor should be paid the costs of recovering judgment & there should be no costs of the application against the judgment creditor; further, there being no facts in dispute, leave to bring an action should be refused, the only result of which would be to increase costs & delay the winding-up proceedings.—*Re McDONALD (A. S.) CO., LTD.* (1919), 53 N. S. R. 238; 50 D. L. R. 417.—CAN.

o. — — — — — *Sale not "subject to existing mortgage or lien"—Rights of mortgagees & lien-holders.*—In a proceeding for the winding up of the co., liquidator was authorised by the ct. to sell & did sell all the assets of the co., including a ship, for \$67,500, of which \$5,000 was for the ship. A bank held a mtge. upon the ship, & there were wages due to seamen, for which they were entitled to maritime liens. The ship was not, as between vendor & purchaser, sold subject either to the mtge. or the liens. Some time after the sale & delivery to purchaser, the ship was destroyed. After the sale, the bank valued their security at \$5,000, & claimed that sum in the hands of liquidator. The lien-holders claimed a first charge upon that fund:—*Held*: both the bank & lien-holders had the same rights in the fund as they had in the ship, & the latter were entitled to the first charge contended for.—*Re FORT GEORGE LUMBER CO.* (1913), 25 W. L. R. 92.—CAN.

Sale of outstanding debts—Reduction of sale.—In the course of winding up the affairs of a joint-stock co., their outstanding debts, including a debt alleged to be due by one of the shareholders, were sold by public roup, & were purchased by a party who was one of the directors appointed to superintend the winding up, who acted as law-agent, & stood otherwise in a confidential relation to the co. In an action of reduction of

Brazil, the ct. sanctioned the sale by the official liquidator of all the co.'s assets in Brazil, & the release of all rights against contributories there, in consideration of the payment of a lump sum, it being shown that there would be great difficulty in realising the property, & that it would be practically impossible to recover any calls.—*Re PARAGUASSU STEAM TRAMROAD CO., LTD.* (1873), 42 L. J. Ch. 442; *sub nom. Re PARAGUASSU STEAM TRAMWAY CO., LTD., WILSON'S OFFER*, 28 L. T. 463.

6325. — Sale en bloc.—*Re ORIENTAL BANK CORPN.*, No. 6317, *ante*.

6326. — Discretion of judge to sanction—Whether strict proof of circumstances necessary.—*Re ORIENTAL BANK CORPN.*, No. 6317, *ante*.

6327. — Interference by court—Whether sale restrained—On adjourned summons—Necessity for bill.—The ct. will not, upon an adjourned summons in a winding up, grant an injunction to restrain a sale by a liquidator of property of the co. A bill must be filed.—*Re XERES WINE CO., LTD.* (1865), 13 L. T. 269; 14 W. R. 43.

6328. — With judge's discretion.—*Re ORIENTAL BANK CORPN.*, No. 6317, *ante*.

6329. — What are assets—Misfeasance claims against directors.—A co. being in course of winding up, an arrangement was entered into with the sanction of the ct., in pursuance of which the official liquidators assigned to W., in the most general terms, all the estate, property & effects of the co. which the liquidators had power to dispose of, in consideration of certain payments to be made by W., & which were duly made. W. entered into the arrangement on behalf of E., an officer of the co. After this the liquidators brought forward claims against E. & some of the directors, alleging that they had improvidently sold property of the co. at an undervalue, & seeking to make them liable for the loss, & also alleging that E. & some of the directors had purchased for the co. certain property, & concealed the fact that it had shortly before been bought by E. for little more than half the amount, & seeking to make them liable for the difference. The existence of these claims was not known at the time when the above arrangement was entered into. E. took out a summons to restrain the liquidators from prosecuting these claims without his consent, which application was refused:—*Held*: claims of this nature were "things in action" of the co. within 1862 Act, s. 95 (3), & could be assigned by the official liquidator.—*Re PARK GATE WAGGON WORKS CO.* (1881), 17 Ch. D. 234; 44 L. T. 901; 30 W. R. 20, C. A.

6330. — When sale will be set aside—Acquiescence or laches by applicant.—The ct. will not set aside an unauthorised sale where it was made in good faith by the liquidator, & there

is constructive acquiescence or long delay on the part of those applying to set the sale aside.—*Re HAFOD HOTEL CO., LTD.* (1868), 18 L. T. 144.

6331. — Liquidator interested in purchase.—*Re LLYNVI & TONDU CO.* (1889), 6 T. L. R. 11.

6332. — Whether liquidator liable for profits.—Where the sale of an undertaking of a co. effected by its liquidator, nominally to another co., but really to himself, had been set aside on the ground of fraud, & the retransfer of the undertaking to the original co. had been ordered:—*Held*: the liquidator, being in a fiduciary capacity, should repay the rents & profits which had accrued, but he was not to be charged with interest on the same.—*SILKSTONE & HAIGH MOOR COAL CO. v. EDEY*, [1900] 1 Ch. 167; 69 L. J. Ch. 73; 48 W. R. 137; 44 Sol. Jo. 41.

6333. Sale by person other than liquidator—When authorised—Disposal of assets requiring specialised knowledge.—Part of the assets of a co. in liquidation consisted of stocks & shares which were unmarketable on the Stock Exchange & could only be realised to advantage by a person having special qualifications:—*Held*: a specially qualified person who had been appointed receiver in a debenture holders' action ought to be continued as receiver of the unmarketable stocks & shares & the official receiver ought to be appointed as receiver of the other assets.—*INDUSTRIAL & GENERAL TRUST, LTD. v. SOUTH AMERICAN & MEXICAN CO., LTD.* (1893), 63 L. J. Ch. 169; 69 L. T. 693; 42 W. R. 181; 1 Mans. 92; 7 R. 64, C. A.

G. Carrying on Company's Business.

See 1908 Act, s. 151 (1).

6334. "Necessary for beneficial winding up" **Object to facilitate reconstruction.**—An order having been made for the winding up of a co., proposals were made by L., one of the shareholders, to the liquidator for the use of the co.'s plant, etc., to enable him to carry out certain experiments with a view of resuscitating the co.; & on an application to the ct., leave was given to the liquidator to enter into an agreement with L. Subsequently some creditors & a shareholder applied to the ct. for an injunction to restrain the liquidator from acting upon the agreement, & for directions to the liquidator to sell & get in the co.'s assets:—*Held*: (1) the object of the agreement being merely to make the shares of value so as, if possible, to resuscitate the co., the agreement was not within 1862 Act, s. 95, which provides that the official liquidator of a co. in liquidation shall have power, with the sanction of the ct., to carry on the business of the co., so far as it may be "necessary for the beneficial winding

the sale, at the instance of the shareholder, the debt due by whom had been brought to sale:—*Held*: as a partner of co., as well as the party from whom payment of the debt was demanded, pursuer had a title to insist in a reduction of the sale, & it was not a valid objection that the action could only proceed with the concurrence of the co.; an approval of the sale at a general meeting of shareholders did not, in the circumstances, bar pursuer's right to challenge it; & the sale being illegal & invalid, decree of reduction must be pronounced.—*THORBURN v. MARTIN, ETC.* (1853), 15 Dunl. (Ct. of Sess.) 845.—SCOT.

q. — Interference by court—Overriding private covenant against assignment.—The power of the ct. under Indian Cos. Act, VI. of 1882,

sect. 144 (c), to give sanction to an official liquidator to sell the property of the co. overrides a private contract against assignment made by the co. A covenant in a lease to a co. provided that the lessees should not "assign, underlet, or part with the possession of any part of the said premises unless with the express consent in writing of the said lessors or their assigns." The co. having gone into liquidation, & official liquidator having applied, under above sect., for sanction to sell the co.'s property, it was objected on behalf of lessors' assigns that the proposed sale would be in contravention of the covenant:—*Held*: the covenant did not apply to assignments by operation of law or assignments authorised by statute. Sects. 10 & 12 of Transfer of Property Act, IV of

1882, relate only to transfers by act of parties.—*Re WEST HOPETOWN TEA CO., LTD.* (1890), 1 L. R. 12 All. 193.—IND.

r. ——Where the majority of a co. propose to benefit themselves at the expenses of the minority, the ct. may interfere to protect the minority.—*CAIRD v. PLATA COLD STORAGE CO., LTD. (LIQUIDATOR)*, [1910] C. P. D. 568.—S. AF.

PART III. SECT. 36, SUB-SECT. 10.—G.

s. "Necessary for beneficial winding up" — Preservation of assets.—The liquidator of a mineral oil co. which had gone into liquidation by reason of its inability to meet its liabilities applied to the ct., under Cos. Act, 1862

Sect. 36.—Winding up by court: Sub-sect. 10, G.; sub-sect. 11, A.

up of the same"; (2) the word "necessary" in the sect. shows that the carrying on of the business must be with a view to the winding up of the co., & not with a view to its continuance.—*Re WRECK RECOVERY & SALVAGE CO.* (1880), 15 Ch. D. 353; 43 L. T. 190; 29 W. R. 266, C. A.

Annotations:—As to (1) Rejd. Bateman v. Ball (1887), 56 L. J. Q. B. 291. *Generally, Mentd. Re Canadian Pacific Colonisation Corpn.* (1891), 40 W. R. 40.

6335. — Continuance of company's contract.]—Pltf., a waggon co., by agreement in writing let to defts. a number of railway waggons for a term of years at an annual rent, the agreement providing that pltf., its executors or administrators, should during the term keep the waggons in repair. Pending the agreement an order was made for the winding up of pltf. co. under the supervision of the ct., in pursuance of a resolution previously passed by the co., & liquidators were appointed, who joined the co. in assigning the benefit of the contract to another co., upon the terms that such co. should perform the stipulations by the assignors contained in the original contract. The assignees took over the repairing stations of pltf. & the staff of workmen employed by them, & were always ready & willing to execute all necessary repairs to the waggons:—*Held*: defts. had no defence to an action for rent, upon the ground that pltf. co. had incapacitated itself from performing its contract; for, the voluntary liquidation of the co. was immaterial, the liquidators having power under 1862 Act, ss. 95, 131, to continue the letting of the waggons; & moreover, the repair of the waggons by the co. to whom the contract was assigned was a sufficient performance by pltf. co. of its agreement to repair.—*BRITISH WAGGON CO. v. LEA* (1880), 5 Q. B. D. 149; 49 L. J. Q. B. 321; 42 L. T. 437; 44 J. P. 440; 28 W. R. 349, D. C.

Annotations:—Apld. Tolhurst v. Associated Portland Cement Manufacturers (1900), *Associated Portland Cement Manufacturers* (1900) v. Tolhurst, [1902] 2 K. B. 660. *Rejd. Tolhurst v. Associated Portland Cement Manufacturers* (1900), *Tolhurst v. Associated Portland Cement Manufacturers* (1900) & *Imperial Portland Cement Co.*, [1903] A. C. 414. *Mentd. Jaeger's Sanitary Woollen System Co. v. Walker* (1897), 77 L. T. 180; *Fratelli Sorrentino v. Buerger*, [1915] 3 K. B. 367; *Belvedere Fish Guano Co. v. Rainham Chemical Works, Feldman & Partridge, Ind Coope v. Same*, [1920] 2 K. B. 487.

6336. — Discretion of receiver—Where assets include perishable goods.]—A petition was presented by a creditor to wind up a co. The objects for which the co. was established included the sale of perishable goods. It was asked that the order might contain a direction that the official receiver might be at liberty to carry on the business as a going concern. There appeared to be no provision for carrying on the business of a co. pending applications under 1890 (Winding up) Act, ss. 5, 12. The ct. made the usual winding-up

sect. 95, to sanction him in carrying on the co.'s business for six months, & to declare that the expenses thereby incurred should be a first charge on the assets. The application stated that the mineral oil trade was in a state of severe depression, which rendered the property of the co. unsaleable except at ruinous sacrifice; & that he considered it of great importance that the mines' & works should be kept going for a time, until it was seen whether a sale could be effected on favourable terms, or a suitable scheme of reconstruction carried through. The great majority of the creditors of the co., secured & unsecured, expressed their approval of the liquidator's proposal, which was opposed by three creditors only, whose debts were of small amount.

The ct. refused the application, holding that the powers craved were not necessary for the beneficial winding up of the co.—*BURNTISLAND OIL CO. (IN LIQUIDATION) v. DAWSON* (1892), 20 R. (Ct. of Sess.) 242; 30 Sc. L. R. 180.—*SCOT.*

t. Liquidator carrying on business—Power to make advances—To conserve company's assets.]—Re INDIAN COMPANIES ACT, 1866, Re COMMERCIAL BANK CORPN. OF INDIA & THE EAST, Re AGRA & MASTERMAN'S BANK, LTD. (1866), 1 Ind. Jur. N. S. 335.—*IND.*

PART III. SECT. 36, SUB-SECT. 11.—
A. (a).

a. Contribution to reserve fund.]—Shareholders in a loan co. in answer to a proposal from the co. paid towards

order, with the addition of a direction that the official receiver should be at liberty, if he thought fit, to carry on the business of the co. so far as necessary for the purposes of the winding up.—*Re GENERAL SERVICE CO-OPERATIVE STORES, LTD.* (1891), 64 L. T. 228.

6337. — Onus of proof on party objecting to contract.]—Pltf. co. sued defts. for breach of contract. The contract was of a kind which it was the business of the co. to make, but it was entered into after the co. had commenced proceedings for a voluntary winding up. The contract & the breach of it were proved:—*Held*: it lay on defts. to show that the contract was not required for the beneficial winding up of the co., & in the absence of such evidence pltf. was entitled to succeed.—*HIRE PURCHASE FURNISHING CO. v. RICHENS* (1887), 20 Q. B. D. 387; 58 L. T. 460; 36 W. R. 365; 4 T. L. R. 184, C. A.

6338. Liquidator carrying on business—May not make profit out of moneys in his hands.]—*Re ANON.* (1866), No. 5955, *ante*.

Costs of carrying on business—Where property subject to specific charge.]—*See No. 6547, post.*

SUB-SECT. 11.—PROOF OF DEBTS.

A. Debts Provable.

(a) Claims by Shareholders.

6339. In respect of shares fraudulently issued—If acquired bonâ fide.]—Where shares in a joint-stock co. have been issued fraudulently, a *bonâ fide* purchaser of these shares in the market, before any bill has been filed to impeach the transaction, is entitled, on a winding up of the co., notwithstanding the fraud, & notwithstanding that he bought the shares at a very great discount, to prove on equal terms with the other shareholders of the co. who bought their shares at par; but this privilege does not extend to any person who purchased his shares after the filing of the bill, unless his vendor was a *bonâ fide* holder of the shares before bill filed; & the *onus* of proof that such was the case is upon him.—*BARNARD v. BAGSHAW, Re LAKE BATHURST AUSTRALASIAN GOLD MINING CO.* (1863), 1 Hem. & M. 69; 71 E. R. 31.

6340. After payment of calls—Entitled to rank with creditors.]—*Re OVEREND, GURNEY & CO. GRISSELL'S CASE*, No. 6423, *post*.

6341. Purchaser of debt for less than full value—May prove for full value.]—A contributory of a co. in course of liquidation, who has bought up a debt of the co. for a less sum than is actually due thereon, may prove against the co. for the full amount of the debt, & not merely for what he has paid.—*Re HUMBER IRONWORKS CO.* (1869), L. R. 8 Eq. 122.

the reserve fund dividends paid to them by the co. & various other sums of money, with a view to increase the reserve fund to the same amount as the paid-up stock. In winding-up proceedings:—*Held*: such shareholders were not entitled to rank as creditors upon the assets of the co. with other creditors, depositors & debenture-holders, & that any claim they had against the co. & its reserve fund was subject to the payment of the debts of the co.—*Re ATLAS LOAN CO. (CLAIMS ON RESERVE FUND)* (1905), 9 O. L. R. 468; 5 O. W. R. 452.—*CAN.*

b. Overpayment for shares—Company liable as debtor not as trustee.]—A subscriber for shares in a co., after paying therefor in full, paid the amount

6342. Damages for improper forfeiture of shares.]—C., a holder of shares in a limited co., had a call made upon him in June, 1886, which he did not pay at the time appointed by the directors; & they, by a resolution of the board, forfeited the shares, without having previously given C., in accordance with one of the arts. of assocn., notice that if he failed to pay on or before the day appointed for payment they might at any time forfeit them. The directors allotted the forfeited shares to numerous shareholders. The shares were, at the date of forfeiture, at a premium. In June, 1888, the co. was ordered to be wound up. In Feb., 1889, C. applied, under another art. of assocn., to be allowed to prove in the liquidation for damages for the irregularity of the directors in ordering the forfeiture:—*Held*: there had been an irregularity by the directors in not giving notice to C., & he was entitled to prove for damages under the arts., & in competition with the other creditors of the co., 1862 Act, s. 38 (7), not applying to the case.—*Re NEW CHILE GOLD MINING CO.* (1890), 45 Ch. D. 598; 60 L. J. Ch. 90; 63 L. T. 344; 39 W. R. 59; 6 T. L. R. 462; 2 Meg. 355.

(b) *Claims in respect of Breaches of Contract generally.*

6343. Contract to repair ship—Continuing breach after winding up.]—A shipbuilding co. agreed to repair a ship within a certain time. Before the repairs were executed an order was made for winding up the co. After some time an order was obtained in the winding up, with the assent of the shipowners, that the official liquidator should be at liberty to complete the repairs, which he did, & the ship was, long after the time agreed upon, delivered to the owners & sent on a voyage:—*Held*: (1) the shipowners were entitled, under 1862 Act, s. 158, to recover damages from the co. for the delay in executing the repairs, & these damages continued after the winding up, notwithstanding General Order of Nov. 11, 1862, r. 25; (2) under the circumstances, the shipowners could not recover damages for an injury to the ship alleged to have been done whilst she was in the possession of the co.—*Re TRENT & HUMBER CO., Ex p. CAMBRIAN STEAM PACKET CO.* (1868), 4 Ch. App. 112; 38 L. J. Ch. 38; 19 L. T. 465; 17 W. R. 181; 3 Mar. L. C. 119, L. C.

Annotations:—As to (1) *Reid. Re Albert Life Assce., Cook's Policy* (1870), L. R. 9 Eq. 703; *Re Phoenix Bessemer Steel Co., Ex p. Carnforth Hematite Iron Co.* (1876), 4 Ch. D. 108; *Re Northern Counties of England Fire Assce., Macfarlane's Claim* (1880), 17 Ch. D. 337. *Generally Reid. Re Paraguassu Steam Tramroad Co., Black & Hawthorn's Case* (1872), 27 L. T. 509; *The Oreta Holme* (1897), 66 L. J. P. 166. *Mentd. The Argentino* (1888), 13 P. D. 191.

6344. Contract to purchase ship—Option in shipbuilder to be paid by company or third party—Dishonour of third party's bills.]—A limited co. & a firm, employed a shipbuilder to build a ship to be delivered to them, & paid for in manner following: one-third cash, & balance by the co.'s acceptance at four months, or, at contractor's option, by the firm's acceptance. The shipbuilder took the firm's bills, which were dishonoured, but he gave no notice to the company:—*Held*: the shipbuilder was entitled to prove in the winding up of the co. for the amount for which the bills were given.—*Re BRITISH & AMERICAN STEAM NAVIGATION CO., PEARSE'S CLAIM* (1869), L. R. 8 Eq. 506; 17 W. R. 1077.

again by mistake. He sued the co. for the amount overpaid & issued a garnishee summons & the garnishee paid money into ct. The co. went into liquidation:—*Held*: the co. was

liable to pltf. as debtor, & not as trustee; in any case by his garnishment proceedings pltf. elected to claim as creditor; the money in ct. belonged to the liquidator & pltf. was only

6345. Contract to buy goods.]—C. Co. formed for the purpose of constructing railways, by a letter from the secretary gave an order to E. Co. for 500 tons of rails at a certain price, to be paid for by three months' acceptances from the date of delivery. The managing director of E. Co. was also a director of C. Co. The rails were intended to be used in the construction of a railway which the managing director of C. Co., & not the co. itself, had undertaken to make. The rails were made, but were not delivered, in consequence of C. Co. being ordered to be wound up:—*Held*: the order was binding on C. Co., & E. Co. was entitled to prove in the winding up for damages occasioned by the non-acceptance of the rails, & the ct. would not sanction the giving of acceptances by the official liquidator for the price of the rails.—*Re CONTRACT CORPN., EBBW VALE CO.'S CLAIM* (1869), L. R. 8 Eq. 14; 20 L. T. 964.

6346. —.]—A co. entered into a contract with a firm of engineers for the supply of certain machines for the co.'s use. Before the machines were delivered the co. went into voluntary liquidation & the liquidator refused to accept delivery. The firm claimed to prove as creditors in the winding up for their full loss of profit. At the commencement of the winding up the articles which the co. was still under contract to buy consisted of (a) machines which the creditors had manufactured, but not delivered; (b) machines which the creditors had not commenced to manufacture. The former were altered & then sold elsewhere for a price less than that which the co. had contracted to pay. It was not proved that the creditors' works were not sufficiently ample to have enabled them to perform their contract with the co. in addition to other contracts which they actually performed for other customers:—*Held*: as to (a), there being no available market for the goods as originally made, the measure of damage was the whole loss of profit which the creditors had suffered, & not merely the loss on resale plus the costs of alteration; as to (b), the measure of damages was the full amount of prospective profits which the creditors had lost by non-fulfilment of their contract.—*Re VIC MILL, LTD.*, [1913] 1 Ch. 465; 82 L. J. Ch. 251; 108 L. T. 444; *sub nom. Re VIC MILL, LTD., Re ARUNDEL & Co.* (No. 1), 57 Sol. Jo. 404, C. A.

Annotation:—*Consd. Hill v. Showell* (1918), 87 L. J. K. B. 1106.

6347. Contract for sale of business—Inquiry as to damages.]—An agreement was executed between L., a banker at Paris, & the directors of a co. formed to take over his business. No day was fixed for the completion of the transfer of the business & offices. In fact, the transfer was never carried out; but the co. was started, & it transacted business, & L. admitted a committee of its directors to his offices, which he vacated, removing his clerks to a higher storey in the same building, where he continued to transact his business pending the completion of the contract, which he was always anxious & willing to effect by handing over books & executing legal transfers. The contract never was completed, owing to the default of the co. The co. was wound up, when L. claimed the full amount of the purchase-money for which he had contracted:—*Held*: the contract was *in fieri*, & L. could not prove for the purchase-

entitled to share *pro rata* with other creditors.—*Re WAYNE COAL CO., LTD. (IN LIQUIDATION), SCHULTZ'S CASE*, [1920] 3 W. W. R. 642.—CAN.

Sect. 36.—Winding up by court: Sub-sect. 11, A. (b).

money, but as it was owing to the fault of the co. that the contract never became fully executed, an inquiry should be directed before the chief clerk as to the damages sustained by L. through the breach of contract, & L. allowed to prove for the amount of damages so ascertained.—*LAFFITTE (CHARLES) & CO., LTD. v. LAFFITTE* (1873), 42 L. J. Ch. 716; 29 L. T. 80; 21 W. R. 750, H. L.; *subsequent proceedings, sub nom. Re LAFFITTE (CHARLES) & CO., LTD., LAFFITTE'S CLAIM* (1874), 23 W. R. 379.

Annotation:—Mentd. Re Simpson, Simpson v. Simpson, [1904] 1 Ch. 1.

6348. Action begun against company before winding up—Dismissed for want of prosecution.]—

Where an action had been commenced against a co. & continued by leave after a winding-up order, & before trial an order had been obtained to dismiss the action for want of prosecution:—

Held: pltf. in the action was not debarred from bringing forward a claim in the same matter in the winding up.—*Re ORRELL COLLIERY & FIRE BRICK CO.* (1879), 12 Ch. D. 681; 28 W. R. 145; *sub nom. Re ORRELL COLLIERY & FIRE BRICK CO., HOLT'S CLAIM*, 48 L. J. Ch. 655.

6349. Judgment by consent for instalment taken before winding up—Liquidator estopped from disputing agreement sued on.]—

An action was brought against a co. to recover an instalment of a debt alleged to be due under an agreement, the existence of which was denied by the co.:—*Held*: judgment by consent for pltf. precluded the liquidator in the winding up of the co. from denying the existence of the agreement on a proof being sent in for the total amount due under the agreement.—*Re SOUTH AMERICAN & MEXICAN CO., Ex p. BANK OF ENGLAND*, [1895] 1 Ch. 37; 64 L. J. Ch. 189; 71 L. T. 594; 43 W. R. 131; 11 T. L. R. 21; 39 Sol. Jo. 27; 12 R. 1, C. A.

Annotation:—Reid. Cooke v. Rickman (1911), 81 L. J. K. B. 38.

6350. Breach of contract to allot shares as fully-paid—Contract not registered.]—

The promoter of a co. accepted as part of the purchase-money two debentures of the co. for £500 each, which he subsequently assigned to A. his solr., who was also

a director of the co., for valuable consideration in the shape of money lent & services rendered. A. afterwards surrendered the debentures to be cancelled in exchange for 500 shares in the co. of £2 each issued to him as fully paid up. No contract was ever registered in respect of the shares as required by 1867 Act, s. 25, & in the winding up of the co., A. was settled on the list of contributories & called upon to pay the full amount of the shares:—*Held*: there having been a breach of contract on the part of the co., A. was entitled to prove in the liquidation for damages for the full amount of the calls made against him.—*Re GREAT AUSTRALIAN GOLD MINING CO., Ex p. APPELYARD* (1881), 18 Ch. D. 587; 50 L. J. Ch. 554; 45 L. T. 552; 30 W. R. 147.

Annotations:—Dbtd. Re Addlestone Linoleum Co. (1887), 37 Ch. D. 191. *Reid. Re London Celluloid Co., Ex p. Bayley & Hanbury* (1888), 57 L. J. Ch. 843; *Re Railway Time Tables Publishing Co., Ex p. Welton*, [1899] 1 Ch. 108.

6351. ———.]—(1) A person who has purchased shares in a co. has thereby contracted to contribute the amount of the value of the shares, to be dealt with as part of the assets of the co., & therefore cannot, while he remains, either voluntarily or involuntarily the holder of the shares, in any way, directly or indirectly, withdraw from the co. any part of those assets which, as holder of the shares, he has contracted to contribute.

(2) A co. issued preference shares at a discount, the certificates declaring the shares so issued to be fully-paid shares. It was doubtful whether there was a contract to issue the shares as fully-paid shares or only a contract to issue the shares at a discount, but no contract was registered under 1867 Act, s. 25. The shares issued were not in fact fully-paid. The co. went into liquidation, & a holder of some of the shares in question was placed on the list of contributories, & paid the liquidator the amount remaining unpaid thereon. The holder claimed to prove against the co. in the winding up for damages, to the amount of the call paid by him, "for breach of contract or otherwise in relation to the issue of the shares":—*Held*: even assuming there was a contract to issue the shares as fully-paid, the holder of the shares was precluded, by the above principle,

PART III. SECT. 36, SUB-SECT. 11.—A. (b).

6350 i. Breach of contract to allot shares fully-paid—Contract not registered.]—Where paid-up shares are allotted to a shareholder in a co. which subsequently goes into liquidation, & in consequence of the agreement to allot paid-up shares not having been registered, as provided by Cos. Act, 1882, s. 34, the shareholder is made a contributory, he can prove in the liquidation for the amount of calls paid, as for damages.—*Re WAITOH COAL-MINING CO., LTD., Ex p. SEYMOUR* (1886), 4 N. Z. L. R. 250.—N.Z.

c. Breach of contract to grant privileges.]—On payment of a subscription fee to a publishing co., certificates were issued by the co. to the subscribers, guaranteeing to such purchasers the privilege for five years of purchasing all books, magazines, periodicals, & other printed matter, at the prices quoted in the co.'s catalogue & bulletins. Before the expiry of the above period, an order was obtained for the winding up of the co., whereupon certain subscribers claimed to rank on the assets as creditors in respect of damages alleged to have been sustained by them through the co.'s failure to supply them with books, etc., during the

residue of the term:—*Held*: only nominal damages were recoverable, for beyond this the damages were of too speculative or conjectural a nature to be maintained, nor could any part of the subscriptions be recovered back on the ground of it being unearned.—*Re PUBLISHERS' SYNDICATE* (1904), 7 O. L. R. 223; 24 C. L. T. 122; 3 O. W. R. 114.—CAN.

d. Breach of option to purchase in lease.]—Deft. co. leased a house to the pltf., the lease containing a clause, providing that if the lessors obtained during the term an offer to purchase the premises, before accepting the same the lessee should be given the option of purchasing on same terms as in the offer. Subsequently an order for the winding up of deft. co. was made, & the liquidator sold the premises without giving pltf. an opportunity to exercise his option:—*Held*: the winding-up order did not in any way cut down the rights of pltf. or change his position; the liquidator was authorised to sell the premises, but only subject to the terms & conditions of the lease; & he was bound to submit to pltf., who had not waived his rights, the offer received, & not having done so, the deft. co. were liable in damages, notwithstanding that pltf. was aware that the liquidator was making efforts to sell the premises.—*MCCARTER v.*

YORK COUNTY LOAN CO. (1907), 14 O. L. R. 420; 10 O. W. R. 165.—CAN.

e. Contract to purchase shares in consideration of appointment.—Company to repurchase on completion of service.]—Pltf. became salesman to & manager of deft. co., now in liquidation, for a period of two years at a salary of £20 per month. In consideration of his appointment pltf. took & paid for 200 fully paid-up £1 shares in the co., it being agreed that pltf. should not alienate his shares during the period of two years, & at the end of that period, if pltf. desired, the co. should repurchase the shares at par. The contract was entered into on behalf of the company by S., the managing director, who represented that he had power to enter into the contract. Table A. of Cos. Act in substance regulated the working of the co. No formal delegation of their powers was made to S. by the other directors, but in practice they allowed him to superintend the business of the co. Before the lapse of the period of two years the co. went into liquidation. The liquidators having repudiated the contract, pltf. sued them for damages based on the amount of the purchase price of the shares & salary for the unexpired portion of the period of two years:—*Held*: the undertaking by the co. to repurchase pltf.'s shares

from putting in any proof in the winding up in respect of damages for breach of contract.

(3) The ct. also expressed an opinion that, even if the holder of the shares had been entitled to prove, he could not, having regard to 1862 Act, s. 38 (7), have proved in competition with outside creditors of the co.—*Re ADDLESTONE LINOLEUM Co.* (1887), 37 Ch. D. 191; 57 L. J. Ch. 249; 4 T. L. R. 140; *sub nom. Re ADDLESTONE LINOLEUM Co., LTD., Ex p. BENSON*, 58 L. T. 428; 36 W. R. 227, C. A.

Annotations :—*As to* (1) *Appld. Re New Chile Gold Mining Co.* (1888), 38 Ch. D. 475; *Re Eddystone Marine Insce.*, [1893] 3 Ch. 9. *Refd. Re Almada & Tiritto Co.* (1888), 38 Ch. D. 415; *Re London Celluloid Co., Bayley & Hanbury's Cases* (1888), 59 L. T. 109; *Re Railway Time Tables Publishing Co., Ex p. Sandys* (1889), 42 Ch. D. 98; *Re Railway Time Tables Publishing Co., Ex p. Welton*, [1899] 1 Ch. 108. *Generally, Mentd. Welton v. Saffery*, [1897] A. C. 299; *Re Wragg*, [1897] 1 Ch. 796.

6352. — Satisfaction of debt by allotment of fully-paid shares to creditor—Some shares not fully-paid allotted.]—(1) Where a co. contracts to issue to a creditor a certain number of fully-paid shares in satisfaction of a debt due by it to him, & some of the shares are in fact issued as unpaid, there is *pro tanto* a failure of consideration, & the creditor can, notwithstanding that he has become a member of the co., prove in its winding up for such part of his debt as is represented by the unpaid shares.

(2) Interest cannot be claimed upon such a debt, except either by contract or by way of damages under Civil Procedure Act, 1833 (c. 42), s. 29.—*Re RAILWAY TIME TABLES PUBLISHING Co., LTD., Ex p. WELTON*, [1899] 1 Ch. 108; 68 L. J. Ch. 50; 79 L. T. 679; 47 W. R. 133; 15 T. L. R. 46; 43 Sol. Jo. 75; 5 Mans. 367, C. A.

6353. Contract to advertise at weekly rent—Winding up of advertising company.]—*Re OLYMPIA, LTD.* (1896), 12 T. L. R. 240.

6354. Gambling contract—Recovery of deposit.]—*Re DUNCAN (W. W.) & Co., LTD.* (1903), *Times*, Mar. 17, C. A.

6355. Agreement to distribute annual bonus among customers—Impossibility of distribution owing to winding up.]—*Appls.*, who were wholesale tobacconists, agreed with resp. in consideration of his undertaking to become a customer & not to sign any agreement with any co. or firm which would prevent him from buying or selling *appls.*' goods, & to continue to buy & sell such goods, that resp. should for four years share in a distribution by *appls.* of an annual bonus among such of their customers as should purchase direct from them, the distribution to be made according to the purchases for the year. Before the expiration of the four years *appls.* sold their business & went into liquidation. Resp. had fulfilled his part of the undertaking:—*Held*: there was an implied undertaking on the part of *appls.* that they would continue to carry on their business, & would not do any voluntary act which would

make it impossible to distribute the sums which they had undertaken to distribute, & therefore, by parting with their business there was a breach of contract, which entitled resp. to damages.—*OGDENS, LTD. v. NELSON, OGDENS, LTD. v. TELFORD*, [1905] A. C. 109; 74 L. J. K. B. 433; 92 L. T. 478; 53 W. R. 497; 21 T. L. R. 359, H. L.; *affg.*, [1904] 2 K. B. 410, C. A.

Annotations :—*Distd. Bovine v. Dent & Wilkinson* (1904), 21 T. L. R. 82. *Appld. Lorette v. Collins, Collins v. Same* (1906), 50 Sol. Jo. 258. *Refd. Dublin City Steam Packet Co. v. R.* (1908), 24 T. L. R. 657; *Lazarus v. Cairn Line of Steamships* (1912), 106 L. T. 378.

6356. Contract to carry on business with another company—Company wound up under Trading with Enemy Acts.]—In 1887 the F. Co. was formed for the purpose of selling in this country the gas mantles of a German firm. In 1906 the M. Co. was formed to manufacture the mantles in this country. Until the outbreak of war in 1914 the raw material was supplied from Germany by the German firm. After the outbreak of war the supply of raw materials from Germany ceased to be forthcoming. In Dec. 1915, a contract was entered into between the two cos. in which they made provision for the further carrying on of the business. Clause 4 of this contract was as follows: "This arrangement to endure until the expiration of six calendar months from the date peace is declared between England & Germany." At the end of 1916 an order was made under Trading with the Enemy Amendment Act, 1916 (c. 105), s. 1, requiring that the business of the M. Co. should be wound up, & conferring on the controller power to sell & power to carry on the business with a view to its winding up. In Apr. 1917, W., who was then supervisor & controller of the M. Co. & supervisor of the F. Co., sold the factory & business of the M. Co. to outside purchasers. A claim for damages for breach of contract having been made by the F. Co., the liquidator refused it. These proceedings were then instituted & it was admitted that, apart from certain special defences raised, there had been a breach entitling the F. Co. to damages. It was contended, however, that no claim for damages existed on the ground, *inter alia*, that the claim was one for damages for breach of an agreement to carry on the M. Co.'s business which an executive act, the order of the Board of Trade, had made it illegal to carry on:—*Held*: the position was no different from what it would have been in the ordinary case of a winding up by the ct. under 1908 Act, & the claim must be admitted for such an amount, if any, as upon a consideration of the evidence to be submitted to him the liquidator might consider proper.—*Re BRITISH INCANDESCENT MANTLE WORKS, LTD.* (1923), 129 L. T. 126; 39 T. L. R. 244; 67 Sol. Jo. 517.

Damages payable in foreign currency.]—*See DAMAGES.*

was illegal & unenforceable, as it was in effect an unauthorised reduction of the capital of the co., but that it did not go to the root of the contract, which was primarily one of service, & as it was not inequitable that *pltf.* should be allowed to claim in competition with other creditors he was entitled to recover damages for breach of the contract of service, but not for failure to repurchase the shares.—*WOLFE v. SMYTH & CRAWFORD (LIQUIDATORS)*, [1914] 5 C. P. D. 187.—S. AF.

Impossibility of performance.]—A co. entered into an absolute contract to employ A. as agent for three

years from the date of the agreement, & in consideration thereof A. contracted to advance the co. certain moneys & to act as its adviser & agent during that period. For so doing he was to receive in each year a stated commission on the co.'s gross output. Before the expiration of the term of three years the co., owing to bad seasons & strong competition by another co., was carrying on its business at a loss & was forced to sell out to the opposing co. In order to carry out the sale, which was advised & carried through by A., it was necessary to go into voluntary liquidation, A., who was a member of the co., con-

curring in & voting for this course. A. sought to prove in the winding up for damages, made up of the amount of commission which it was estimated would have been earned on the gross output for the period the contract had yet to run at the date of the winding up:—*Held*: the co. in ceasing to carry on its business acted under stress of circumstances for which it was not responsible & which for all practical purposes was irresistible, & there was no breach of the agreement by the co. A. was disentitled to prove.—*Re NORTH OTAGO DAIRY CO., LTD., Ex p. MACEWAN (J. B.) & Co.* (1905), 24 N. Z. L. R. 748.—N.Z.

Sect. 36.—Winding up by court: Sub-sect. 11, A. (c) & (d).]

(c) Claims by Directors, Servants and Agents.

Remuneration of directors, servants & agents generally, see Sect. 28, sub-sects. 3, 9; Sect. 29, sub-sects. 1, C., 2, B., 3, C., *ante*.

6357. Directors—Remuneration due as member.]

—In a co. where directors were obliged to be members:—*Held*: a director's unpaid fees were debts due to him in his character of member, & to be postponed to outside creditors.—*Re LEICESTER CLUB & COUNTY RACECOURSE CO.*, *Ex p. CANNON* (1885), 30 Ch. D. 629; 55 L. J. Ch. 206; 53 L. T. 340; 34 W. R. 14; 1 T. L. R. 658.

Annotations:—*Folld. Re Iceland Sulphur & Copper Co.* (1886), 2 T. L. R. 509. *Distd. Re Dale & Plant* (1889), 43 Ch. D. 255; *Re New British Iron Co.*, *Ex p. Beckwith*, [1898] 1 Ch. 324; *Re A.1 Biscuit Co.* (1899), 43 Sol. Jo. 657. *Refd. Re Washington Diamond Mining Co.* (1893), 69 L. T. 27. *Mentd. Municipal Permanent Investment Bldg. Soc. v. Richards* (1888), 39 Ch. D. 372.

6358. ———.]—Re ICELAND SULPHUR & COPPER CO., LTD. (1886), 2 T. L. R. 509.

6359. ——— Remuneration not due as member.]—

The arts. of assocn. of a co. required its directors to possess a share qualification, & provided that the remuneration of the board "shall be an annual sum of £1,000 to be paid out of the funds of the co.":—*Held*: although these provisions in the arts. were only part of the contract between the shareholders *inter se*, the provisions were, on the directors being employed & accepting office on the footing of them, embodied in the contract between the co. & the directors; the remuneration was not due to the directors in their character of members, but under the contract so embodying the provisions; & in the winding up of the co., the directors were entitled to rank as ordinary creditors in respect of the remuneration due to them at the commencement of the winding up.—*Re NEW BRITISH IRON CO.*, *Ex p. BECKWITH*, [1898] 1 Ch. 324; 67 L. J. Ch. 164; 78 L. T. 155; 46 W. R. 376; 14 T. L. R. 196; 42 Sol. Jo. 234; 5 Mans. 168.

Annotations:—*Consd. Re Dover Coalfield Extension*, [1907] 2 Ch. 76; *Foster v. Foster*, [1916] 1 Ch. 532.

6360. ———.]—Re A1 BISCUIT CO. (1899), 43 Sol. Jo. 657.

6361. Managing director—Employment for fixed term at salary & commission—Fresh employment obtained within term.]—By an agreement dated July 20, 1915, a co. & three life directors who held all the issued capital appointed appct. managing director for one year as from July 1, 1915, at a salary of £5 a week & a commission of 5 per cent. on the amount realised from & paid upon all sales effected by the co.'s goods. By clause 5, the co. & the three directors granted appct. the right on applying to the co. therefor & paying for the same at par within one year from July 1, 1915, to acquire from the co. shares equal to one-third of the share capital issued at that date, & the directors undertook to procure an allotment accordingly. It was

provided that if & when appct. acquired the shares his commission should cease, but his employment should continue for ten years from July 1, 1915, at £5 a week. He was not to part with the shares within the ten years without the written consent of the three directors. On Nov. 16, 1915, a compulsory winding-up order was made, before appct. had exercised his option under clause 5. On Dec. 3, 1915, appct. obtained employment with one of the directors who continued to carry on a similar business. He was engaged at £5 a week without commission & subject to a week's notice. On Jan. 22, 1916, appct. sent in a proof claiming: (a) arrears of salary & commission up to the winding up; (b) damages for loss of salary from the winding up to June 30, 1916; (c) damages for loss of commission during the same period; & (d) damages for loss of his option to take up shares & obtain a ten years' appointment. On Apr. 13, 1916, the liquidator admitted the proof in respect of (a), & in respect of (b), only up to the date that appct. obtained his new employment. He rejected the rest of the proof. On May 3, 1916, appct. appealed & claimed to have the proof allowed in full. Appct. admitted that his present employment, though throughout precarious, would in all probability continue till June 30, 1916, but contended that the damages ought to be assessed as at the date of the breach of contract having regard to the then probability of his obtaining full employment for the term:—*Held*: (1) appct. had not proved any damages under head (b) beyond what the liquidator had allowed; (2) the claim for damages under head (c) was not maintainable; (3) clause 5 implied that any application for shares thereunder must be made while the co. was in existence, & as appct. had not fulfilled the condition precedent to obtaining a ten years' appointment, he was not entitled to damages under head (d).—*Re NEWMAN (R. S.), LTD., RAPHAEL'S CLAIM*, [1916] 2 Ch. 309; 85 L. J. Ch. 625; 115 L. T. 134; 60 Sol. Jo. 585; [1916] H. B. R. 129, C. A.

Annotation:—*As to (2) Consd. Reigate v. Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K. B. 592.

6362. Manager—Loss of salary.]—Principle upon which the amount for salary & compensation payable to the manager of a co. in respect of his engagement, which has been suddenly terminated by the winding up of the co., will be calculated.—*Re ENGLISH JOINT STOCK BANK, YELLAND'S CASE* (1867), L. R. 4 Eq. 350.

Annotations:—*Folld. Re London & Colonial Co.*, *Clark's Case* (1869), 20 L. T. 774; *Re London & Scottish Bank*, *Ex p. Logan* (1870), L. R. 9 Eq. 149. *Refd. Re Great Northern Salt & Chemical Works*, *Ex p. Fenwick* (1891), 36 Sol. Jo. 42.

6363. ——— Employment for fixed term.]—By the arts. of assocn. of a bank, L. was appointed manager at a specified salary, with a proviso that, in the event of L. being at any time deprived of his office, except for misconduct, the directors should pay him, as compensation for loss of office, a sum

PART III. SECT. 36, SUB-SECT. 11.— A. (c).

6357 i. Directors—Remuneration due as member.]—Directors are not entitled to claim for fees in competition with creditors. Consequently such fees cannot be set-off by directors against amounts due by them as contributories.—*GRAND HOTEL & THEATRE CO. (IN LIQUIDATION) v. HAARBURGER* (1907), —S. AF.

g. — For work requiring special skill.]—A director is not precluded from proving in competition with other creditors in respect of a claim for moneys due as payment for particular work which he has special skill in doing.

—*Re MOUNT COSTIGAN LEAD & SILVER MINING CO., LTD.* (1896), 17 N. S. W. Eq. 80.—AUS.

6362 i. Manager—For salary.]—An order for winding up a co. under Cos. Statute, 1864, is a notice of discharge to its manager, & if, under the agreement under which he was appointed, his engagement was terminable by a month's notice, he is entitled to claim against the estate a month's salary in respect thereof; & he is entitled, under sect. 113, sub-sect. (11) of the Insolvency Statute, 1871, s. 113 (11), to preferential payment of not more than four months' salary nor more than £50.—*Re INTERCOLONIAL SMELTING &*

REDUCING CO., LTD (1887), 13 V. L. R. 896.—AUS.

h. Agent — For retiring allowance.]—The directors of a bank agreed to give F., an agent at one of the branch offices, upon his resignation, a retiring allowance of £150 *per annum* in consideration of his past services. The bank's contract of co-partnership provided for the suspension or dismissal by the directors of any of the officers or clerks without cause assigned, & also that they should have no claim for salary beyond what might then be payable. Upon the bank's failure a few years afterwards:—*Held*: F. had no claim of debt enforceable in the

equal to three years' salary. L. was also a shareholder. The bank was ordered to be wound up, & L. consequently ceased to be employed:—*Held*: (1) L. was entitled to be paid a sum equal to three years' salary; (2) he could set off his claim for a sum equal to three years' salary against the amount recoverable from him in respect of calls on his shares.—*Re LONDON & SCOTTISH BANK*, *Ex p. LOGAN* (1870), L. R. 9 Eq. 149; 21 L. T. 742; 18 W. R. 273.

6364. — Proviso for compensation on dismissal—Appointment as liquidator.—By arts. of assocn. of a co. it was provided that, in the case of the dismissal of S., the manager, he should be paid the full amount of money paid upon his shares. A resolution was passed to wind up the co., & S. was appointed liquidator. S. had paid £2,000 on his shares, & received £400 for remuneration as liquidator:—*Held*: the winding up was equivalent to a dismissal of S., & he was entitled to prove in the winding up for £2,000, subject to a set-off of the £400.—*Re IMPERIAL WINE CO., SHIRREFF'S CASE* (1872), L. R. 14 Eq. 417; 42 L. J. Ch. 5; 27 L. T. 367; 20 W. R. 966.

Annotations:—*Consd.* *Midland Counties District Bank v. Attwood*, [1905] 1 Ch. 357. *Refd.* *Reid v. Explosives Co.* (1886), 56 L. J. Q. B. 68.

6365. — Payment in foreign currency—Proof in English currency.—By an agreement entered into in England between the manager of a co. carrying on business in Chile & the co. it was provided that he should be paid an annual salary, at the rate of £1,000 sterling, by monthly payments, "at such place or places & in such manner as he may direct." The manager, while the co. was carrying on business, drew bills upon them from time to time for the monthly payments of his salary payable in Chile in Chilean dollars in an amount of dollars that would at those dates, at the then rate of exchange, be equivalent to the amount of his sterling claim. These drafts were not paid by the co.; & on the co. subsequently going into liquidation the manager claimed to prove in the liquidation for the amounts of the unpaid instalments calculated in pounds sterling, the rate of exchange having fallen since the dates when the bills were drawn:—*Held*: the co. not having paid the manager in the manner in which he "directed" by drawing the bills, his position was that of a person whose salary, at the rate of £1,000 *per annum*, was unpaid; & he was entitled to prove for his unpaid salary at the sterling rate.—*Re TAL TAL CHILE NITRATE CO., LTD.* (1895), 73 L. T. 422; 12 T. L. R. 47, C. A.

6366. Agent—Loss of commission.—A co. engaged M. to act as their agent for five years at a fixed salary, & also for a commission of 10 per cent. on the net profits in each year. The co. was wound up before the termination of the five years:—*Held*: M. was not entitled to any compensation

by way of damages for any loss of commission during the unexpired part of the five years.—*Re ENGLISH & SCOTTISH MARINE INSURANCE CO., Ex p. MACLURE* (1870), 5 Ch. App. 737; 39 L. J. Ch. 685; 23 L. T. 685; 18 W. R. 1123, L. J.

Annotations:—*Distd.* *Re Patent Floor Cloth Co., Dean & Gilbert's Claim* (1872), 41 L. J. Ch. 476. *Apld.* *Re Newman, Raphael's Claim*, [1916] 2 Ch. 309. *Distd.* *Reigate v. Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K. B. 592. *Refd.* *Brace v. Calder* (1895), 64 L. J. Q. B. 582; *Re Royal Aquarium & Summer & Winter Garden Soc.* (1903), 20 T. L. R. 35; *Lazarus v. Cairn Line of Steamships* (1912), 106 L. T. 378; *Warren v. Agdeshman* (1922), 38 T. L. R. 588. *Mentd.* *Brown v. Brown, Brown v. Brown* (1877), 36 L. T. 272; *Cyclemakers' Co-op. Supply Co. v. Sims*, [1903] 1 K. B. 477.

6367. — ——A co. engaged D. & G. to act as their commercial travellers for three years in a certain district, at a commission upon goods ordered. The co. was wound up before the termination of the three years:—*Held*: D. & G. were entitled to compensation in respect of commission for the unexpired portion of the term, the amount to be ascertained by the chief clerk in chambers.—*Re PATENT FLOOR CLOTH CO., DEAN & GILBERT'S CLAIM* (1872), 41 L. J. Ch. 476; 26 L. T. 467.

Annotations:—*Consd.* *Warren v. Agdeshman* (1922) 38 T. L. R. 588. *Refd.* *Turner v. Goldsmith* (1891), 39 W. R. 547.

6368. Servant—Employment ultra vires company—Pension granted in respect of employment.—Where the servant of a co. was employed in matters *ultra vires* the co., & therefore illegal, he cannot, on a winding up, make any claim against the assets of the co. in respect of a pension which he was granted upon his retirement.—*Re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY*, [1913] 1 Ch. 400; 82 L. J. Ch. 232; 108 L. T. 211; 29 T. L. R. 256; 20 Mans. 159.

6369. Mortgage broker—Loss of commission on authorised transaction.—A co. employed a mtge. broker to obtain for them a loan, agreeing to pay a certain commission per cent. The brokers introduced mtgees., but, a petition to wind up the co. having been presented, the intending mtgees. refused to complete:—*Held*: the brokers could neither rank as creditors for the commission in the winding up nor recover damages on a *quantum meruit*.—*Re SOVEREIGN LIFE ASSURANCE CO., SALTER'S CLAIM* (1891), 7 T. L. R. 602.

(d) Advances to and Payments on behalf of Company.

6370. Moneys advanced for purposes of company—To directors on their personal security.—Directors of one railway co. passed a resolution to lend money to the directors of another co. on their personal responsibility, & the money was so lent, & some of the directors signed a guarantee for repayment. Under an order for winding up the co. the directors of which borrowed the money,

liquidation.—*FRASER v. CITY OF GLASGOW BANK* (1880), 7 R. (Ct. of Sess.) 961; 17 Sc. L. R. 661.—*SCOT.*

k. Servant—For salary.—Application was made at chambers for an order allowing certain persons who had been in the employ of a co. now being wound up to be collocated in the dividend sheet by special privilege over other creditors for arrears of salary due at the time of the winding-up order being made. The order was made under 45 Vict. c. 23, D., which gave no such special privilege, but during the winding up 49 Vict., c. 46, was passed allowing such privilege:—*Held*: the latter Act was not retrospective & did not apply.—*Re PETERS' COMBINATION LOCK CO.* (1887), 26 N. B. R. 595.—*CAN.*

COMPANIES ACT, 1866, Re COMMERCIAL BANK CORPN. OF INDIA & THE EAST, Re AGRA & MASTERMAN'S BANK, LTD. (1866), 1 Ind. Jur. N. S. 335, 349.—*IND.*

m. — — ——Under Indian Cos. Act, 1882, the claim of servants of a co. in respect of unpaid wages has no priority to other debts due by the co.—*Re PARELL MILL CO., LTD.* (1886), 1 L. R. 10 Bom. 211.—*IND.*

n. President & vice-president—For salary.—Claims for arrears of salary, made by persons occupying the position of president & vice-president of a co., such salary being payable under resolutions duly passed therefor, are valid; & upon the liquidation of the co. are payable in priority to the claims of the general body of creditors.

—*FAYNE v. LANGLEY* (1899), 31 O. R. 254.—*CAN.*

PART III. SECT. 36, SUB-SECT. 11.—A. (d).

o. Moneys advanced for purposes of company—By shareholder.—The directors of the co. passed a resolution to the effect that T., A., & B., being the holders of vendors' shares, offered to hand the same over to the co. to be sold, the proceeds to be a loan to the co., to be refunded only when the funds of the co. permitted. The shares were sold, & the proceeds paid to the co.:—*Held*: the amount was a loan to the co., & as on the winding up there were, after payment of all the other creditors, sufficient funds on hand to repay the loan, the amount must be repaid.

Sect. 36.—Winding up by court: Sub-sect. 11, A. (d),

a claim was carried in on behalf of the lending co. but it was disallowed; & on appeal:—*Held*: where a co. or assocn. is ordered to be wound up, the master has no jurisdiction under the order to take cognisance of a claim not alleged to be due from the co., but only from individual members of it, & it made no difference that the money was applied for the purposes of the co.—*Re GREAT WESTERN EXTENSION ATMOSPHERIC RY. CO., WRYGHT'S CASE* (1852), 2 De G. M. & G. 636; 21 L. J. Ch. 807; 19 L. T. O. S. 342; 16 Jur. 715; 42 E. R. 1020, L. JJ.

Annotation:—*Refd.* *Re Warwick & Worcester Ry.* (1858), 27 L. J. Ch. 735.

— **Right to set off against calls in winding up.]**

—*See* Sub-sect. 11, C., *post*.

— **By directors.]—See** Sect. 28, sub-sect. 4, F., *ante*.

(e) *Claims against Company for Indemnity.*

6371. Amalgamation—Covenant by purchasing company to indemnify selling company—Judgment against selling company.]—(1) By the deed of amalgamation between P. & A. Cos., the P. Co. covenanted with the A. Co. to indemnify it against its liabilities; judgments had been recovered against the latter co. by its creditors:—*Held*: the A. Co. were entitled to prove in the winding up of the P. Co. as creditors, for the amounts of such judgments & costs.

(2) The holder of an annuity granted by the A. Co. had so far been accepted by, & had recognised, the P. Co. under the amalgamation as to receive payments of the annuity:—*Held*: she was entitled to prove for the value of her annuity, but a simple contract creditor of the A. Co. was not entitled to prove for his debt.—*Re BRITISH PROVIDENT LIFE & FIRE ASSURANCE CO., ANGLO-AUSTRALIAN ASSURANCE CO.'S CASE, TEETE'S CASE, RUMNEY'S CASE* (1864), 4 New Rep. 48; 10 L. T. 326; 12 W. R. 701.

Annotation:—*As to* (1) *Refd.* *Midland Coal, Coke & Iron Co., Craig's Case* (1894), 71 L. T. 329.

6372. Unpaid shares held by trustee for company—Trustees indemnity for calls made.]—M. was the registered owner of 100 shares in the T. Co., but he really held them as the nominee & trustee of the N. Co., & had executed a declaration of trust accordingly. Both the cos. being in liquidation, calls to a large amount were made upon M. in respect of the shares, which calls he did not pay:—*Held*: M. was entitled to rank as a creditor of the N. Co. for the amount of the calls which had been made upon him, & interest thereon, & also for any future calls on the same shares & interest thereon, he undertaking that the liquidator of the N. Co. should be at liberty to pay over to the liquidator of the T. Co. the dividends payable from time to time in the liquidation of the N. Co. to M. in respect of the calls, & the liquidator of the T. Co. consenting to accept what might be so paid or payable, in full satisfaction all claim against M. or his estate, in respect of

the 100 shares.—*Re NATIONAL FINANCIAL CO., Ex p. ORIENTAL COMMERCIAL BANK* (1868), 3 Ch. App. 791; 16 W. R. 994; *sub nom.* *Re NATIONAL FINANCIAL CO., LTD., MAITLAND'S CASE*, 18 L. T. 895, L. JJ.

Annotations:—*Refd.* *Re International Contract Co., Hughes' Claim* (1872), L. R. 13 Eq. 623.; *Heritage v. Paine* (1876), 2 Ch. D. 594.

6373. Lessee in trust for company—Assignment to third party for sum of money—Right of trustee to prove for sum if reasonable.]—The lessee in trust for a co., after the commencement of the winding up, entered into an arrangement with S., by which S., in consideration of a sum of money paid to him, agreed to accept an assignment of the lease, & to indemnify the trustee against further liability:—*Held*: the trustee was entitled to prove in the winding up for such sum, if on inquiry, it should be found a fit & proper sum to be paid for the purpose.—*Re SOUTHAMPTON IMPERIAL HOTEL CO., LTD., HUNT'S CLAIM* (1872), 26 L. T. 384; 20 W. R. 435.

6374. Costs incurred by agent in libel action arising out of employment.]—An engineer was employed by a co. to make a report on the co.'s affairs, & in the course of the report he made allegations in respect of which one of the directors brought an action against him for libel. Ultimately, owing to non-compliance by pltf. with an order for security for costs, judgment was signed for deft. The co. was ordered to be wound up & deft. sought to prove for the amount of the costs incurred by him in the proceedings:—*Held*: as deft. had been directed by the co. to make the report as their agent he was entitled to be indemnified by the co. & was therefore entitled to prove in the winding up for the amount of the costs.—*Re FAMATINA DEVELOPMENT CORPN., LTD.*, [1914] 2 Ch. 271; 84 L. J. Ch. 48; 30 T. L. R. 696, C. A.

Annotation:—*Refd.* *Hickman v. Kent or Romney Marsh Sheep Breeders' Assocn.*, [1915] 1 Ch. 881.

(f) *Claims for Rent and Rates against Liquidator.*

6375. Highway & improvement rate—Assessment of company before winding up—Entry into possession by liquidator only for purpose of winding up.]—Re WEST HARTLEPOOL IRON CO., LTD., Ex p. WEST HARTLEPOOL IMPROVEMENT COMRS., No. 6463, post.

6376. General district & poor rate—Occupation by liquidator—Rate cannot be apportioned during liquidator's occupation—Local board must prove in winding up for whole rate.]—In Apr. 1881, general district & poor rates were declared for the township of S. for the ensuing six months, & a sum assessed upon the W. Co. in respect of their premises. In Aug., the W. Co. was ordered to be wound up. The liquidator continued in occupation of the premises. The local board claimed payment in full of an apportioned part of the Apr. rate in respect of the liquidator's occupation from Aug. till Oct.:—*Held*: the ct. had no power to apportion the rate, & the local board could prove in the liquidation for the whole amount.—*Re WEAR-*

Qu.: whether, if there had been insufficient to pay all, the other creditors would have had priority.—*Re RICHARDS BEACH GOLD-DREDGING CO., LTD.* (1902), 21 N. Z. L. R. 239.—N.Z.

p. *Mortgagee entitled to prove for whole debt.]—FOTTRELL v. KAVANAGH* (1876), 10 L. R. Eq. 256.—IR.

q. *Damages awarded in action against company.]—SIMPSON (R. D.), LTD. & LIQUIDATOR v. BEARE* (1908), 45 Sc. L. R. 424.—SCOT.

PART III. SECT. 36, SUB-SECT. 11.—A. (I).

r. *Rent—Occupation by Liquidator.]—The winding up of a co. under 45 Vict., c. 23 (D.), commences from the time of the service of the notice under sect. 12, & therefore, under sect. 69, a landlord's claim to be paid preferentially for overdue rent after such service is invalid. An undertaking by a provisional liquidator in possession to pay such a claim is by sect. 20 & 21 void unless the per-*

mission of the ct. is first obtained.—FUCHES v. HAMILTON TRIBUNE CO. (1884), 10 P. R. 409.—CAN.

s. ———.]—Two mineral leases granted by the same landlord to the same tenant of different subjects in the same coal field, & for different rents & terms of duration, contained clauses excluding assignees & sub-tenants except upon the condition that the tenant should remain liable for the rents, etc., contained in them. The tenant afterwards assigned them

MOUTH CROWN GLASS CO. (1882), 19 Ch. D. 640 ; 45 L. T. 757 ; 30 W. R. 316.

6377. Rent—Occupation by liquidator—Landlord may prove for apportioned rent—Distraint for subsequent rent.]—Where a co. in liquidation continued in the possession of leasehold premises for the purpose of carrying on their business :—*Held* : the rent of the premises must be apportioned under Apportionment Act, 1870 (c. 35), the landlord of the premises being entitled to prove jointly with the other creditors for so much rent as became due up to the date of the presentation of the petition for winding up, when a provisional liquidator was appointed, & being entitled to distrain for the full rent due after that day.

Qu. : whether there would be any such apportionment in a case where the landlord sought to proceed by re-entry instead of by distress.—*Re SOUTH KENSINGTON CO-OPERATIVE STORES* (1881), 17 Ch. D. 161 ; 29 W. R. 662 ; *sub nom. Re SOUTH KENSINGTON CO-OPERATIVE STORES, LTD., Ex p. SEYMOUR*, 50 L. J. Ch. 446 ; 44 L. T. 471.

Annotations :—*Reid. Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322 ; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373 ; *Rochester, Bp. v. Le Fanu*, [1906] 2 Ch. 513. *Mentd. Re London Metallurgical Co., Ex p. Parker* (1895), 72 L. T. 421.

See, also, Sub-sect. 13, E. (a)–(c), *post*.

(g) *Claims of Holders of Negotiable Instruments.*

6378. Proof by holder against acceptor—Dividend received out of estate of drawer—Balance only provable.]—After the date of the winding-up order of a co., the holder of bills accepted by the co. received a dividend on the amount secured by the bills out of the estate of the drawers. Subsequently to such receipt the holder claimed to prove against the co. for the whole amount secured by the bills :—*Held* : in the absence of proof to the contrary, the drawers must be taken to have paid for & on account of the acceptors, the co., & accordingly the holder could only prove for the difference between the amount secured & that paid to him by the drawers.—*Re ORIENTAL COMMERCIAL BANK, Ex p. MAXOUDOFF* (1868), L. R. 6 Eq. 582 ; 37 L. J. Ch. 471 ; 18 L. T. 450 ; 16 W. R. 784.

6379. — Goods realised by holder—Holder must deduct value of goods realised from proof.]—(1) P. & Co. were cotton merchants at Pernambuco. A. at Liverpool, wished to obtain consignments of cotton from them. They desired some security other than his own. He obtained from a banking co. at Liverpool a letter of credit, by which the bankers authorised the Pernambuco firm to draw on them against cotton purchased in conformity with instructions. The drafts were to be covered by shipping documents, invoices & bills of lading of cotton addressed to the banking co., & forwarded under separate cover by the same mail which brought the drafts for acceptance, on receipt of which documents they engaged to honour such drafts. Some shipping documents of cotton were sent, & some bills were accepted ; one bill was accepted without any shipping documents being sent, & then, before any one of these bills was due, the bankers became bkpt., & bills arriving immediately afterwards

to a public co. & became divested of all right under them. The co. subsequently came to be wound up under the ct.'s supervision, the liquidators obtaining authority to continue to work the minerals as previously. Upon the liquidators declining to pay the rent to the landlord due on one of the leases, on the ground that they

had not adopted & had not entered into possession of it, the minerals in it never having been wrought, the original tenant presented a note in the liquidation to have the liquidators & the co. ordained to pay to the landlord the rents due & to become due under the lease in question :—*Held* : assuming the competency of the pro-

were left unaccepted. On a winding-up order, issued in the matter of the bank, J., who was the agent of the Pernambuco firm, & was also a partner in that firm, claimed to prove against the bankers for the whole amount of the bills, without bringing into account the value of the cotton which had been sold, or which remained in hand :—*Held* : he was not in a position to do so, but was entitled only to prove for the balance.

(2) The power given by 1862 Act, s. 124, to the Ct. of Appeal to extend the time for appealing, may be exercised after the time given by that statute for giving notice of appeal has expired.—*BANNER v. JOHNSTON* (1871), L. R. 5 H. L. 157 ; 40 L. J. Ch. 730 ; *sub nom. BARNED'S BANKING CO. v. JOHNSTON*, 24 L. T. 542.

Annotations :—*As to* (1) *Consd. Re BARNED'S BANKING CO., Ex p. Joint Stock Discount Co.* (1875), 31 L. T. 862. *Reid. Royal Bank of Scotland v. Commercial Bank of Scotland* (1882), 7 App. Cas. 366 ; *Re Suse, Ex p. Dever* (1884), 13 Q. B. D. 766. *As to* (2) *Consd. Re Jones, Ex p. Lovering* (1874), 9 Ch. App. 586. *Generally, Mentd. Fraser v. Province of Brescia Steam Tram. Co.* (1887), 56 L. T. 771.

6380. —.]—A banking co., at the request of L., gave to H., who had been instructed to buy cotton for him, a letter of credit authorising him to draw upon them, the bills of exchange to be accompanied by bills of lading of the cotton to be delivered to them on their accepting the bills. A bill for £7,798 was accordingly drawn & accepted by the banking co., & the bills of lading delivered to them. The banking co. handed the bills of lading to L., to enable him to obtain an advance. L. obtained an advance of £6,000 on them from his brokers, & paid the amount to the banking co., who carried it to his account. Before the bill of exchange arrived at maturity, the banking co. was ordered to be wound up. After the commencement of the winding up, but before any claim was sent in upon the bill, the cotton was sold by the brokers, who, after retaining £6,000, paid the balance of £574 to the holders of the bill. The holders were allowed to prove for the whole amount of the bill, but the £574 was directed to be set off against the dividends payable to them :—*Held* : the £574 could not be set off against the dividends.

Semle : the amount of the proof ought to have been reduced by £574.—*Re BARNED'S BANKING CO., LEECH'S CLAIM* (1871), 6 Ch. App. 388 ; 40 L. J. Ch. 590 ; 24 L. T. 647 ; 19 W. R. 552, L. J.

6381. — Securities realised by holder—Balance only provable.]—All the parties to certain bills of exchange, the payment of which was secured as between some of them, became insolvent—one of them, a co., being ordered to be wound up. The securities were realised, & the proceeds paid to the bill-holders. After the bills had matured, but before the securities were realised, the holders had proved against the co. for the full amount :—*Held* : the proof must be reduced by the amounts received by the bill-holders from the securities, & any dividends received on the excess of the original over the reduced proof must be refunded.—*Re BARNED'S BANKING CO., Ex p. JOINT STOCK DISCOUNT CO.* (1875), 10 Ch. App. 198 ; 44 L. J. Ch. 494 ; 31 L. T. 862 ; 23 W. R. 281, L. JJ.

6382. — Mutual acceptances—Proof for

ceeding, the original tenant, having merely a personal right against the assignees for the rent due to the landlord, was not entitled to put forward a claim which would virtually give him a preference in the liquidation, & the note must be refused.—*GRAY'S TRUSTEES v. BENHAR COAL CO.* (1881), 9 R. (Ct. of Sess.) 225.—*SCOT.*

Sect. 36.—Winding up by court: Sub-sect. 11, A. (g), (h) & (i), & B. (a).]

balance.]—*Re LONDON, BOMBAY & MEDITERRANEAN BANK, Ex p. CAMA, No. 6500, post.*

6383. — Expenses for protest for non-payment—Expenses of protest for better security.]—A bank abroad drew bills of exchange on a bank in London, which were duly accepted.

The London bank went into liquidation before the bills matured, & after the stoppage of the bank, the holders had them protested for better security, & they were accepted *supra* protest for the honour of the drawers by the drawers' London bankers. The bills were duly presented for payment to the acceptors & were protested by the holders for non-payment. They were then presented to the bankers of the drawers, who paid the principal money due on the bills together with the notarial charges thereon, which consisted partly of the expenses of protest for non-payment & partly of the expenses of protest for better security. The bankers of the drawers also charged the drawers a commission for accepting the bills. The drawers were admitted to prove in the winding up of the London bank for the amount of the bills, & they claimed to prove also in respect of the notarial charges & commission. This claim the liquidator rejected:—*Held*: (1) upon summons for leave to prove in respect of the latter claims, appcts. were entitled to prove for the expenses of protest for non-payment, as being expenses falling within Bills of Exchange Act, 1882 (c. 61), ss. 51 (2), 57 (1), but they were not entitled to prove in respect of the expenses of protest for better security nor for the commission, as, under sect. 57 of the Act, such expenses only as are "necessary" are recoverable; (2) the protest mentioned in sect. 68 (6) of the Act means the protest for non-payment which is necessary; (3) the Act not only does not give but excludes the expenses of the protest for better security.—*Re ENGLISH BANK OF THE RIVER PLATE, Ex p. BANK OF BRAZIL, [1893] 2 Ch. 438; 62 L. J. Ch. 578; 69 L. T. 14; 41 W. R. 521; 9 T. L. R. 367; 37 Sol. Jo. 373; 3 R. 518.*

6384. Bill forged by company's secretary—Proof by discounted against company—For any sums which company had obtained against the forged bills.]—A secretary & financial agent of a co., having authority to get bills discounted, forged bills & got them discounted. He paid the proceeds into a bank to the account of a firm to which he belonged, & in his character of a member of that firm drew cheques on the account in favour of the co.; it was alleged that, out of the amounts so drawn, he actually made payments for the benefit of the co. The bill-discounter had not negotiated the bills. In the winding up of the co., the discounter asked for an inquiry, what amount of proceeds of the bills had thus reached the co., & claimed for the amount when ascertained:—*Held*: an inquiry must be directed as to the amount of the proceeds of the bills had been

applied, directly or indirectly, for the benefit of the co., & a claim for the amount when ascertained would be good.—*Re JAPANESE CURTAINS & PATENT FABRIC CO., LTD., Ex p. SHOOLBRED (1880), 28 W. R. 339.*

(h) *Interest on Debts.*

6385. What debts carry interest—Simple contract debt.]—The ct. has no jurisdiction, under the General Order of Nov. 11, 1862, r. 26, to direct the payment of interest on a simple contract debt, out of the assets of a co. being wound up.—*Re HADFIELD'S PATENT CASK & PACKAGE CO., LTD., Ex p. GREENWOOD (1863), 3 De G. J. & Sm. 603; 8 L. T. 846; 9 Jur. N. S. 997; 46 E. R. 770; sub nom. Re HADFIELD PATENT CASK CO., 2 New Rep. 502; 11 W. R. 971, L. C.*

Annotations:—Distd. Re State Fire Insce., Times Assce. Case (1864), 2 Hem. & M. 722. Foll'd. Re Herefordshire Banking Co. (1867), 17 L. T. 58. Consd. Re East of England Banking Co. (1868), 1 L. R. 6 Eq. 368.

6386. — Where interest recoverable at law as damages.]—(1) In winding up a joint-stock co., interest will be allowed upon all claims in respect thereof which would have been recoverable at law as damages, but not upon the balance of an unsettled account.—*Re STATE FIRE INSURANCE CO., TIMES ASSURANCE CO.'S CASE (1864), 2 Hem. & M. 722; 5 New Rep. 108; 34 L. J. Ch. 58; 11 L. T. 489; 10 Jur. N. S. 1176; 13 W. R. 152; 71 E. R. 644.*

6387. — —.]—(1) Where a co. is wound up under 1862 Act, & calls have been made on the shareholders, interest after the date of the winding up can be paid out of the calls only on those debts which carry interest at law.

(2) Interest was not allowed on the notes of a banking co. where the notes were payable on demand, & no demand for payment had been made before the co. was ordered to be wound up. Rule 26 of the General Order of Nov. 1862, is *ultra vires* & invalid.—*Re HEREFORDSHIRE BANKING CO. (1867), L. R. 4 Eq. 250; 36 L. J. Ch. 806; 17 L. T. 58; 15 W. R. 1056.*

Annotations:—As to (1) Ref'd. Whittingstall v. Grover (1886), 55 L. T. 213. As to (2) Consd. Re East of England Banking Co. (1868), L. R. 6 Eq. 368. Ref'd. Re International Contract Co., Hughes' Claim (1872), L. R. 13 Eq. 623.

6388. — Notes payable on demand—No demand made before winding up.]—*Re HEREFORDSHIRE BANKING CO., No. 6387, ante.*

6389. — Money paid on behalf of company by third party under legal obligation—Trustee.]—A trustee for a co. who pays money on behalf of the co. under a contract by which he was legally bound to make such payment, is in no worse position than a stranger who makes advances; & is entitled, in the winding up of the co., to interest at £5 per cent on his debt.—*Re BEULAH PARK ESTATE, SARGOOD'S CLAIM (1872), L. R. 15 Eq. 43.*

6390. — — Surety.]—OMNIUM INSURANCE CORPN., LTD. v. UNITED LONDON & SCOTTISH INSURANCE CO., LTD. (1920), 36 T. L. R. 386.

6391. — Where interest implied from course of dealing.]—*Re DUNCAN (W. W.) & Co., No. 6394, post.*

PART III. SECT. 36, SUB-SECT. 11.— A. (h).

t. General rule—Right to interest.]—Pltf. bank sued a co. in liquidation for money due under a cash credit loan bond mortgaging certain properties. One of the pleas was that pltf. was not entitled to any interest after the date on which the co. went into liquidation:—*Held*: as far as possible the rules of bkpcy. were applicable to liquidation matters & when a co. went into liquidation a secured creditor might realise his security & prove for any balance

outstanding. The remaining assets of the co. would in that case only be liable for such principal & interest as was due on the date of the winding-up order. A secured creditor was in the case of a liquidation on the same footing as in that of insolvency proceedings. The property hypothecated was thus liable for the whole claim, principal & interest up to date of realisation & it was only the liability of the remaining assets that could be affected by the winding-up order.—*RAM CHAND v. BANK OF UPPER INDIA (1921), I. L. R. 3 Lah. 59.—IND.*

a. What debts carry interest.]—If a co. is, or ultimately turns out to be, solvent, interest is payable upon any debts, which carry interest or upon which a right to interest has been acquired, out of the surplus assets remaining after payment of principal & interest up to the date of the winding-up order.—*GHANSHAM DAS v. PUBLIC BANKING & INSURANCE CO. (1919), I. L. R. 1 Lah. 154.—IND.*

b. —.]—Notwithstanding G. O. 26 of Jan. 31, 1868, interest is not payable on debts or claims allowed by

6392. To what date interest allowed—Commencement of winding up—Unless surplus remains after payment of all creditors.]—In the case of an insolvent co. which is being wound up, creditors whose debts carry interest are entitled to dividends only upon what was due for principal & interest at the winding up, & it is only in the event of there being a surplus that they can have any claim for subsequent interest, in which case the dividends will be treated as applicable, first, in payment of interest, & then in reduction of principal.—*Re HUMBER IRONWORKS & SHIPBUILDING CO., WARRANT FINANCE CO.'S CASE* (1869), 4 Ch. App. 643; 38 L. J. Ch. 712; 20 L. T. 859; 17 W. R. 780, L. J.J.

*Annotations:—***Expld.** *Re Contract Corpn., Ebbw Vale Co.'s Case* (1869), 5 Ch. App. 112. The principle of the decisions was, that there are words found in the Act of Parliament which point to the distribution of the property equally & rateably among the creditors, & the ct. held that it was right to stop the interest at the date of the winding up because it was more analogous to the practice in bankruptcy where the same equality is pointed at by the statute, than to the practice in Chancery (LORD HATHERLEY, C.). **Distd.** *Re Joint Stock Discount Co., Warrant Finance Co.'s Case* (1869), 5 Ch. App. 86. **Consd.** *Re Imperial Land Co. of Marseilles, Ex p. Colborne & Strawbridge* (1871), L. R. 11 Eq. 478; *Re International Contract Co., Hughes' Claim* (1872), L. R. 13 Eq. 623. **Refd.** *Whittingstall v. Grover* (1886), 55 L. T. 213; *Re Deutsche Bank, [1921]* 2 Ch. 30.

6393. ————.]—An order to wind up a co. fixes the right of its creditors, & nullifies, as between them, all contracts for interest. Therefore, a demand for interest accruing after the order upon payments by a surety for the co., will not be admitted to proof by him; but he may take a claim into chambers for the estimated value of his right to indemnity at the time when the winding-up order was made.

Semle: the claim for interest should be made against the surplus assets only of the co. after all its debts, *quâ* principal moneys, are paid.—*Re INTERNATIONAL CONTRACT CO., HUGHES' CLAIM* (1872), L. R. 13 Eq. 623; 41 L. J. Ch. 373; 26 L. T. 500; 20 W. R. 522.

6394. ————.]—(1) On the winding up of a co., creditors from whose course of dealing with it there can be implied a contract to pay interest are entitled to interest on admitted debts to the date of paying a final dividend, provided there be surplus assets. This is so notwithstanding the debt is for money deposited to secure a wagering contract.

(2) The duty of a liquidator is to distribute the assets according to the rights of the parties; therefore a receipt for final dividend expressed to be in full discharge of all claims is no release of a claim for interest if the liquidator knew the question was to be raised.

(3) The amount of a debt admitted to proof is the amount at the date of winding up; therefore, if the amount has been settled by compromise under order of the ct., this does not negative a right to subsequent interest.—*Re DUNCAN (W. W.) & Co., [1905]* 1 Ch. 307; 74 L. J. Ch. 188; 92 L. T. 108; 53 W. R. 299; 49 Sol. Jo. 223; 12 Mans. 39.

6395. Rate of interest—Judgment debt—Judgment taken as collateral security.]—*Re AGRICULTURIST CATTLE INSURANCE CO., Ex p. HUGHES* (1872), 4 Ch. D. 34, n.; 25 W. R. 92, n., L. J.J.

*Annotations:—***Expld. & Distd.** *Re European Central Ry., Ex p. Oriental Financial Corpn.* (1876), 35 L. T. 583. **Consd.** *Re Sneyd, Ex p. Fewings* (1883), 32 W. R. 352.

6396. ————.]—A corpn. held debentures of a co. bearing interest at £6 per cent, & charged on the property of the co. The corpn. obtained a judgment for the principal, interest, & costs under Judgment Act, 1838 (c. 110); the judgment debt bore interest at £4 per cent. The liquidator of the corpn. was allowed to prove in the winding up of the co. for the amount of the judgment debt, & £4 per cent interest. The debenture debt, with interest at £6 per cent, would have amounted to more, & it was sought to raise the proof to the higher sum:—*Held:* there was no other debt or obligation between the parties than that which had been converted into a judgment, & the further claim for additional interest must be disallowed.—*Re EUROPEAN CENTRAL RY. CO., Ex p. ORIENTAL FINANCIAL CORPN.* (1876), 4 Ch. D. 33; 46 L. J. Ch. 57; 35 L. T. 583; 25 W. R. 92, C. A.

*Annotations:—***Distd.** *Popple v. Sylvester* (1882), 22 Ch. D. 98. **Appld.** *Re Sneyd, Ex p. Fewings* (1883), 25 Ch. D. 338. **Consd.** *Arbuthnot v. Bunsill* (1890), 62 L. T. 234.

6397. Creditor may receive dividends from two companies—Until all interest paid.]—The rule that a creditor of a co. which is being wound up is not entitled to dividends towards payment of interest accrued since the commencement of the winding up, does not prevent a creditor who has a right of proof for the same debt against the estates of two cos. in liquidation from receiving dividends from both estates until the full amount of his debt & interest has been satisfied.—*Re JOINT-STOCK DISCOUNT CO., WARRANT FINANCE CO.'S CASE* (1869), 5 Ch. App. 86; 39 L. J. Ch. 122; 21 L. T. 626; 18 W. R. 102, L. J.; *subsequent proceedings* (1870), L. R. 10 Eq. 11.

*Annotations:—***Appld.** *Re Humber Ironworks & Shipbuilding Co., Warrant Finance Co.'s Case (No. 2)* (1869), 5 Ch. App. 88. **Refd.** *Re Collicie, Ex p. Findlay* (1881), 17 Ch. D. 334.

Secured creditors.]—See Sub-sect. 11, E. (d), *post*.

(i) Effect of Statutes of Limitation.

6398. Whether claim barred—Right of action accrued before winding up.]—An order having been made to wind up a joint-stock co. in 1850, a creditor whose right of action had accrued previous to the winding-up order, brought in a claim:—*Held:* the claim was barred by Stat. Limitations.—*Re ROYAL BANK OF AUSTRALIA, Ex p. FOREST* (1860), 2 Giff. 42; 29 L. J. Ch. 295; 1 L. T. 477; 6 Jur. N. S. 245; 8 W. R. 269; 66 E. R. 18.

*Annotation:—***Distd.** *Re General Rolling Stock Co., Joint Stock Discount Co.'s Claim* (1872), 7 Ch. App. 646.

6399. ———— Whether Statute of Limitations runs after winding-up order.]—After an order to wind up a co. has been made the above statute does not run so as to bar a creditor's claim, but he will be allowed to prove his debt at any time not disturbing former dividends.—*Re GENERAL ROLLING STOCK CO., JOINT STOCK DISCOUNT CO.'S CLAIM* (1872), 7 Ch. App. 646; 41 L. J. Ch. 732; 27 L. T. 88; 20 W. R. 762, L. J.J.

*Annotation:—***Consd.** *Re Fleetwood & District Electric Light & Power Syndicate, [1915]* 1 Ch. 486.

B. Application of Bankruptcy Rules.

(a) In General.

6400. Effect of Judicature Act, 1875 (c. 77), s. 10—Company in liquidation prior to commencement of Act—Whether Bankruptcy rules applicable.]—The above sect. does not apply to cos. that at

the chief clerk's certificate in a winding-up matter, if they do not of themselves carry interest.—*Re EAST HOLYFORD MINING CO.* (1874), 9 L. R. Eq. 327.—**IR.**

c. From what date interest allowed.] A notice to a liquidator by a creditor demanding interest on his claim cannot be regarded as a demand under 3 & 4 Will. IV., c. 42, s. 28, for

present payment, so as to make the debt carry interest from the date of the notice.—*Re UNITED IMPORTERS CO., Ex p. DAWKES & Co.* (1889), 7 N. Z. L. R. 229.—**N.Z.**

the commencement of the Act were already in liquidation; & consequently the creditors of such cos. are entitled to prove for the full amount of their claims without any deduction for securities held, although their claims were not admitted before the commencement of the Act.—*Re SUCHE (JOSEPH) & Co., LTD. (1875), 1 Ch. D. 48; 45 L. J. Ch. 12; 33 L. T. 774; sub nom. Re SUCHE (JOSEPH) & Co., LTD., Ex p. NATIONAL BANK, 24 W. R. 184.*

6401. —————.]—The above sect. relating to the winding up of insolvent cos. according to the rules of bkpcy. does not apply to cos. already being wound up, where the claims of the creditors have been ascertained & admitted prior to the commencement of the Act.—*Re PHOENIX BESSEMER STEEL Co.* (1875), 45 L. J. Ch. 11; 33 L. T. 403; *sub nom. Re PHOENIX BESSEMER STEEL Co., LTD., Ex p. SHEFFIELD BANKING Co.*, 24 W. R. 19.

6402. Validating payments made by directors pending winding-up petition—How far court guided by principles of bankruptcy.]—*Re* REPERTOIRE OPERA CO., LTD., No. 5839, *ante*.

6403. Rule against double proofs.]—The rule in bkpcy. that there cannot be a double proof against the same estate in respect of the same debt, applies in cases of winding up under 1862 Act. Bills of exchange were accepted by the E. Co., at the request of the O. Co., upon an undertaking by the O. Co. that it would provide funds to meet the bills at maturity. The bills were indorsed by the O. Co., & discounted; but before they arrived at maturity, both the E. & the O. Cos. had stopped payment, & were in process of liquidation, & the bills were dishonoured. The holders of the bills recovered the amount due on them by proofs against the estates of both cos. under their respective winding up:—*Held*: the E. Co. was not entitled under the contract of indemnity to prove as a creditor against the O. Co. for the amount that had been recovered from the estate by the holders of the bills.—*Re ORIENTAL COMMERCIAL BANK, Ex p. EUROPEAN BANK* (1871), 7 Ch. App. 99; 41 L. J. Ch. 217; 25 L. T. 648; 20 W. R. 82, L. J.J.

6404. Whether sum paid by surety considered as expunged for purposes of dividend.]—Four directors of a co., by way of security for any balance which might be due from the co. to a bank, gave the manager of a branch of the bank their promissory note for £2,000, & the manager indorsed the note to the bank. The co. was wound up. The bank proved in the winding up for £3,859 as due by the co. to the bank, & was declared entitled to a dividend of £1,051 on that sum. The bank afterwards brought an action against one of the makers of the note, who paid the bank £2,067 for debt & interest due on the note:—*Held*: the giving the note was in pursuance of an ordinary contract of suretyship, & the surety who had paid the £2,067 was entitled to receive from the bank

6405. Rule as to reputed ownership.]—The bkpcy. rules as to reputed ownership are not to be applied under Jud. Act, 1875 (c. 77), s. 10 in the winding up of a limited co.—*Re CRUMLIN VIADUCT WORKS Co.* (1879), 11 Ch. D. 755; 48 L. J. Ch. 537; 27 W. R. 722.

6406. —[.]—The bankruptcy rules as to reputed ownership are not imported into the winding up of cos. by Jud. Act, 1875 (c. 77), s. 10. A limited co. being indebted to H. & Co. on an acceptance, wrote to them a letter in Jan. 1885, in the following terms: "We hold at your disposal the sum of £425 due from C. & Co. for goods delivered by us to them up to Dec. 31, 1884, until the balance of our acceptance for £660 has been paid."—No notice was given by H. & Co. to C. & Co. until Feb. 5, 1885, which was after a petition for winding up the co. had been presented:—*Held*: as the bkpcy. rules of reputed ownership do not apply to the winding up of cos., the debt did not form part of the assets of the co. at the commencement of the winding up.—**GORRINGE v. IRWELL INDIA RUBBER & GUTTA PERCHA WORKS** (1886), 34 Ch. D. 128; 56 L. J. Ch. 85; 55 L. T. 572; 35 W. R. 86, C. A.

6407. Secured creditor—Giving up or valuing security.]—(1) Jud. Act, 1875 (c. 77), s. 10, does not make all the rules of bkpcy. apply to a secured debt.

(2) There is no mode in a winding up, of applying the bkpcy. rule that a petitioning creditor with a secured debt must either give up or value his security, in the latter case proving for the difference, as there are no means of knowing in the winding up whether the co. is insolvent or not.—*MOOR v. ANGLO-ITALIAN BANK* (1879), 10 Ch. D. 681; 40 L. T. 620; 27 W. R. 652.

6408. Rule preventing partner from proving against joint estate with joint creditors.]—A creditor of a banking co. in liquidation who is also a shareholder in the co. is entitled to receive a dividend on his debt if he has paid all the calls made upon him, & the law in that respect has not been altered by Jud. Act, 1875 (c. 77), s. 10. The rules in bkpcy. that a partner cannot prove against the joint estate in competition with the joint creditors does not, under that sect., apply to cos. wound up under the Cos. Acts.—*Re WEST OF ENGLAND BANK, Ex p. BROWN* (1879), 12 Ch. D. 823; 48 L. J. Ch. 604; 41 L. T. 27; 27 W. R. 869.

6409. Right to add costs to provable debt.]—Where applications are made by shareholders under 1862 Act, s. 35, for the removal of their names from the register of the co. & the return of the money paid for their shares, & a test case is

tried & succeeds, & the co. is afterwards ordered to be wound up, the costs incurred by those of the shareholders whose applications had not been tried can be added to the amounts due to them on the rectification of the register, & proved for in the winding up of the co. though no order has been made as to such costs.

Jud. Act, 1875 (c. 77), s. 10, has rendered Bkpcy. Act, 1883 (c. 52), s. 37, the enactment by which the question must be determined. 1862 Act, s. 158, is no longer the governing sect. in a case like this (*LINDLEY, M.R.*). — *Re BRITISH GOLD FIELDS OF WEST AFRICA*, [1899] 2 Ch. 7; 68 L. J. Ch. 412; 80 L. T. 638; 47 W. R. 552; 15 T. L. R. 363; 43 Sol. Jo. 494; 6 Mans. 334, C. A. *Annotation*:—*Apld. Re A Debtor*, [1911] 2 K. B. 652.

As to priority of debt.—*See* Sub-sect. 11, D., *post*.

As to fraudulent preference.—*See* Sub-sect. 15, *post*.

As to right of distraint.—*See* Sub-sect. 13, E., *post*.

Restriction on rights of execution creditors.—*See* Sub-sect. 13, D., *post*.

Mutual credits & set off.—*See* Sub-sect. 11, C., *post*.

(c) Proof of Contingent and Future Debts.

6410. Lessor may enter claim for whole of future rent.—A co. which had taken a lease of a quarry & covenanted for payment of the rent, was ordered to be wound up, & the leasehold interest was sold under the winding up. On the application of the lessor for leave to enter a claim for future rent, which had been refused by the judge, it was ordered that a claim should be entered for the whole value of the future rent, with the qualification that the lessor should not receive more than the amount which the co. might become liable to pay under the covenant; the order to be without prejudice to any application to dissolve the co., but no order of dissolution to be made without notice to the lessor.—*Re HAYTOR GRANITE CO.* (1865), 1 Ch. App. 77; 30 J. P. 100; 12 Jur. N. S. 1; 14 W. R. 186; *sub nom. Re HAYTOR GRANITE CO., Ex p. BELL*, 35 L. J. Ch. 154; *sub nom. Re HAYTOR GRANITE CO., Ex p. SCOBELL*, 13 L. T. 515, L. JJ.

Annotations:—*Apld. Re London & Colonial Co., Horsey's Claim* (1868), L. R. 5 Eq. 561. *Consd. Re Gartness Iron Co., Ex p. Elphinstone* (1870), L. R. 10 Eq. 412; *Gooch v. London Banking Asscn.* (1886), 32 Ch. D. 41; *Re Blackburn & District Benefit Bldg. Soc., Ex p. Graham* (1889), 42 Ch. D. 343. *Apld. Re New Oriental Bank Corpn.* (No. 2), [1895] 1 Ch. 753. *Distd. Re Dieckmann*, [1918] 1 Ch. 331. *Reid. Re Telegraph Construction Co.* (1870), L. R. 10 Eq. 384; *Oppenheimer v. British & Foreign Exchange & Investment Bank* (1877), 6 Ch. D. 744; *Cohen v. Popular Restaurants*, [1917] 1 K. B. 480. *Mentd. Re Oriental Bank Corpn.* (1885), 54 L. J. Ch. 481.

6411. — May not impound sum to secure payment.—After a lessor of premises to a co. now in liquidation, had obtained leave to enter a claim for the amount at which the future rent was estimated, a dividend was paid by the liquidators:—*Held*: the lessor was not entitled to have a sum equal to the dividend upon the amount at which the future rent was estimated, impounded, to secure payment of the future rent.—*Re LONDON & COLONIAL CO., HORSEY'S CLAIM* (1868), L. R. 5 Eq. 561; 37 L. J. Ch. 393; 18 L. T. 103; 16 W. R. 577.

Annotations:—*Consd. Re Gartness Iron Co., Ex p. Elphinstone* (1870), L. R. 10 Eq. 412; *Re Telegraph Construction Co.* (1870), L. R. 10 Eq. 384; *Gooch v. London Banking Asscn.* (1886), 32 Ch. D. 41; *Re Midland Coal, Coke, & Iron Co., Craig's Claim*, [1895] 1 Ch. 267. *Apld. Re New Oriental Bank Corpn.* (No. 2), [1895] 1 Ch. 753. *Distd. Re Dieckmann*, [1918] 1 Ch. 331. *Reid. Re Blackburn & District Benefit Bldg. Soc., Ex p. Graham* (1889), 42

Ch. D. 343; *Cohen v. Popular Restaurants*, [1917] 1 K. B. 480.

6412. — — — — ——Jud. Act, 1875 (c. 77), s. 10, which provides that in the winding up of cos. the same rules shall prevail & be observed as to debts & liabilities provable as may be in force for the time being under the law of bkpcy., does not comprise, among such liabilities, the obligations of a co. in liquidation under covenants in a lease to pay rent & not to assign without consent, no breach having taken place. A mtgee. in possession of a lessor to a co., now in liquidation, claimed to have impounded out of the assets a sum equal to the aggregate future rent, or such other sum as might be sufficient to provide for the liabilities of the co. under the lease; or, if such a sum could not be raised, to be admitted to prove for the amount:—*Held*: there was no privity of a contract between appct. & the co., & until breach he could not have assets impounded or be admitted to prove.—*Re WESTBOURNE GROVE DRAPERY CO.* (1877), 5 Ch. D. 248; 25 W. R. 509; *sub nom. Re WESTBOURNE GROVE DRAPERY CO., MANN'S CLAIM*, 46 L. J. Ch. 525; 36 L. T. 439; *subsequent proceedings* (1878), 39 L. T. 30.

6413. — — — — ——Where at the date of the winding up of a co. the co. is the lessee of premises for an unexpired term of years, the lessor is entitled to prove in the winding up for the amount of the rent then due, & to enter a claim for the full amount of the rent which will become due under the lease.—*Re NEW ORIENTAL BANK CORPN.* (No. 2), [1895] 1 Ch. 753; 64 L. J. Ch. 439; 43 W. R. 523; 11 T. L. R. 291; 39 Sol. Jo. 347; *sub nom. Re NEW ORIENTAL BANK CORPN., LTD., Ex p. HONG KONG LAND INVESTMENT & AGENCY CO., LTD.*, 72 L. T. 419; 2 Mans. 301; 13 R. 459.

Annotations:—*Distd. Re Panther Lead Co.*, [1896] 1 Ch. 978; *Re Dieckmann*, [1918] 1 Ch. 331. *Reid. Cohen v. Popular Restaurants*, [1917] 1 K. B. 480.

6414. Lessor treating lease as determined—Right to prove for future & contingent liabilities.—It is the duty of the ct. to assist a lessor in proving in respect of an insolvent co.'s obligation as lessee, where he desires to prove at once for his loss on the footing of the lease being treated as determined.

Semble: proof may at once be made in respect of all liabilities, present or future, certain or contingent, of the co. as lessee.—*Re PANTHER LEAD CO.*, [1896] 1 Ch. 978; 65 L. J. Ch. 499; 44 W. R. 573; 12 T. L. R. 327; 40 Sol. Jo. 437; 3 Mans. 165.

Annotations:—*Consd. Re Dieckmann*, [1918] 1 Ch. 331. *Reid. Cohen v. Popular Restaurants*, [1917] 1 K. B. 480.

6415. Claim in respect of future feu duties—Superior may claim for capitalised value.—A co., assignees from a former co. of a piece of land in Scotland, which had been disposed to them by the heritable proprietor on payment of certain feu duties, having been ordered to be wound up:—*Held*: the superior was entitled to enter a proof for the feu duties then due, & also entitled to enter a claim, but not a proof, for the capitalised value of the future feu duties.—*Re GARTNESS IRON CO., Ex p. ELPHINSTONE (LORD)* (1870), L. R. 10 Eq. 412; 39 L. J. Ch. 884; 23 L. T. 389; 18 W. R. 1103.

Annotations:—*Consd. Gooch v. London Banking Asscn.* (1886), 32 Ch. D. 41; *Re Blackburn & District Benefit Bldg. Soc., Ex p. Graham* (1889), 42 Ch. D. 343.

C. Set-off.

(a) By Contributories.

See, generally, SET-OFF & COUNTERCLAIM.

Sect. 36.—Winding up by court: Sub-sect. 11, C. (a).]

6416. Whether set-off against unpaid calls due—For advances to pay debts to company.]—A joint-stock co. was formed in England for working mines in Germany, subject to the terms of a deed of settlement, which provided that the capital should be £50,000, & gave no powers to the directors to raise money except by the creation of new shares. That capital was paid up & proved insufficient for working the mines. The wages of the miners being in arrear, & other debts being due, the managing directors obtained advances from some of the shareholders for the purpose of paying those debts & preventing the mines from being seized under the law of the country. The directors also borrowed other sums on their personal guarantee from the bankers of the co., not for payment of debts, but for carrying on the business of the co. in its ordinary course, & they afterwards repaid the bankers these advances. The co. was wound up:—*Held*: (1) the advances made by the shareholders to pay debts of the co. might be set off by them with interest against a call; (2) although the advances made by the bankers did not constitute a debt due to them from the co., the directors having no power to borrow, the directors were entitled to be allowed the amounts repaid by them to the bankers, the directors being trustees, & in that character entitled to indemnity from their *cestuis que trust* against expenses *bonâ fide* incurred.—*Re GERMAN MINING CO., BALL'S CASE, Ex p. CHIPPENDALE* (1854), 4 De G. M. & G. 19; 2 Eq. Rep. 983; 24 L. J. Ch. 41; 23 L. T. O. S. 200; 18 Jur. 710; 2 W. R. 543; 43 E. R. 415, L. JJ.

Annotations:—*As to* (1) *Consd.* *Re Norwich Equitable Fire Insce., Brasnett's Case* (1885), 53 L. T. 569. *Refd.* *Re Electric Telegraph Co. of Ireland, Troup's Case* (1860), 29 Beav. 353; *Re Magdalena Steam Navigation Co.* (1860), John. 690. *As to* (2) *Appld.* *Re Magdalena Steam Navigation Co.* (1860), John. 690; *Lowndes v. Garnett & Moseley Gold Mining Co. of America* (1864), 3 New Rep. 601. *Consd.* *Re National Permanent Benefit Bldg. Soc., Ex p. Williamson* (1869), 5 Ch. App. 309; *Yorkshire Ry. Wagon Co. v. Maclure* (1881), 19 Ch. D. 478; *Hardoon v. Belillos*, [1901] A. C. 118. *Refd.* *Re Era Assee., Williams' Case, Anchor Case* (1862), 1 Hem. & M. 672; *Selwyn v. Harrison* (1862), 2 John. & H. 334; *Re Catholic Publishing & Bookselling Co.* (1864), 3 New Rep. 551; *Re Wrexham Mold & Connah's Quay Ry.*, [1899] 1 Ch. 440. *Generally, Refd.* *Re Norwich Yarn Co., Ex p. Bignold* (1856), 22 Beav. 143. *Mentd.* *Darke v. Williamson* (1858), 22 J. P. 705; *Re Cork & Youghal Ry.* (1869), 4 Ch. App. 748, n.; *Martin v. Powning* (1869), 4 Ch. App. 356; *Re Durham County Permanent Investment Land & Bldg. Soc., Davis' Case* (1871), L. R. 12 Eq. 516; *Crampton v. Varna Ry.* (1872), 41 L. J. Ch. 817; *Blackburn Bldg. Soc. v. Cunliffe Brooks* (1882), 22 Ch. D. 64, n.; *Re Pumfrey, Worcester City & County Banking Co. v. Blick* (1882), 22 Ch. D. 255; *Strickland v. Symons* (1884), 26 Ch. D. 245; *Re Companies Acts, Ex p. Watson* (1888), 21 Q. B. D. 301.

6417. ———.]—D., one of the managing

committee of an abortive railway co., paid an engineer's bill. Nothing had been done in the formation of the co. beyond expenses incurred. An order was made for the winding up the concern, when D. & L. were placed on the list of contributories. L. paid the solr.'s bill, D. & L. before the master, claimed to be allowed as against the rest of the contributories, the sums so paid by them. The master refused to entertain these claims:—*Held*: he must review his decision.—*Re LONDON & BIRMINGHAM & BUCKINGHAMSHIRE RY. CO., Ex p. DAYRELL & LOWNDES* (1855), 26 L. T. O. S. 174; 1 Jur. N. S. 1129; 4 W. R. 110.

6418. ——— Payment after winding up.]—A director of an unlimited co., paid to the bankers of the co., after a winding-up order, & after a call had been made, £500 in respect of an overdraft of the co., for which he had become surety. On summons asking the ct. to declare that under 1862 Act, s. 101, the director was entitled to set off this sum against £875, due from him for calls on shares, it was held that, the payment being made after the winding up, this was not a case of a co. carrying on business & incurring a debt to bankers in the ordinary way, & that the director was not entitled to set off the debts against calls. On appeal:—*Held*: the amount, if any, owing to the director was one which could only be ascertained by inquiry; it was not clear that the director had any claim to be repaid; & the ct., in the exercise of the discretion given by the sect., ought not to allow the set-off.—*Re NORWICH EQUITABLE FIRE INSURANCE CO., BRASNETT'S CASE* (1885), 53 L. T. 569; 34 W. R. 206, C. A.

6419. ———.]—A contributory has no right to set off a debt due to him from a joint-stock co. as against calls made upon him by the official liquidator under a winding up.

Semble: the rule in bkpcy. must be followed, which is, to set aside the dividends payable to the creditor in respect of his debt as against the moneys claimed from him under the bkpcy.—*Re CARDIFF & CAERPHILLY IRON CO., LTD., Ex p. FOLEY* (1862), 6 L. T. 371.

6420. ———.]—A joint-stock co., limited, proceeded to wind itself up, & appointed liquidators. An action having been brought by the liquidators on behalf of the co. against one of the shareholders to recover the amount of a call on his shares:—*Held*: debt. was entitled to set off a claim against the co.—*GARNET GOLD MINING CO. v. SUTTON* (1862), 3 B. & S. 321; 1 New Rep. 93; 32 L. J. Q. B. 47; 7 L. T. 506; 9 Jur. N. S. 542; 122 E. R. 121; *sub nom.* *MOSELEY GOLD MINING CO., LTD. v. GARNETT*, 11 W. R. 167.

Annotation:—*Consd.* *Re Breech-Loading Armoury Co., Calisher's Case* (1868), L. R. 5 Eq. 214.

PART III. SECT. 36, SUB-SECT. 11.—C. (a).

6416 i. Whether set-off against unpaid calls due—For advance to pay debts of company.]—A shareholder who has paid off a debt due by a co., with the acquiescence of the directors, is entitled to credit for the amount so paid as against his liability upon his shares.—*Re SWITCHBACK RY., ETC., CO., LTD., Ex p. HAYDON & MOUNT* (1890), 16 V. L. R. 339.—AUS.

due to shareholder.]—A co. while a going concern sued a shareholder for a call, & he set up a defence of set-off to an amount exceeding the amount of the call, & obtained by consent a verdict for the balance. Before this verdict was obtained, a petition for winding up the co. of which the shareholder had no actual notice was filed, upon which a winding-up order was made sub-

sequent to the verdict:—*Held*: the ordinary rule applied, that a shareholder cannot, after the commencement of a winding up set off a debt due to him from the co. against a call made in the winding up.—*Re SPADLER, LTD.* (1904), 4 S. R. N. S. W. 619.—AUS.

e. ———.]—Subscribers for shares in the co. are not entitled in the winding up to set off, against their liability to pay up the shares, claims for goods supplied to the co. under such an agreement.—*Re JONES & MOORE ELECTRIC CO., JONES & MOORE'S CASE* (1909), 18 Man. L. R. 549.—CAN.

f. ———.]—A co. assigned to plff. bank by way of mtge. all calls then due to the co. by shareholders & unpaid, including an amount due for such calls by debt. After the assignment, but before notice of it to debt,

the co. became indebted to debt. for goods sold & delivered in the ordinary course of business, in an amount exceeding the amount due by him for calls. No statement of account was ever rendered by debt. to the co., nor by the co. to debt. in which the one amount was set-off against the other. The co. went into liquidation, & the bank, subsequently to the date of the winding-up order, gave notice of its mtge. to debt. In an action by the bank to recover the calls due by debt.:—*Held*: (1) Cos. Act, 1882, s. 34, would have prevented a set-off by debt. of the price of the goods sold & delivered by him to the co., even if the co. itself had been suing, & there could therefore be no set-off as against the bank; (2) apart from sect. 34, the fact that the co. was in liquidation would have prevented any set-off, although an assignee, & not the liquidator himself, was suing.—BANK

6421. Payment by surety of debt after winding up.]—Whilst it is contrary to the policy of the law to permit a debtor to an estate that is being wound up to buy up counterclaims subsequently to the winding-up order, for the purpose of making a case of set-off; yet it is otherwise where there is an actual ownership of a counterclaim, which, though arising subsequently to the winding-up order, is a consequence of some anterior matter. A co. entered into a contract for the purchase of mines which were subject to a mtge. for £7,000, & B., a shareholder in the co., was a surety to the mtgee. for the mtgor.-vendor. Part of the agreement was, that the co. should pay off the mtge. debt in May, 1862; but the co. failing to do this, handed to the mtgee. a promissory note of the co. for £7,000 at six months, dated in Sept. 1862. In Oct. following, a winding-up order was made; & in Feb. 1863, the mtgee. pressing for his money, B. induced his sister to pay off the mtge. debt, & take a transfer of the securities, including the promissory note, which shortly after fell due & was dishonoured. B. having been settled on the list of contributories, obtained a transfer of the co.'s note from his sister, giving her his own promissory note instead; & then asserted his right to set off his claim against the co. in respect of the promissory note *pro tanto* against the sum due from him for calls:—*Held*: the payment by B. to the transferee of the mtge. related back to the claim of the mtgee. anterior to the winding-up order, & B. was entitled to a set-off.—*Re MOSELEY GREEN COAL & COKE CO., LTD., BARRETT'S CASE* (No. 2) (1865), 4 De G. J. & Sm. 756; 5 New Rep. 496; 34 L. J. Bey. 41; 12 L. T. 193; 13 W. R. 559; 46 E. R. 1116, L. C.

6422. Counterclaim acquired from third party after winding up.]—Upon the formation of a limited joint-stock co., 250 shares were taken by C., in the name of B., & C. paid, or was allowed on account, a sum of £1 per share, paid by him upon allotment. Afterwards, upon its becoming known to C. that B. would be liable for calls,

C. procured & handed to the solr. of B. two promissory notes of the co. for £500, one at 18, the other at 24 months date, in order, as the solr. deposed, to indemnify B. in respect of his liability to the co. Within eight months after the date & delivery of the notes, a winding-up order was made:—*Held*: B. was not entitled to set off the notes against a call due from him in respect of 250 shares.—*Re MOSELEY GREEN COAL & COKE CO., LTD., BARRETT'S CASE* (No. 2) (1865), 4 De G. J. & Sm. 756; 34 L. J. Bey. 41; 12 L. T. 756; 46 E. R. 1116, L. C.

6423. —.]—(1) A shareholder in a limited co., who is also a creditor of the co. under a contract, is not, in the event of the co. being wound up, entitled to set off the debt due to him against the calls, nor to set off against the calls a dividend which may hereafter come to him.

(2) Upon payment of all calls which have become due, he is entitled to receive dividends at the same time & at the same rate with the other creditors.—*Re OVEREND, GURNEY & CO., GRISSELL'S CASE* (1866), 1 Ch. App. 528; 35 L. J. Ch. 752; 14 L. T. 843; 30 J. P. 548; 12 Jur. N. S. 718; 14 W. R. 1015, L. C. & L. JJ.

Annotations:—As to (1) *Consd.* *Re Blakely Ordnance Co., Blakely's Case* (1867), 17 L. T. 307. *Distd.* *Re Duckworth* (1867), 2 Ch. App. 578; *Brighton Arcade Co. v. Dowling* (1868), L. R. 3 C. P. 175. *Consd.* *Re Breech-Loading Armoury Co., Calisher's Case* (1868), L. R. 5 Eq. 214; *Re China S.S. Co., Ex p. Mackenzie* (1869), L. R. 7 Eq. 240. *Distd.* *Re International Life Assce. Soc., Gibbs & West's Case* (1870), L. R. 10 Eq. 312. *Appld.* *Re Paraguassu Steam Tramroad Co., Black & Co.'s Case* (1872), 8 Ch. App. 254; *Re Whitehouse* (1878), 9 Ch. D. 595. *Consd.* *Re Pyle Works* (1890), 44 Ch. D. 534. *Appld.* *Re Auriferous Properties* (No. 2), [1898] 2 Ch. 428; *Re West Coast Gold Fields, Rowe's Trustees Claim*, [1905] 1 Ch. 597. *Refd.* *Re European Central Ry., Gustard's Case, Holden's Case* (1869), 17 W. R. 875; *Re London & Colonial Co., Ex p. Clark* (1869), L. R. 7 Eq. 550; *Re Universal Banking Co., Ex p. Strang, Ex p. Mackreth* (1870), 22 L. T. 219; *Re Stranton Iron & Steel Co., Barnett's Case* (1875), L. R. 19 Eq. 449; *Government Security Investment Co. v. Dempsey* (1880), 50 L. J. Q. B. 199; *Re Exchange Banking Co., Flitcroft's Case* (1882), 21 Ch. D. 519; *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95; *Re Auriferous Properties*, [1898] 1 Ch. 691; *Re Hiram Maxim Lamp Co.*, [1903] 1 Ch. 70; *Re Peruvian Ry. Construction Co.*, [1915] 2 Ch. 144. As to

OF AUSTRALIA *v. ZOHRA* (1892), 10 N. Z. L. R. 310.—N.Z.

g. —.]—Directors of a co. raised action against a shareholder for payment of arrears of calls.

The shareholder pleaded compensation in respect of sums due by the co. to him for contract work & produced a decree-arbitral which fixed the sum due to him at a much larger sum than the arrears of calls. Before further action, an order for winding up the co. was obtained at the instance of creditors:—*Held*: after the order for winding up had been pronounced, the plea of compensation could not be sustained as it would give shareholder preference over other creditors of the co.—*COWAN (OFFICIAL LIQUIDATOR OF EDINBURGH THEATRES, WINTER GARDEN & AQUARIUM CO., LTD.) v. GOWANS* (1878), 5 R. (Ct. of Sess.) 581; 15 Sc. L. R. 315.—SCOT.

h. —.]—Calls due by a shareholder cannot be set against debts due by the co. so as to operate compensation except under a written agreement.—*COWAN v. SHAW* (1878), 5 R. (Ct. of Sess.) 680; 15 Sc. L. R. 384.—SCOT.

k. —.]—*Mutuality of claims essential.*—M. appealed from a portion of an order made in the winding up of a co., which put applt. upon the list of contributories for a balance due upon shares; & the liquidator of the co. also appealed from a portion of the same order, which allowed a set-off for advances made by M. for the benefit of the co.:—*Held*: M. had no defence

to the application of the liquidator to put him on the list of contributories for the amount actually unpaid in respect of the shares & the right of set-off did not exist, on the broad ground of absence of mutuality between the claim of the liquidator against M. & M.'s claim as a creditor of the co.—*Re WIARTON BEET SUGAR MANUFACTURING CO., MCNEIL'S CASE* (1905), 5 O. W. R. 637; 10 O. L. R. 219.—CAN.

l. President of company acting as solicitor—Costs of litigation.]—Where a director, who was also president of a co. was appointed by the board of directors & acted as solr. for the co.:—*Held*: he was entitled to profit costs in respect of causes in ct. conducted by him as solr. for the co., but not in respect of business done out of ct., & was entitled to set off the amount of such costs against the amount of his liability as a shareholder.—*Re MIMICO SEWER PIPE & BRICK MANUFACTURING CO., PEARSON'S CASE* (1895), 26 O. R. 289.—CAN.

m. —.]—*For directors' fees—In competition with creditors.*—Directors are not entitled to claim for fees in competition with creditors. Consequently such fees cannot be set-off by directors against amounts due by them as contributories.—*GRAND HOTEL & THEATRE CO. (IN LIQUIDATION) v. HAARBURGER* (1907), O. R. C. 25.—S. AF.

6422 i. —.]—*Counterclaim acquired from third party—After winding up.*—Y., in making a deposit on a govt.

contract, gave a deposit receipt issued by a bank, in which he was a shareholder. Y. gave his note to the bank to cover the amount of the receipt. The bank went into liquidation & Y., having been required by the govt. to take up the deposit receipt & replace it with other security, took an assignment of the receipt & notified the bank. On being threatened with a suit on the note, he filed a petition asking for leave to set off the deposit receipt against the note:—*Held*: (1) Y. as maker of the note to the bank was a mere debtor & not a contributory, & although also a shareholder, & so liable as a contributory, he was not a contributory *quoad* the debt, which arose out of an independent transaction; (2) the prohibition in R. S. C., c. 129, s. 73, against acquiring debts for the purpose of set-off is limited to the case of contributories; as to debtors the law of set-off as administered by the cts. is applicable as if the co. was a going concern.—*Re CENTRAL BANK OF CANADA, YORKE'S CASE* (1888), 15 O. R. 625.—CAN.

n. —.]—*In contemplation of winding up.*—Winding-up Act, 45 Viet. c. 23 (D.), ss. 75, 76, in respect to claims acquired by contributories within thirty days of the commencement of winding-up proceedings for use as a set-off, only apply to actions against a contributory when the debt claimed is due from the person sued in his capacity as contributory & the Act is not retrospective in regard to a claim purchased in good faith & for value prior to the passing of the statute.

Sect. 36.—Winding up by court: Sub-sect. 11, C.

(2) *Consd. Re West of England Bank, Ex p. Brown* (1879), 12 Ch. D. 823. *Generally, Mentd. Re Imperial Mercantile Credit Assocn., Chapman & Barker's Case* (1867), L. R. 3 Eq. 361.

6424. — Costs of petitioning creditor.]—*Re GENERAL EXCHANGE BANK*, No. 5750, *ante*.

6425. — Special agreement in contract.]—A co. was formed to carry on the business of B., & it was agreed that B. should take the purchase-money partly in shares & partly in promissory notes, & it was expressly provided that B. should be entitled to set off the unpaid purchase money against the calls payable on his shares. B. deposited the notes to secure certain advances made to him. The co. was now winding up, & the official liquidator made a call:—*Held*: as the depositors were entitled to retain the notes till the amount due to them was paid, & B.'s only right was to the balance after satisfaction of their claim, he could not have a set-off.—*Re BLAKELY ORDNANCE CO., BLAKELY'S CASE* (1867), 17 L. T. 307; 16 W. R. 188.

6426. — —.]—In a compulsory winding up a shareholder cannot set off against calls, debt due to him upon a contract with the co., notwithstanding his right to do so may have been specially stipulated for by the contract, & notwithstanding his application for shares may have been in consideration & in pursuance of such contract. *Qu.*: whether, under a voluntary winding up, such a set-off can be allowed.—*Re PARAGUASSU STEAM TRAMROAD CO., BLACK & CO.'S CASE* (1872), 8 Ch. App. 254; 42 L. J. Ch. 404; 28 L. T. 50; 37 J. P. 309; 21 W. R. 249, L. C. & L. JJ.

Annotations:—*Consd. Re Stranton Iron & Steel Co., Barnett's Case* (1875), L. R. 19 Eq. 449; *Re Whitehouse* (1878), 9 Ch. D. 595. *Apld. Re West Hartlepool Iron Co., Gunn's Case* (1878), 38 L. T. 139. *Consd. Re Branksea Island Co., Ex p. Bentinck* (No. 1) (1888), 1 Meg. 12. *Follid. Hoby v. Birch* (1890), 59 L. J. Q. B. 247. *Distd. Re Pyle Works* (1890), 44 Ch. D. 534. *Apld. Re Law Car & General Insee. Corpn.*, [1912] 1 Ch. 405. *Re Matlock Old Bath Hydropathic Co., Wheatcroft's Case* (1873), 42 L. J. Ch. 853; *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95; *Monkwearmouth Flour Mill Co. v. Lightfoot* (1897), 13 T. L. R. 327; *Re Auriferous Properties*, [1898] 1 Ch. 691; *Re Hiram Maxim Lamp Co.*, [1903] 1 Ch. 70. *Mentd. Re Government Security Fire Insee., Mudford's Claim* (1880), 14 Ch. D. 634; *Re Alliance Soc.* (1885), 28 Ch. D. 559; *Re Railway Time Tables Publishing Co., Ex p. Sandys* (1889), 42 Ch. D. 98; *Knowles v. Scott*, [1891] 1 Ch. 717; *Re Kent Coalfields Syndicate* (1898), 67 L. J. Q. B. 500.

6427. — —.]—An agreement between a director of a co. & the co., that any moneys which the director may pay under a guarantee of the co.'s overdraft at the bank shall be treated as payments made in advance of future calls, though such an agreement is within the co.'s powers & validly made, will not enable the director to set off moneys so paid against a subsequent call made by the liquidator in a compulsory winding up.—*Re LAW CAR & GENERAL INSURANCE CORPN., LTD.*, [1912] 1 Ch. 405; 81 L. J. Ch. 218; 106 L. T. 180; 56 Sol. Jo. 273; 19 Mans. 152.

6428. — Contributory insolvent.]—Where a shareholder in a limited co. has executed a deed of assignment which has been registered, the trustees of that deed are entitled to set off a debt due to the shareholder from the co. against a demand for

calls made by the official liquidator of the co.—*Re DUCKWORTH* (1867), 2 Ch. App. 578; *sub nom. Re DUCKWORTH, Ex p. COOPER*, 36 L. J. Bey. 28; 16 L. T. 580; 15 W. R. 858, L. JJ.

Annotations:—*Apld. Re Anglo-Greek Steam Navigation & Trading Co., Carralli & Haggard's Claim* (1869), 4 Ch. App. 174. *Follid. Re Universal Banking Corpn., Ex p. Strang* (1870), 5 Ch. App. 492. *Distd. Re General Works Co., Gill's Case* (1879), 12 Ch. D. 755; *Re Auriferous Properties*, [1898] 1 Ch. 691. The decision in *Re Duckworth* has stood so long that I do not suppose that the House of Lords, even if they differed from it, would now interfere with it (WRIGHT, J.). *Reid. Re Lankester, Ex p. Price* (1875), 23 W. R. 844; *Paddy v. Clutton*, [1920] 2 Ch. 554. *Mentd. Waterhouse v. Jamieson* (1870), L. R. 2 Sc. & Div. 29; *Re Appletreewick Lead Mining Co.* (1874), L. R. 18 Eq. 98, n.; *Re National Funds Assoc.* (1878), 10 Ch. D. 118.

6429. — —.]—A contributory of a co. in course of winding up executed an inspectorship deed, the effect of which was to import the mutual credit clause of the Bkpcy. Act, 1849 (c. 106). At the date of the deed the contributory was the holder of three bills accepted by the co., which were shortly afterward indorsed to an agent for collection. After the execution of the deed a call was made on the contributory to an amount exceeding that of the bills, & a few days later the bills matured:—*Held*: the bills could not be proved against the co., but must be set off against the call.—*Re ANGLO-GREEK STEAM NAVIGATION & TRADING CO., CARRALLI & HAGGARD'S CLAIM* (1869), 4 Ch. App. 174; 19 L. T. 706; 17 W. R. 244, L. JJ.

6430. — —.]—Shortly after the date of an order for winding up a co., M., who was the holder of a large number of shares in it, executed & had duly registered, a deed of assignment to trustees for the benefit of his creditors. The deed contained a release extending to both past & future liabilities. M. claimed that the co. was indebted to him to the amount of over £8,000, & his trustees sent in a claim for the amount to the official liquidator. The official liquidator subsequently obtained two orders against M. to enforce the payment of two overdue calls, of which the one had been made before, the other after, the date of the deed of assignment. Upon an application by M. to have these orders discharged, the ct. sanctioned a compromise setting off the claims of M.'s trustees & the official liquidator against each other.—*Re OXFORD & CANTERBURY HALL CO., LTD., Ex p. MORTON* (1869), 38 L. J. Ch. 390; 17 W. R. 606.

6431. — —.]—Where a contributory, who is also a creditor of a co. which is being wound up, becomes bkpt., or executes a creditors' deed under the Bkpcy. Act, 1861 (c. 134), after the commencement of the winding up, the debt must be set off against the calls, whether the claim be made in the bkpcy. or in the winding up; & if the contributory had before his bkpcy. assigned his debt to a third party the assignee will stand in the same position as the contributory would have done as to the right of set-off.—*Re UNIVERSAL BANKING CORPN., Ex p. STRANG* (1870), 5 Ch. App. 492; 39 L. J. Ch. 644; 18 W. R. 475; *sub nom. Re UNIVERSAL BANKING CO., LTD., Ex p. STRANG, Ex p. MACKRETH*, 22 L. T. 219, L. J.

Annotations:—*Distd. Re General Works Co., Gill's Case* (1879), 12 Ch. D. 755. *Reid. Re Auriferous Properties*, [1898] 1 Ch. 691.

—INGS v. BANK OF PRINCE EDWARD ISLAND (1885), 11 S. C. R. 265.—CAN.

o. For amount deposited with company.—A shareholder of a bank which is being wound up under the Winding-up Act, R. S. C., c. 129, who has a claim against the bank for an amount deposited to his credit

for more than thirty days before the commencement of the winding-up proceedings, is entitled to set off the amount of his claim against calls made upon him as a contributory.—*Re MARITIME BANK, TROOP'S CASE* (1888), 27 N. B. R. 295.—CAN.

p. Whether set off against liability

upon shares—*Call not made*—*For salary due.*—A., a holder of stock in a co., of which co. he was president at a specified salary, paid up his shares to a certain amount, & as far as calls were made by the co., B., a judgment creditor of the co., sued A., under Canadian Act, 14 & 15 Vict. c. 51,

6432. .].—The rule that in the winding up of a limited co. a contributory who is also a creditor of the co. is not entitled to set off against calls, made either before, or in, the winding up, either his debt or any dividend which may come to him on his debt, applies to the case where the estate of a deceased contributory is insolvent.—*Re WEST HARTLEPOOL IRON CO., LTD., GUNN'S CASE* (1878), 38 L. T. 139.

6433. —.].—A contributory of a limited co. being wound up by the ct. under 1862 Act, is not entitled, in the absence of special agreement, to set off money due to him from the co. against a call made before the winding up. *Qu.*: whether such an agreement would be *intra vires*.

Semble: "Creditors" in sect. 101 of the above Act must mean "creditors other than contributories of the co."—*Re BREECH-LOADING ARMOURY CO., CALISHER'S CASE* (1868), L. R. 5 Eq. 214; 37 L. J. Ch. 208; 16 W. R. 303.

Annotations:—*Distd.* *Re International Life Assce. Soc., Gibbs & West's Case* (1870), L. R. 10 Eq. 312. *Consd.* & *Folld.* *Re Stranton Iron & Steel Co., Barnett's Case* (1875), L. R. 19 Eq. 449. *Consd.* *Re Whitehouse* (1878), 9 Ch. D. 595.

6434. Against salary due for loss of office.]

LONDON & SCOTTISH BANK, *Ex p.* LOGAN, No. 6363, *ante*.

6435. Effect of Judicature Act, 1875 (c. 77), s. 10.]—The rule that a contributory cannot set off a judgment debt due to him from the co. against calls made upon him by the official liquidator in the winding up of the co., has not been affected by the above sect., which provides that in a winding up the same rules shall apply as are in force in bkpcy.—*Re GENERAL WORKS CO., GILL'S CASE* (1879), 12 Ch. D. 755; 48 L. J. Ch. 774; 41 L. T. 21; 27 W. R. 934.

Annotations:—*Consd.* *Re Auriferous Properties*, [1898] 1 Ch. 691. *Refd.* *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95.

6436. Unlimited liability company.]—A shareholder in an unlimited co. in the course of winding up under the order of the ct., who is also a creditor of the co., is not entitled to set off the debt due to him from the co. against the calls made him in the winding up.—*Re WEST OF ENGLAND & SOUTH WALES DISTRICT BANK, Ex p. BRANWHITE* (1879), 48 L. J. Ch. 463; 40 L. T. 652; 27 W. R. 646.

Annotation.—*Mentd.* *Re West of England & South Wales District Bank, Ex p. Hatcher* (1879), 27 W. R. 907.

6437. Debt due by company to trustees—One trustee contributory & entitled to beneficial interest.]—The trustees of a will advanced part of the trust property to a co. by way of deposit at interest. One of the trustees being entitled to a life estate in the trust property was entitled to the interest. The same trustee was also a shareholder in the co., & on the co. being ordered to be wound up, became indebted to the co. for calls. The official liquidator claimed to set off the interest on the deposited money as against the money due on the calls:—*Held*: no set-off ought to be allowed, on the ground that the whole debt, principal & interest, was due to the trustees, & that there was no privity between the contributory & the co. in respect of the contributory's life estate.—*Re IMPERIAL MERCANTILE*

CREDIT ASSOCN., LTD., *Ex p.* SMITH & FORD (1867), 15 W. R. 1069.

6438. Assignee of contributory—Taken subject to equities at date of transfer.]—L., a shareholder of a co., in the process of being wound up, transferred to M. for valuable consideration certain debentures issued to him by the co. Calls were afterwards made on L. & remained unpaid. M. attempted to prove under the winding up for the amount due on his debentures:—*Held*: M. took the debentures subject to the equities subsisting at the time of the transfer between the co. & L. & the co. had a right to set off the amount due on the debentures against the amount of the calls, & M.'s proof must be reduced accordingly.—*Re CHINA S.S. CO., Ex p. MACKENZIE* (1869), L. R. 7 Eq. 240; 38 L. J. Ch. 199; 19 L. T. 667; 17 W. R. 343.

Annotations:—*Distd.* *Re Milan Tram. Co., Ex p. Theys* (1882), 22 Ch. D. 122. *Consd.* *Christie v. Taunton, Delmard, Lane, Re Taunton, Delmard, Lane*, [1893] 2 Ch. 175.

6439. Insolvent contributory company—Not entitled to dividend till call paid.]—Two cos., each of which was now in liquidation, were indebted to one another, one in respect of arrears of calls, the other in respect of balance of account & money lent. There was no prospect of either co. receiving a cash dividend in the liquidation of the other, if it was first bound to satisfy in full the amount of its indebtedness to the other:—*Held*: neither co. was entitled to receive a cash dividend in the liquidation of the other without first satisfying in full the amount of its indebtedness to the other, & under these circumstances liberty should be given to the liquidator in the liquidation of each co. to distribute its available assets in payment of dividends to its other creditors without regard to the claim of the debtor co. in each case.—*Re NATIONAL & PROVINCIAL LIVE STOCK INSURANCE CO., LTD., Re NATIONAL GENERAL INSURANCE CO., LTD.*, [1917] 1 Ch. 628; 86 L. J. Ch. 391; 116 L. T. 466; [1917] H. B. R. 119.

(b) Of Mutual Debts and Credits.

See, generally, SET-OFF & COUNTERCLAIM.

6440. No set off in respect of transactions subsequent to winding up—Future liability on bills of exchange.]—*Re COMMERCIAL BANK CORPORATION OF INDIA & THE EAST, SMITH, FLEMING & CO.'S CASE, GLEDSTANES & CO.'S CASE*, No. 5985, *ante*.

6441. — Payments on behalf of company after winding up.]—At the commencement of the winding up of the A. Co. which was insolvent, some of the assets were in the hands of the B. Co., which afterwards, with notice of the winding up, applied them in payment in full of certain debts owing to the A. Co.:—*Held*: the B. Co. could not set off these payments in accounting to the liquidator for the assets in its hands.

In liquidation, as in bkpcy., there is no set off of mutual debts & credits in respect of transactions subsequent to the commencement of the winding up.—*Re UNITED PORTS & GENERAL INSURANCE CO., Ex p. ETNA INSURANCE CO.* (1877), 46 L. J. Ch. 403; 36 L. T. 457; 25 W. R. 580.

in his character of a shareholder of the co., for the amount of his stock unpaid. A. pleaded compensation under Civil Code of Lower Canada, arts. 1187, 1188, the co. being indebted to him for salary as president to an amount exceeding the sum due on the unpaid stock, which he insisted operated as an extinguishment by compensation:—*Held*: as no calls in respect of the

unpaid stock held by A. had been made under above Act, the provisions of arts. 1,187, 1,188 did not apply, & compensation had not taken place between A. as a shareholder & B., as judgment creditor of the co.—*RYLAND v. DELISLE* (1867), C. R. 5 A. C. 477.—*CAN.*

g. For debt due to shareholder.]—An arrangement between a

co. & a shareholder therein whereby the latter purports to set off a debt owing to him by the co. against the amount unpaid by him on his shares where no call has been made for the amount, is not a ground for removing the shareholder's name from the list of contributories.—*Re CONSOLIDATED INVESTMENTS, LTD., SIMONS' CASE*, [1918] 2 W. W. R. 581.—*CAN.*

Sect. 36.—Winding up by court: Sub-sect. 11, C. (b).]

6442. —.]—(1) A winding-up order against a co. was made in 1877. One of the original directors, H., had received from the promoters 85 shares. In 1879, H. obtained from creditors of the co. assignments of the debts due to them. On Feb. 25, 1880, H. assigned these debts for value to T., who gave notice on the day following to the official liquidator of the co. At the time T. was not aware of any claim or demand by the co. against H. On Feb. 5, 1880, the official liquidator took out a summons against H. for damages for a misfeasance in respect of the 85 shares. On July 28, 1880, an order was made on the summons for payment by H. to the official liquidator of a sum of £2,000. On a summons taken out by T. for payment to him of the dividends on the debts which had been declared in Aug. 1881:—*Held*: the sum of £2,000 could not be set off against the dividends, but they were payable to T.

(2) The mutual credit clause of the Bkpcy. Act, 1869 (c. 71), draws the line at which set-off is to be allowed at the time of the bkpcy., & the rights of the parties as then existing are not altered by subsequent transactions.

(3) Although Jud. Act, 1875 (c. 77), s. 10, in terms only refers to a co. unable to pay its debts, it applies to all cos. in liquidation unless it is shown that the assets are sufficient to pay all the creditors in full.—*Re MILAN TRAMWAYS CO., Ex p. THEYS* (1884), 25 Ch. D. 587; 53 L. J. Ch. 1008; 50 L. T. 545; 32 W. R. 601, C. A.

Annotations:—*As to* (1) *Reid*. Newfoundland Government v. Newfoundland Ry. (1888), 13 App. Cas. 199; *Re Goy, Farmer v. Goy*, [1900] 2 Ch. 149; *Re Leeds & Hanley Theatres of Varieties*, [1904] 2 Ch. 45; *Re Rhodesia Goldfields, Partridge v. Rhodesia Goldfields*, [1910] 1 Ch. 239; *Re Jewell's Settlement, Watts v. Public Trustee*, [1919] 2 Ch. 161. *As to* (2) *Appld. Re Gillespie, Ex p. Reid* (1885), 14 Q. B. D. 963. *Reid*. Alcoy & Gandia Ry. & Harbour Co. v. Greenhill (1897), 76 L. T. 542; *Re Daintrey, Ex p. Mant*, [1900] 1 Q. B. 546. *As to* (3) *Reid. Re Auriferous Properties (No. 2)*, [1898] 2 Ch. 428; *Fryer v. Ewart*, [1902] A. C. 187. *Generally, Mentd. Re Brown & Gregory, Shephard v. Brown & Gregory, Andrews v. Brown & Gregory*, [1904] 1 Ch. 627; *Re Webb (Smithfield, London)*, [1922] 2 Ch. 369.

6443. Rights of parties same whether company carrying on business or in liquidation.—The rights of persons who are both creditors & debtors of a limited co. as to set-off are the same whether the co. be still carrying on business or be in course of being wound up.—*Re AGRA & MASTERMAN'S BANK, ANDERSON'S CASE* (1866), L. R. 3 Eq. 337; 36 L. J. Ch. 73; 15 W. R. 246.

Annotation:—*Reid. Mersey Steel & Iron Co. v. Naylor* (1882), 9 Q. B. D. 648.

6444. Mutuality essential—Money secured for specific purpose—Balance in hand cannot be set-off.—The characteristic of mutuality is as necessary under the mutual credit clause of the Bkpcy. Act, 1883 (c. 52), as under the mutual credit clauses of prior Bkpcy. Acts in order that a set off may be claimed.

Where moneys of a co. are paid to a person for certain specified purposes & after those purposes are satisfied a balance remains with the payee he cannot if a winding up takes place set off a debt

owing to him by the co. unless he can show that the balance was retained by him with the consent of the co.—*Re MID-KENT FRUIT FACTORY*, [1896] 1 Ch. 567; 65 L. J. Ch. 250; 74 L. T. 22; 44 W. R. 284; 40 Sol. Jo. 211; 3 Mans. 59.

Annotations:—*Distd. Re Thorne*, [1914] 2 Ch. 438. *Reid. Monkwearmouth Flour Mill Co. v. Lightfoot* (1897), 13 T. L. R. 327; *Re Daintrey, Ex p. Mant*, [1900] 1 Q. B. 546; *Tilley v. Bowman*, [1910] 1 K. B. 745.

6445. — Money due for misfeasance.—The F. Co. & the T. Co. were both in liquidation; the F. Co. were creditors of the T. Co. for £5,100 on debentures of the T. Co., & were also debtors to the T. Co. for £4,323, the balance of a sum of £12,000 ordered to be paid to the T. Co. for misfeasance. There being no mutual credit, & consequently no set-off of these two debts, the question now raised was how the claim by the F. Co. for £5,100 against the T. Co. was to be adjusted:—*Held*: in distributing the assets of the T. Co. the liquidator must treat the balance of the debt due from the F. Co. as paid, & must divide the resulting total assets of the T. Co. ratably among all the creditors of the T. Co., including the F. Co., the dividend due to the F. Co. being *pro tanto* retained in respect of the debt due from them, which must thus be satisfied before any dividend on the £5,100 could be received by the F. Co.—*Re LEEDS & HANLEY THEATRES OF VARIETIES, LTD.*, [1904] 2 Ch. 45; *sub nom. Re LEEDS & HANLEY THEATRES OF VARIETIES, Ex p. CONSOLIDATED EXPLORATION & FINANCE CO.*, 73 L. J. Ch. 553; 52 W. R. 506; 12 Mans. 191.

Annotations:—*Consd. Re National Live Stock Insee., Re National General Insee.*, [1917] 1 Ch. 628. *Reid. Re Peruvian Ry. Construction Co.*, [1915] 2 Ch. 144.

6446. Claim must be for money—Claim for unliquidated damages.—Resps. bought from applt. co. 5,000 tons of steel of the co.'s make, to be delivered 1,000 tons monthly, commencing Jan. 1881, payment within three days after receipt of shipping documents. In Jan. the co. delivered part only of that month's instalment, & in the beginning of Feb. made a further delivery. On Feb. 2, shortly before payment for these deliveries became due, a petition was presented to wind up the co. Resps. *bonâ fide*, under the erroneous advice of their solr. that they could not without leave of the ct. safely pay pending the petition, objected to make the payments then due unless the co. obtained the sanction of the ct., which they asked the co. to obtain. On Feb. 10, the co. informed resps. that it should consider the refusal to pay as a breach of contract, releasing the co. from any further obligations. On Feb. 15, an order was made to wind up the co. by the ct. The liquidator made no further deliveries, & brought an action in the name of the co. for the price of the steel delivered. Resps. counterclaimed for damages for non-delivery:—*Held*: (1) Jud. Act, 1875 (c. 77), s. 10, imported into the winding up of cos. the rules as to set-off in bkpcy; (2) resps. were entitled, after the winding up order was made, to set off damages for non-delivery against the payments due from them, & to counterclaim for damages in this action.—*MERSEY STEEL & IRON CO. v. NAYLOR, BENZON & CO.* (1884), 9 App. Cas.

PART III. SECT. 36, SUB-SECT. 11.—C. (b).

6445 i. Mutuality essential—Money due for misfeasance.—*Re BAILEY COBALT MINES, LTD., BAILEY COBALT MINES, LTD. v. BENSON* (1919), 44 O. L. R. 1.—CAN.

r. What may be set off—Liability of company—Acquired before winding

up commenced.—A debtor of a bank which is being wound up under the Winding-up Act, R. S. C., c. 129, is entitled to set off against a debt due by him to the bank prior to the commencement of the winding-up proceedings, a liability of the bank acquired by him before the presentation of the petition for the winding up, even though acquired by him for that

purpose after the bank had suspended payment, & with a knowledge of that fact; but such right of set-off does not exist in respect to claims acquired after the presentation of the petition for the winding up.—*MARITIME BANK OF DOMINION OF CANADA v. ROBINSON* (1887), 26 N. B. R. 297.—CAN.

Acquired after winding

Sect. 36.—Winding up by court: Sub-sect. 11, C. (b)

(1882), 9 Q. B. D. 648; *Re Asphaltic Wood Pavement Co.*, Lee & Chapman's Case (1885), 30 Ch. D. 216.

6452. — **Contract entered into after liquidation—Special stipulation in contract.]—***Re Moss Bay Hematite Iron & Steel Co., Ltd.* (1892), 8 T. L. R. 475, C. A.

6453. — **Money paid in respect of ultra vires transaction.]—**The broker of a banking co., acting under the orders of the directors, bought shares in the co. on behalf of the co., & paid for them out of moneys which had been placed in his hands for investment. The shares were transferred into the name of a nominee of the co., & the broker was repaid by being credited with the price paid by him for the shares in his banking account with the co. On the winding up of the co.:—*Held*: the transaction was *ultra vires* of the directors to the knowledge of the broker, & therefore, the liquidator might set off the price of the shares against proof of the balance standing to the credit of the broker.—*Re London, Hamburg & Continental Exchange Bank, Zulueta's Claim* (1870), 5 Ch. App. 444; 39 L. J. Ch. 598; 18 W. R. 778, L. J.

Annotations:—*Consd.* Parker v. Lewis (1873), 28 L. T. 91. *Refd.* *Re Marsoilles Extension Ry., Ex p. Credit Foncier & Mobilier of England* (1871), 7 Ch. App. 161.

6454. — **Money of company recovered without consideration.]—**Two summonses were taken by the official liquidator of a co. against E., one of the directors. The first summons called upon E. to repay a sum of £1,000 paid to him out of the assets of the co., & the second to pay calls upon forty shares of £25 each held by him in the co. The circumstances under which the £1,000 was paid to E. were similar to those under which a like sum was paid to deft. in *Re Canadian Oil Works Corporation, Ltd., Hay's Case*, No. 3202, *ante*, who had been ordered by the Ct. of Appeal to repay the money on the ground that it had been improperly paid to him out of the assets of the co. to enable him to pay for the forty shares which he held as his qualification as a director. In E.'s case, however, it was alleged that E. knew nothing of the arrangement under which the £1,000 was paid into his bankers, & that he paid for the forty shares out of his own money. With respect to the first summons, E. admitted his liability to pay the £1,000, but claimed a set-off in regard to money

which the co. owed him:—*Held*: with regard to the £1,000 paid into his bankers, although that sum came into E.'s hands, without any consideration, the co. could only have enforced their claim by means of an action for money had & received, & in respect to that claim E. was entitled to set off any debt due to him from the co.—*Re Canadian Oil Works Corp., Eastwick's Case* (1876), 45 L. J. Ch. 225; 34 L. T. 84, C. A.

Annotation:—*Mentd.* Anderson's Case, *Re Wedgwood Coal & Iron Co.* (1877), 37 L. T. 560.

6455. — **Money held by bank for purposes of company—Account in name of official of company.]—***Re Hett, Maylor & Co., Ltd.* (1894), 10 T. L. R. 412.

D. Preferential Debts.**(a) In General.**

See 1908 Act, s. 209.

6456. Preferential Payments in Bankruptcy Amendment Act, 1897 (c. 19), s. 2—Whether retrospective.]—Before the above Act received the Royal assent a winding-up order had been made against a co. which had issued debentures creating a floating charge, & a receiver had been appointed in an action for realisation of the debentures:—*Held*: the Act was not retrospective, & did not apply so as to give priority over the debenture-holders to the preferential creditors referred to in the Act.—*Re Waverley Type Writer, D'Esterre v. Waverley Type Writer*, [1898] 1 Ch. 699; 67 L. J. Ch. 360; 78 L. T. 593; 46 W. R. 685; 14 T. L. R. 354; 42 Sol. Jo. 473; 5 Mans. 269.

Annotation:—*Folld.* Weekes v. Kent, Sussex & General Land Soc. (1898), 42 Sol. Jo. 449.

6457. — **—.]—**WEEKES v. KENT, SUSSEX & GENERAL LAND SOCIETY, LTD. (1898), 42 Sol. Jo. 449.

(b) Crown Debts.

See, now, 1908 Act, s. 209.

6458. Under 1862 Act.]—*Re Henley & Co.*, No. 6673, *post*.

6459. Application of bankruptcy rules—Effect of Judicature Act, 1875 (c. 77), s. 10.]—The provisions of Bkpcy. Act, 1883 (c. 52), which take away the priority of the Crown over other creditors in the distribution of assets in bkpcy., have not, by virtue of the assimilating provisions contained in Jud. Act, 1875 (c. 77), s. 10, been incorporated

owing to the co. by a debtor, which had a claim against the trust fund, should be set off against the amount payable to such debtor out of the general assets of the co. in liquidation, & not set off against the sum payable to it out of the trust fund.—*Re Canadian Home Investment Co.*, [1917] 3 W. W. R. 629; 37 D. L. R. 598.—CAN.

d. Effect of defence of set-off.]—A defence of set-off is a defence *in rem* going to the root of the obligation. Such a defence, existing at the time of a session, & valid against the cedent, would be equally effective against a mere cessionary.—*WALKER v. SYFRET*, N. O., [1911] App. D. 141; 5 Biss. & Sm. 799.—S. AF.

PART III. SECT. 36, SUB-SECT. 11.—D. (a).

e. What are — Fixed deposits at interest.]—The co. received money on fixed deposit at interest:—*Held*: the depositors were only ordinary creditors & had no preference.—*Re North Western Farmers' Assocn., Ltd.* (1907), 2 Tas. L. R. 95.—AUS.

f. — Debts due to province.]—On the winding up of a co. debts due by it to a province take priority to all unsecured claims. The claim of the

province is not subject, under Winding-up Act, s. 70, to the claims of clerks & other employees of the co. in respect to wages due to them for three months prior to the winding-up order.—*Re Sid. B. Smith Lumber Co., Ltd.*, [1917] 3 W. W. R. 844.—CAN.

g. — Expenses of interpleader proceedings.]—Creditors' Relief Act, Alta., 1910 (2nd sess.), c. 4, s. 5 (4), gives creditors, contributing to the expense of interpleader proceedings in order to contest adverse claims, a special statutory preference, lien, charge or salvage as a reward for taking the risk & expense involved in the proceedings, & such preference or lien, etc., does not arise simply out of an unsatisfied execution but arises from the statute. These contesting creditors are not deprived of their statutory preference by Dominion Winding-up Act, R. S. C., 1906, c. 144, s. 84, as amended 1908, 7-8 Edw. 7, c. 75, the debtor, a limited co., having been placed in liquidation & the liquidator subsequently making a claim without having participated in the interpleader proceedings.—*Dominion Lumber Co. & Revillon Wholesale, Ltd. v. McKenna Lath & Lumber Co., Ltd.* (LIQUIDATOR), [1922] 3 W. W. R. 751; 70 D. L. R. 323.—CAN.

h. — Claims by foreign creditors — On foreign assets.]—A Cape Ct. made an order recognising the appointment of Transvaal liquidators to a Transvaal co. which had movable & immovable assets in Cape Colony, & declared such liquidators entitled to the sole administration of such assets, without attaching conditions for the protection of local creditors. These liquidators realised the assets & removed the proceeds to the Transvaal:—*Held*: the liquidators in the distribution of the assets among the creditors were bound to recognise a preference to which a Cape creditor was entitled according to Cape law & should rank his claim as preferent in respect to payment from the proceeds realised from the Cape assets.—*CAPE GOVERNMENT v. BALMORAL DIAMOND CO., LTD.* (IN LIQUIDATION), [1908] T. S. 681.—S. AF.

PART III. SECT. 36, SUB-SECT. 11.—D. (b).

k. Money received for game licenses.]—Moneys received for game licenses by two game guardians were by them deposited with a co. of which they were directors, & either paid out as petty cash or deposited in the bank:—*Held*: for such moneys the Crown had a preferential claim in the winding

into 1862 Act, so as to bar the prerogative right of the Crown to issue process & thus to obtain payment in full, in priority over other creditors, in respect of a debt due from a co. in course of liquidation under 1862 Act.—*Re ORIENTAL BANK CORPN., Ex p. R.* (1884), 28 Ch. D. 643; 54 L. J. Ch. 327; 52 L. T. 170; 1 T. L. R. 42.

Annotations:—Consd. Re Webb (Smithfield, London), [1922] 2 Ch. 369. *Refd. Re Art Engraving Co.* (1888), 60 L. T. 381.

6460. — Effect of 1908 Act.]—The joint effect of 1908 Act, ss. 186 & 209, is that the Crown's prerogative right of priority in the payment of debts in the winding up of a co. is extinguished, & the rule in *bkpcy.* obtains in the case of the winding up of an insolvent co.—*FOOD CONTROLLER v. CORK*, [1923] A. C. 647; 92 L. J. Ch. 587; 39 T. L. R. 699; 67 Sol. Jo. 788, H. L.

6461. Crown moneys deposited in bank—Knowledge of bank.]—Letter receivers were in the habit, with the sanction of the Postmaster-General, of paying moneys received on account of the Post Office into a bank to their private account, together with their own moneys, & of drawing cheques both for their own purposes & for payment to the Post Office. The bank had notice that their customers were letter receivers, & drew cheques for Post Office purposes. The bank having gone into liquidation:—*Held*: the Postmaster-General, on behalf of the Crown, was entitled to payment in priority over other creditors of the bank of the balance due upon the letter receivers' accounts in respect of Post Office moneys.—*Re WEST LONDON COMMERCIAL BANK* (1888), 38 Ch. D. 364; 57 L. J. Ch. 925; 59 L. T. 296; 4 T. L. R. 446.

(c) Rates and Taxes.

See 1908 Act, s. 209.

6462. Application of bankruptcy rules—Judicature Act, 1875 (c. 77), s. 10.]—The rule in *bkpcy.* giving local rates due from the *bkpt.* priority over his other debts does not under the above sect. apply to the case of a co. in liquidation.—*Re ALBION STEEL & WIRE CO.* (1878), 7 Ch. D. 547; 47 L. J. Ch. 229; 38 L. T. 207; 42 J. P. 279; 26 W. R. 348.

Annotations:—Consd. Re Printing & Numerical Registering Co. (1878), 8 Ch. D. 535; *Re Bridgewater Engineering Co.* (1879), 12 Ch. D. 181; *Re Land Financiers Assn.* (1881), 16 Ch. D. 373. *Refd. Re Richards* (1879), 11 Ch. D. 676; *Re West of England Bank, Ex p. Brown*

up of the co.—*Re SIMPSON & HUNTER, LTD., Re ALBERTA GOVERNMENT CLAIM*, [1917] 1 W. W. R. 402; 10 Alta. L. R. 310.—**CAN.**

1. Whether Provincial Government claims entitled to priority.]—The effect of British North America Act, 1867 (c. 3), is not to sever all connection between the Crown & the Provinces of the Dominion, so as to make the Government of the Dominion the only Government of the Queen in North America, & reduce the Provincial Governments to the rank of municipal institutions; but the several Provincial Governments remain as Governments of the Queen within the limits prescribed by the Act, & therefore the claim of a Provincial Government in a liquidation is for a Crown debt to which the prerogative attaches, & it is entitled to payment in full in priority to other creditors.—*MARITIME BANK OF CANADA (LIQUIDATORS) v. NEW BRUNSWICK RECEIVER-GENERAL* (1892), 67 L. T. 126.—**CAN.**

m. Priority over judgment creditors.]—*Re ELMSDALE CO.*, 24 C. L. T. 341.—**CAN.**

n. Judgment debt due to Secretary of State in Council.]—*SECRETARY OF STATE FOR INDIA v. BOMBAY LANDING*

& SHIPPING CO. (1868), 5 Bom. O. C. 23.—**IND.**

o. Of bodies receiving government grants—No statutory preference.]—A statutory preference given in insolvency or winding up in favour of liabilities to Govt. does not operate for the benefit of bodies which receive grants from the Govt., where such grants are made & warrants drawn severally to the bodies entitled thereto on whose behalf the receipt is given to the Govt., & such bodies have the management & control of the money allotted to them, the Govt. having no cognisance of the state of their accounts, & may be sued by a person entitled to payment thereof. In such a case the recipient of the money paid by the Govt. for such purposes is not a debtor to Govt., & the bodies entitled to grants are not distributing agents of Govt.—*FOX v. NEWFOUNDLAND GOVERNMENT* (1898), 67 L. J. P. C. 77.—**NFLD.**

PART III. SECT. 36, SUB-SECT. 11.—**D. (c).**

p. Effect of withdrawal of levy—Before winding up.]—The city of Halifax was induced to withdraw a levy, which it was about making upon

(1879), 12 Ch. D. 823; *Re Heywood, Parkington v. Heywood*, [1897] 2 Ch. 593; *Re Webb* (Smithfield, London), [1922] 2 Ch. 369. *Mentd. Re Northern Counties of England Fire Insco., Macfarlane's Claim* (1880), 17 Ch. D. 337; *Re D'Epineuil* (1882), 51 L. J. Ch. 491; *Re Maggi, Winehouse v. Winehouse* (1882), 20 Ch. D. 545; *Re Leng, Tarn v. Emmerson*, [1895] 1 Ch. 652.

6463. Rates assessed before winding up—Possession of liquidator solely for purpose of winding up.]

—On June 1, 1875, improvement commrs. made a highway & improvement rate for their district for the six months ending Dec. 31, 1875, & assessed the property in the occupation of a co. at £375. On July 8, 1875, the co. went into liquidation, & thereupon ceased to carry on business, & the liquidators of the co. entered into possession of the property solely for the purposes of the winding up. The comrs. having claimed payment in full of the rate from the liquidators, as the persons in the occupation of the property for the time being:—*Held*: the liquidators were not bound to pay the rate in full, & the comrs. must prove in the winding up for such sums as they might be entitled to.—*Re WEST HARTLEPOOL IRON CO., LTD., Ex p. WEST HARTLEPOOL IMPROVEMENT COMRS.* (1876), 34 L. T. 568.

Annotations:—Folld. Re Watson, Kipling (1883), 23 Ch. D. 500. *Distd. Re International Marine Hydropathic Co.* (1884), 28 Ch. D. 470. *Dbtd. Re National Arms & Ammunition Co.* (1885), 28 Ch. D. 474; *Re Blazer Fire Lighter*, [1895] 1 Ch. 402. *Refd. Re Albion Steel & Wire Co.* (1878), 38 L. T. 207.

6464. Preferential Payments in Bankruptcy Act, 1888 (c. 62)—Whether preference over secured creditors.]—The above Act does not give any priority to parochial or other local rates as against debenture-holders or other secured creditors.—*RICHARDS v. KIDDERMINSTER OVERSEERS, RICHARDS v. KIDDERMINSTER CORPN.*, [1896] 2 Ch. 212; 65 L. J. Ch. 502; 74 L. T. 483; 44 W. R. 505; 12 T. L. R. 340; 4 Mans. 169.

Annotations:—Refd. Re Marriage, Neave, North of England Trustee, Debenture & Assets Corpn. v. Marriage, Neave, [1896] 2 Ch. 663; *National Provincial Bank of England v. United Electric Theatres* (1915), 85 L. J. Ch. 106.

6465. 1908 Act, s. 209—Preferential rights against debenture-holders.]—A co. limited by guarantee was in May, 1913, ordered to be wound up compulsorily. In 1912 the co. had issued a debenture giving a floating charge over its property to secure advances made to it. These were further secured by a trust deed which comprised all the property of the co., except the sums

the goods of deft. co. for three years' taxes then due, by the representation of the principal creditor of the co. that certain arrangements were being made in reference to the taking over & continuance or winding up of the business, & that further time was desired, & that the taxes would be paid in any case. Subsequently, a petition was presented under Winding-up Act for the winding up of the co.:—*Held*: when the city abandoned its levy & the winding-up proceedings intervened, & general creditors' rights accrued, the city had no claim or right to priority over other creditors, except under the provisions of the city charter, as to rates & taxes for the then current year.—*HALIFAX CITY v. KANE & CO., LTD.* (1915), 49 N. S. R. 93.—**CAN.**

q. Effect of failure to distrain—Before winding up.]—The claim of a municipal corpn. for taxes upon a business assessment, of an incorporated trading co. is to be treated by the liquidator of the co. under a winding-up order as the ordinary claim of a creditor, & not as a preferential claim upon the co.'s assets, the corpn. not having distrained, as they might have, before the winding-up order.

Semle: sects. 20, 23, & 84 of

Sect. 36.—Winding up by court: Sub-sect. 11, D. (c) & (d).]

payable by the members of the co. under their guarantees in the event of the co. being wound up. No other debenture was issued. In July, 1913, the trustees of the deed, with the concurrence of the debenture-holder, sold the property comprised in the deed, & realised a sum which after payment of expenses was not enough to satisfy the amount secured by the debenture. Meanwhile rates became due in respect of club premises occupied by the co. The liquidator of the co. received from the guarantors certain moneys which after payment thereof of the costs of the liquidation left a balance of only £1 8s. The liquidator had no other assets of the co. in his hands. In an action by the rating authority & the co. as joint plffs. against the debenture-holder for the amount due for rates:—*Held*: the effect of the above sect. is that the costs & expenses of the winding up are payable out of the assets of the co. not comprised in the debenture security before any payment by the liquidator in respect of preferential debts, & the whole amount due for rates, less the sum of £1 8s., was payable by the debenture-holder out of the proceeds of the sale of the property sold by the trustee without prejudice to the debenture-holder's right to be repaid from any further moneys received by the liquidator from the guarantors.—*WESTMINSTER CORPN. v. CHAPMAN*, [1916] 1 Ch. 161; 85 L. J. Ch. 334; 114 L. T. 63; 80 J. P. 74; [1916] H. B. R. 12.

Restraint of distress for rates & taxes.]—*See* Sub-sect. 13, E. (c), *post*.

(d) Wages of Clerks and Servants.

See 1908 Act, s. 209.

6466. Application of bankruptcy rules—Judicature Act, 1875 (c. 77), s. 10.]—The rule in bkpcy. that servants' wages shall be paid in priority to all other debts is, by the above sect. extended to windings up.—*Re LAND FINANCIERS ASSOCN.* (1881), 16 Ch. D. 373; 50 L. J. Ch. 201; 43 L. T. 753; 29 W. R. 277.

*Annotations:—***Consd.** *Re Leng, Tarn v. Emmerson*, [1895] 1 Ch. 652. **Refd.** *Re Maggi, Winehouse v. Winehouse* (1882), 20 Ch. D. 545; *Re Heywood, Parkington v. Heywood*, [1897] 2 Ch. 593.

6467. — Companies Act, 1883 (c. 28), s. 4—Winding up commenced before Act in force.]—The above sect., which directs that, in the distribution of the assets of any co. being wound up, there shall

be paid, in priority to other debts, all wages or salary of any clerk or servant in respect of service rendered to the co. during four months before the commencement of the winding up not exceeding £50, applies to the case of a winding up commenced before the Act came into force. Where a winding-up order had been made before the commencement of the Act:—*Held*: the co.'s former secretary, to whom arrears were owing, being a "clerk or servant" within the sect., was entitled to payment in full of four months' salary; but that such payment was not to disturb past dividends.—*Re ANGLO-FRENCH CO-OPERATIVE SOCIETY, LTD., Ex p. PELLY* (No. 2) (1884), 50 L. T. 754; 32 W. R. 748.

*Annotations:—***Refd.** *Re Waverley Type Writer, D'Esterre v. Waverley Type Writer*, [1898] 1 Ch. 699. **Mentd.** *Re Bassett, Ex p. Lewis* (1895), 43 W. R. 427.

6468. Date from which preferential right accrues—Voluntary winding up succeeded by compulsory order.]—Where a voluntary winding up of a co. is succeeded by a compulsory order, the four months for which a clerk or servant can claim preferential payment of wages are the four months next before the resolution for a voluntary winding up. Sect. 209 of 1908 Act deals with the winding up of a co. as one continuous process which may be commenced as a voluntary & continued as a compulsory winding up, & there is nothing to show that persons who have acquired preferential rights under the voluntary winding up are to be deprived of them if a compulsory order is made.—*Re HAVANA EXPLORATION CO., LTD., NATHAN'S CLAIM*, [1916] 1 Ch. 8; 85 L. J. Ch. 174; 114 L. T. 16; [1916] H. B. R. 37, C. A.

6469. Who is clerk or servant—Managing director.]—A managing director of a co. is not a "clerk or servant" within Preferential Payments in Bkpcy. Act, 1888 (c. 62), s. 1 (1) (b).—*Re NEWSPAPER PROPRIETARY SYNDICATE, LTD., HOPKINSON v. NEWSPAPER PROPRIETARY SYNDICATE, LTD.*, [1900] 2 Ch. 349; 69 L. J. Ch. 578; 83 L. T. 341; 16 T. L. R. 452; 8 Mans. 65.

*Annotations:—***Refd.** *Woods v. Winskill*, [1913] 2 Ch. 303; *Moriarty v. Regents Garage & Engineering Co.*, [1921] 1 K. B. 423.

6470. — Secretary.]—*Re ANGLO-FRENCH CO-OPERATIVE SOCIETY, LTD., Ex p. PELLY* (No. 2), No. 6467, *ante*.

6471. — Performing duties by another.]—A secretary to a co. may be a "clerk or servant" within Preferential Payments in Bkpcy. Act, 1888 (c. 62), s. 1 (1) (b), but a secretary who does not

Winding-up Act, R. S. C., expressly prevented a liquidator from allowing a preference or priority, unless impressed upon assets before such assets were taken possession of by him.—*Re FAULKNER, LTD., CITY OF OTTAWA'S CLAIM* (1915), 34 O. L. R. 536; 9 O. W. N. 118.—**CAN.**

r. Business tax—Under city charter.]—A liquidator appointed to wind up a co. under R. S. C. 1906, c. 144, is not an assignee for the benefit of creditors within Winnipeg Charter, 1 & 2 Edw. VII. c. 77, sect. 382, so that there is no priority under that sect. in favour of the city for the business tax imposed upon the co. as against other debts.—*Re IDEAL HOUSE FURNISHERS & WINNIPEG CITY* (1909), 18 Man. L. R. 650; 10 W. L. R. 717.—**CAN.**

PART III. SECT. 36, SUB-SECT. 11.—D. (d).

a. Who is clerk or servant—Commercial traveller.]—Commercial travellers are within "clerks & other persons" mentioned in Dominion Winding-up Act, s. 70, & as such are entitled to be collocated by special

privilege over other creditors for their salary, including sums paid for expenses.—*Re MORLOCK & CLINE, LTD., Ex p. SARVIS & CANNING* (1911), 18 O. W. R. 545; 2 O. W. N. 706; 23 O. L. R. 165.—**CAN.**

t. — Winding-up Ordinance, 1903, s. 10.]—Under sect. 10 of Winding-up Ordinance, 1903, a salesman, & *semble*, also a secretary, of the co. is entitled to three months' wages or salary in priority to the general creditors. A managing director is not so entitled.—*Re WALKER (S. E.) Co.* (1913), 25 W. L. R. 164.—**CAN.**

a. — Director—Performing duties additional to those as a statutory officer.]—B., a director & president of an incorporated & manufacturing co., & R. a director & secretary-treasurer, were employed by the co. at annual salaries, under bye-laws & resolutions binding upon the co. The co. becoming insolvent made an authorised assignment under Bkpcy. Act. Both B. & R. devoted their whole time up to the date of the assignment to the service of the co. B. acted as a purchasing agent & general manager, & R. not only as secretary-treasurer,

but as a book-keeper, etc. When the assignment was made there was owing to B. & R. for salary, a sum in excess of three months' salary, & nothing had been paid to them for services rendered during the three months immediately preceding the date of the assignment:—*Held*: they were entitled to priority for wages in respect of services rendered to the bkpt. co. during the three months before the date of the assignment.

The mere fact that a director who claims priority for wages is a superior officer of a co. does not of itself deprive him of priority. The real question is, whether the person making the claim has contracted to render service to the co. beyond what would come within the scope of his duties as a statutory officer such as a director.—*Re EASTERN ONTARIO MILK PRODUCTS CO.*, [1923] 1 D. L. R. 591; 52 O. L. R. 67; 2 C. B. R. 334.—**CAN.**

b. Assignment by company prior to winding up.]—Where a co. which has made an assignment under Assignments Act, 1907 (c. 6), is ordered to be wound up under Winding-up Act, R. S. C., c. 144, the priority given by

give his whole time to the service of the co. & discharges the general duties of his office by a clerk appointed & paid by himself is not a "clerk or servant" within the sub-sect.—*CAIRNEY v. BACK*, [1906] 2 K. B. 746; 75 L. J. K. B. 1014; 96 L. T. 111; 22 T. L. R. 776; 50 Sol. Jo. 697; 14 Mans. 58.

Annotations:—*Mentd. Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979; *Sinnott v. Bowden*, [1912] 2 Ch. 414.

6472. —.] — *Re CALLENDER'S PAPER MANUFACTURING CO.* (1908), Halsbury's Laws of England, Vol. V., p. 518.

6473. — *Opera singer—Paid by performance.* —An artist engaged to sing during an opera season at a certain sum for each performance:—*Held*: a "servant" & his remuneration "wages or salary in respect of services rendered," within Preferential Payments in Bkpcy. Act, 1888 (c. 62), s. 1 (1) (b), so as to entitle him to priority of payment up to £50 upon the winding up of the co. by whom he was engaged.—*Re WINTER GERMAN OPERA, LTD.* (1907), 23 T. L. R. 662.

6474. — *Employment at weekly wage for regular hours part of week.*—B. was a chemist, & in July, 1910 was engaged by M. & Co. for nine months at a weekly wage to produce a specified series of formulæ for the manufacture of soaps & perfumes. The contract was to be considered as completed the moment B. had produced all the formulæ, & if completed before the end of nine months B. was still to be paid all the wages for the

remainder of the nine months. B. had to attend on only three specified days of each week, but for regular hours, the remainder of the week being at his disposal, & he had in fact another regular engagement with another firm. B.'s wages fell into arrear, & in Mar. 1911, a winding-up order was made against M. & Co., & at that date there was due to B. £93 for arrears of wages. B. claimed £50 from the liquidator as a preferential creditor under 1908 Act, s. 209 (1):—*Held*: B. was a clerk or servant within the sub-sect. & was a preferential creditor for £50.—*Re MORISON (G. H.) & Co., LTD.* (1912), 106 L. T. 731.

6475. — *Contributor to periodical—Part time employment at fixed salary.*—The arts. of a co. that published a weekly periodical provided that no director should be disqualified by his office from contracting with or being employed by the co. in the capacity of contributor, editor, or otherwise; & that a director might hold any other office or place under the co. in conjunction with his office of director. R. was a director of the co. & was also dress editress of the periodical at a fixed salary *per annum*, & her duties occupied practically the whole of her time. H. was employed by the co. at a fixed salary *per annum* to supply fashion drawings for the periodical, & the co. had the first call on her services & her work occupied most of her time, but occasionally she did work for other publishers. P. was employed by the co. at a fixed salary *per annum* to supply

Assignments Act, s. 70, to claims for wages over the claims of other creditors is not divested or lost, because of the winding-up proceedings, although the wages in question did not accrue during the three months next previous to the date of the winding-up order.—*Re PIONEER TRACTOR CO.*, [1918] 1 W. W. R. 329.—CAN.

c. —.] — Employees of a co. which had assigned for the benefit of creditors:—*Held*: entitled to rank as preferential creditors for wages to the extent allowed under Assignments Act, 1907, c. 6, notwithstanding that they had taken from the co. promissory notes for the amount of such wages; the assignee not establishing, as the burden upon him required, any agreement that the taking of the notes should constitute payments of the debts; the fact that the employees were also shareholders or even directors of the co., no preference being declared for salaries as directors, should not deprive them of the priority given by the said Act.—*ARMSTRONG v. WATSON (ASSIGNEE OF EUGENE RESTAURANTS, LTD.)*, [1919] 1 W. W. R. 956; 45 D. L. R. 501.—CAN.

d. *Maritime lien.*—Where the former owner of the ship is a limited co. which has gone into liquidation, the crew are not entitled to immediate payment of their wages, up to the date when the new owners took possession, in the absence of proof, that the liquidation was compulsory.—*CASEY v. THE DECCAN*, [1906] S. A. L. R. 125.—AUS.

e. — *Leave to proceed in rem in Exchequer Court.*—B. was master of a ship owned by a joint-stock co., & navigating inland waters. The co. became insolvent, & winding-up proceedings were taken. B., without the advice of counsel, filed a claim for wages under the winding-up proceedings. In this claim he did not mention any security. He afterwards applied for leave to withdraw this claim & file another claiming a maritime lien upon the ship for wages, & also for leave to proceed *in rem* in the Exchequer Ct. to enforce the lien:—*Held*: leave should be granted.—*Re LAKE WINNIPEG TRANSPORTATION,*

ETC. CO., LTD., *BERGMAN'S CLAIM* (1892), 8 Man. L. R. 463.—CAN.

f. *Mechanic's lien.*—A mechanic's lien is a preferential claim under Winding-up Act.—*Re EMPIRE BREWING & MALTING CO., ROURKE & CASS' CLAIM* (1891), 8 Man. L. R. 424.—CAN.

g. —.] —The holders of mechanics' liens filed against mineral claims owned by a co., which was subsequently ordered to be wound up, recovered judgment thereon in a county ct. on the day on which the winding-up order was made. In the list of creditors made up by the liquidator the lien claimants did not appear as secured creditors, but as judgment creditors. The winding-up order was made on the petition of H., a surveyor, who held the field notes of the survey made by him, & who afterwards proposed that he advance the moneys necessary to obtain Crown grants of the claims, & retain a lien on them until he was paid; the liquidator applied to the ct. for leave to accept the proposal, & an order was made, without notice to the lien-holders, giving H. a first charge on the claims for his debt & the amount advanced by him; afterwards on H.'s application, an order was made, on notice to the liquidator, but without notice to the lien-holders, that the claims be sold to pay his charge. The lien-holders did not appeal from either of the last orders, but applied for leave to enforce their security, & that they be declared to have priority over H.:—*Held*: the order giving H. priority over the lien-holders was made without jurisdiction, & the lien-holders were not bound by it.—*Re IBEX MINING & DEVELOPMENT CO. OF SLOCAN, LTD. LIABILITY* (1903), 9 B. C. R. 557; 23 C. L. T. 301.—CAN.

h. *Woodmen's lien.*—The Winding-up Act, R. S. C. 1906, c. 144, does not, by any of its provisions, take away the right of lien-holders, not being creditors of the co., under Woodmen's Lien Act, C. S. N. B. 1903, c. 148, to enforce their liens for labour & services against the property of a co. in liquidation.—*Re GOOD & NEPISQUIT LUMBER CO.* (1912), 12 E. L. R. 89.—CAN.

k. *Payments to servants contracting*

independently.—The claimants were each employed by the co. to haul coal from the co.'s mine to Edmonton, at a certain fixed sum per ton hauled. In doing so it was intended that each should use his own waggon & team, & they did so. Neither was under obligation to haul any specific quantity. They could stop work or be discharged at any time:—*Held*: what they earned in this way was "wages," & they were entitled to rank as preferred creditors in respect of the same, under Cos. Winding-up Ordinance.—*Re WESTERN COAL CO., LTD., WHITE & SUTHERLAND'S CLAIM* (1913), 25 W. L. R. 26.—CAN.

l. *Effect of garnishee order.*—H., an employee of the C. P. Railway, Moose Jaw Divisions, was placed upon the list of contributors in proceedings under Winding-up Act, Canada, in the Supreme Ct. of Ontario, a province where he had never lived. Subsequently liquidator served a garnishee order *nisi* upon the C. P. Railway, in Ontario, & the co. refused to pay H. his wages earned:—*Held*: the garnishee order *nisi* was no answer to H.'s claim for wages, & an order for payment & distress was properly made under Masters & Servants Act.—*R. (HENDERSON) v. CANADIAN PACIFIC RY. CO.* (1916), 34 W. L. R. 1147.—CAN.

m. *Effect of Bank Act, s. 88 (7).*—Where a liquidator takes a transfer from a bank of security held by it under above sect., the wages in respect to which the employees are entitled to priority are, under Winding-up Act, s. 70, such as have accrued to them during the three months next previous to the date of the winding-up order, but where the liquidator does not take over such security & the bank realised its security, it must, under above sub-sect., treat the wages of the employees to the extent of three months, independent of the date when they accrued, as a prior charge to its own claim.—*Re ALBERTA ORNAMENTAL IRON CO. & IMPERIAL BANK*, [1917] 1 W. W. R. 126.—CAN.

n. *Wages of contractor.*—A contractor employed by a co. & who works with his own men, though

Sect. 36.—Winding up by court: Sub-sect. 11, D. (d) & E. (a)

weekly articles & other information for the periodical, but she also wrote for other publishers. R., H., & P. claimed to be preferential creditors of the co. for arrears of salary due to them respectively at the commencement of the winding up:—*Held*: R.'s office of director did not preclude her employment in any other capacity; she was a "clerk or servant" of the co. within 1908 Act, s. 209 (1) (b), & was entitled to preferential payment; H. & P. were merely contributors to the periodical & not "clerks or servants" of the co. within the sub-sect., & were not entitled to preferential payment.—*Re BEETON & Co., LTD.*, [1913] 2 Ch. 279; 82 L. J. Ch. 464; 108 L. T. 918; 57 Sol. Jo. 626; 30 Mans. 222.

Annotation:—*Mentd.* University of London Press v. University Tutorial Press, [1916] 2 Ch. 601.

6476. — *Editor.*—*Re BEETON & Co., LTD.*, No. 6475, *ante*.

6477. — *Employment not exclusive—& not subject to control of employer.*—Where a person is doing work for another away from the latter's place of business, & is not exclusively employed by the latter, & is only bound to do a particular class of work, & is not working under the control or subject to the commands of the latter, these four circumstances & possibly the last one alone, will prevent the person employed from being a "clerk or servant" within 1908 Act, s. 209. This ruling applies so as to exclude outside contributors to a newspaper from the right to preferential payment in the winding up of a co. & in proceedings to realise debentures secured by a floating charge.—*Re ASHLEY & SMITH, LTD., ASHLEY v. THE Co.*, [1918] 2 Ch. 378; 88 L. J. Ch. 7; 119 L. T. 674; 34 T. L. R. 585.

E. Secured Creditors.

(a) Who is a Secured Creditor.

6478. Meaning of "secured creditor"—Judicature Act, 1875 (c. 77), s. 10.—The above sect. by which in the winding up of cos. the same rules are to prevail "as to the respective rights of secured

subject to the co.'s control, is not entitled to a preferential claim for wages upon the winding up of the co.—*Re DOMINION SHIPBUILDING & REPAIR Co., HENSHAW'S CLAIM* (1921), 70 D. L. R. 869; 51 O. L. R. 144; *reversg.* 64 D. L. R. 420; 50 O. L. R. 350.—**CAN.**

o. Personal liability of directors—Manitoba Joint-Stock Cos. Incorporation Act, s. 276.—A co. incorporated under above Act was in process of being wound up. P., a servant of the co., applied for leave under Winding-up Act, s. 16, to bring an action against the co. for arrears of wages, so that he might on the execution being returned unsatisfied proceed to sue the directors under sect. 276 of above Act:—*Held*: the case was one in which leave ought to be given.—*Re LAKE WINNIPEG TRANSPORTATION, LUMBER & TRADING Co., PAULSON'S CLAIM* (1891), 7 Man. L. R. 602.—**CAN.**

p. — Judgment already recovered against company.—In a statutory action against a director for wages alleged to be due to an employee, the judgment which the employee has recovered against the co. is *prima facie* proof of the maximum amount which may be recovered; but, except in this respect, debt. director is not bound by it. The action is upon the original debt.—*GUENARD v. COE* (1914), 28 W. L. R. 250.—**CAN.**

q. — Whether liability joint or several—Ontario Companies Act, 2

Geo. V. (c. 31), s. 96.—It is not necessary to join all directors of a co. as debts. in a personal action against one or more of the directors for the payment of wages.

An action was begun within a year from debts. having ceased to be directors; & after the expiration of the year, it was discontinued against debt., K., who was resident in a foreign country. The action was for wages recovered in a judgment against the co. of which debts. were directors:—*Held*: debts.' liability under above sect. was several as well as joint & pltf. was entitled to sue them separately.—*REUCKWALD v. MURPHY* (1914), 32 O. L. R. 133.—**CAN.**

r. — Of theatrical company—For wages of actress.—An actress engaged by a theatrical co., incorporated under Ontario Cos. Act, R. S. O. 1914, c. 78, at a weekly salary, under a written contract, to play such parts as might be assigned to her, is not a "servant" of the co. within sect. 98 (1) of the Act.—*RYAN v. WILLS* (1918), 43 O. L. R. 624.—**CAN.**

s. — Validity of joint action by employees having separate claims.—Employees of a co. having separate claims for wages against it are not improperly joined in bringing an action against the directors of the co. to enforce the statutory liability for the wages of workmen.—*RISLER v. McTEER*, [1919] 1 W. W. L. 746.—**CAN.**

& unsecured creditors, & as to debts & liabilities proveable," as prevail under the law of bkpcy., renders Bkpcy. Act, 1869 (c. 71), s. 87, applicable to the winding up of a co. If the property of a co. be sold under an execution, & a winding-up petition be presented within fourteen days of the sale & a winding-up order made upon it, the proceeds of the sale must be handed over to the official liquidator.

The term "secured creditor" is not limited to one who holds a security by contract, but embraces the case of a security given by interposition of a ct.—*Re PRINTING & NUMERICAL REGISTERING Co.* (1878), 8 Ch. D. 535; 47 L. J. Ch. 580; 38 L. T. 676; 26 W. R. 627.

Annotations:—*Consd.* *Re Bridgewater Engineering Co.* (1879), 12 Ch. D. 181; *Re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335; *Re Withernsea Brickworks* (1880), 16 Ch. D. 337. *Refd.* *Re Richards* (1879), 11 Ch. D. 676; *Re Land Financiers Assocn.* (1881), 16 Ch. D. 373; *Re Panther Lead Co.* (1896), 65 L. J. Ch. 499. *Mentd.* *Re West of England Bank, Ex p. Brown* (1879), 12 Ch. D. 823; *Re Northern Counties of England Fire Insce., Macfarlane's Claim* (1880), 17 Ch. D. 337; *Re Normanton Iron & Steel Co.* (1881), 50 L. J. Ch. 223.

6479. Director—Personal guarantee of repayment of advances to company—Resolution of company authorising charge on property of company—No charge registered.—In the winding up of a co. registered under 1862 Act, directors will not be allowed to set up against the general creditors a mtge. of, or charge on, the property of the co. not registered pursuant to sect. 43 of the Act. A co., whose arts. of assocn. authorised the directors, with the sanction of a resolution of the co., to borrow money on mtge., being indebted to their bankers on an overdrawn account, the payment of which some of the directors had personally guaranteed, passed a resolution authorising the directors to raise money on a mtge. of the property of the co., to be applied in discharging the liabilities of the co., or any director or other person on behalf of the co. to the bankers; the resolution also confirmed the acts of the directors & any sureties of the co. in reference to the creation or continuance of the liabilities to the bankers, & declared that the bankers, directors & sureties should stand in the same position as to their

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t. Whether depositors on fixed deposit at interest.—A co. received money on fixed deposit at interest:—*Held*: the depositors were only ordinary creditors & had no preference.—*Re NORTH WESTERN FARMERS' ASSOCN., LTD.* (1907), 2 Tas. L. R. 95.—**AUS.**

a. Mortgagee—Whether court can confirm sale—Until security has been valued.—The ct. has no power to confirm a sale by a mortgagee from the co. until the security has been valued, & offered to the liquidator at that value.—*Re THUNDER HILL MINING Co.* (1894), 3 B. C. R. 351.—**CAN.**

b. Lien-holders.—The holders of mechanics' liens filed against mineral claims owned by a co. which was subsequently ordered to be wound up, recovered judgment thereon in the county ct. the same day the winding-up order was made. In the list of creditors made up by the liquidator the lien claimants did not appear as secured creditors, but as judgment creditors. The winding-up order was made on the petition of H., a surveyor, who held the field notes of the survey made by him & who afterwards proposed that he advance the moneys necessary to obtain Crown grants of the claims & retain a lien on them until he was paid; the liquidator applied to the ct. for leave to accept the proposal & an order was made, without

claims against the co. as if such liabilities had been originally loans specially authorised & secured by mtge. under the arts. No mtge. was executed, the resolution was not communicated to the bankers, & no charge on the property of the co. in favour of the bankers or the guaranteeing directors was registered under the 1862 Act, s. 43:—*Held*: in the winding up of the co., the resolution not having been communicated to the bankers did not entitle them to a charge on the property of the co.; & assuming the resolution to have created a charge in favour of the guaranteeing directors, their omission to register it disentitled them to set it up against the general creditors of the co.—*Re WYNN HALL COAL CO., Ex p. NORTH & SOUTH WALES BANK* (1870), L. R. 10 Eq. 515; 39 L. J. Ch. 695; 23 L. T. 348; 18 W. R. 1128.

Annotations:—*Consd.* *Re General Provident Assce., Ex p. National Bank* (1872), L. R. 14 Eq. 507; *Re General South American Co.* (1876), 2 Ch. D. 337. *Dbtd. & N.F.* *Re Globe New Patent Iron & Steel Co.* (1879), 40 L. T. 390; *Wright v. Horton* (1887), 12 App. Cas. 371. *Refd.* *Re Native Iron Ore Co.* (1876), 2 Ch. D. 345; *Re South Durham Iron Co., Smith's Case* (1879), 11 Ch. D. 579.

6480. Vendor—Lien for unpaid purchase-money.—It was agreed between A. & a trustee for an intended co. that as soon as the co. was formed & had adopted the agreement, A. should sell & the co. purchase A.'s interest in a leasehold brickfield, & that on an assignment to the co. being executed the co. should pay him as the purchase-money £8,000, £6,000 in cash & £2,000 in fully paid-up shares. The property was assigned to the co. by a deed which stated the consideration to be £6,000, to be paid to A. as thereafter mentioned, viz., 50 per cent on all sums of money to be received from sale of shares, & 50 per cent on all moneys borrowed by the co. by way of capital until the £6,000 was paid. The co. became abortive; no money was ever received by sale of shares or borrowed, & ultimately the co. was ordered to be wound up:—*Held*: the nature of the contract was such as to exclude vendor's lien & A. had no lien on the leasehold premises.—*Re BRENTWOOD BRICK & COAL CO.* (1876), 4 Ch. D. 562; 36 L. T. 343; 25 W. R. 481; *sub nom. Re BRENTWOOD BRICK & COAL CO., ROWE'S CLAIM*, 46 L. J. Ch. 554, C. A.

Annotation:—*Refd.* *Barker v. Stickney*, [1918] 2 K. B. 356.

6481. Judgment creditor—Garnishee order—Obtained before but served after winding up.—A judgment creditor who has obtained a garnishee order *nisi* to attach debts due to his debtor does not obtain any charge on the debts until service of the order *nisi* on the garnishees. Where a judgment creditor of a co. obtained a garnishee order

notice to the lien-holders, giving H. a first charge on the claims for his debt & the amount advanced by him; afterwards on H.'s application, an order was made, on notice to the liquidator but without notice to the lien-holders, that the claims be sold to pay his charge. The lien-holders did not appeal from either of the last orders, but applied for leave to enforce their security, & that they be declared to have priority over H.:—*Held*: the order giving H. priority over the lien-holders was made without jurisdiction, & the lien-holders were not bound by it.—*Re IBEX MINING & DEVELOPMENT CO. OF SLOGAN, LTD. LIABILITY* (1903), 9 B. C. R. 557.—CAN.

c. *Creditors contributing to expenses of interpleader proceedings—In order to contest adverse claims.*—*DOMINION LUMBER CO. & REVILLON WHOLESALE, LTD. v. MCKENNA LATH & LUMBER CO., LTD. (LIQUIDATOR)*, [1922] 3 W. W. R. 751.—CAN.

d. *Judgment creditor appointed receiver*

—*Whether secured creditor—No further steps taken to enforce payment.*—A judgment creditor of a limited co. obtained an order appointing him receiver over the beneficial interest of the co. in a ship, subject to incumbrances. The creditor took no further step to enforce payment, & a winding-up order was made:—*Held*: the receivership order did not make the judgment creditor a secured creditor of the co.—*Re LOUGH NEAGH SHIP CO., Ex p. THOMPSON*, [1896] 1 I. R. 29; 30 I. L. T. Jo. 70.—IR.

e. ————]—In the compulsory winding up of an insolvent co. in the Ct. of Ch. under Co.'s Acts, 1862–1867, the effect of Judicature (Ireland) Act, 1877 (c. 57), s. 28 (1), is that the rules of bkpcy. as to secured & unsecured creditors in liquidation shall prevail & consequently judgment creditors of the co. in liquidation who had taken no active steps to enforce their securities are not entitled to be paid in priority to the ordinary

against a debtor of the co. & before the order *nisi* was served, a petition was presented to wind up the co. on which an order was afterwards made:—*Held*: the creditor was not a secured creditor at the time of the commencement of the winding up.—*Re STANHOPE SILKSTONE COLLIERIES CO.* (1879), 11 Ch. D. 160; 48 L. J. Ch. 409; 40 L. T. 204; 27 W. R. 561, C. A.

Annotations:—*Appl.* *Croshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154. *Consd.* *Re National United Investment Corpn.*, [1901] 1 Ch. 950. *Refd.* *Hamer v. Giles, Giles v. Hamer* (1879), 11 Ch. D. 942; *Galbraith v. Grimshaw & Baxter*, [1910] 1 K. B. 339.

6482. ——— Service before winding-up petition.—Sect. 45 Bkpcy. Act, 1883 (c. 52), restricting the rights of creditors under attachments of debts, is not made applicable by Jud. Act, s. 10, to the winding up of insolvent cos., & it is still the law, that a judgment creditor who has obtained a garnishee order *nisi* to attach a debt owing by a co. to his debtor, & has served the order on the co. before the commencement of its winding up, is a secured creditor & entitled to the debt as against the liquidator.—*Re NATIONAL UNITED INVESTMENT CORPN.*, [1901] 1 Ch. 950; 70 L. J. Ch. 461; 84 L. T. 766; 17 T. L. R. 396; 8 Mans. 399.

Annotation:—*Distd.* *Geisse v. Taylor* (1905), 74 L. J. K. B. 912.

6483. ——— Order for receiver.—A judgment creditor of a co. obtained an order appointing a receiver of the moneys receivable in respect of the debtor's interest in a ship & her freight without prejudice to the rights of prior incumbrancers. Before the order was acted upon an order was made to wind up the co.:—*Held*: the order appointing a receiver did not confer on the judgment creditor any charge on the debtor's property so as to make him a secured creditor, & was not equivalent to a seizure of the property in execution.—*CROSHAW v. LYNDHURST SHIP CO.*, [1897] 2 Ch. 154; 66 L. J. Ch. 576; 76 L. T. 553; 45 W. R. 570; 41 Sol. Jo. 508.

Annotations:—*Consd.* *Giles v. Kruyer*, [1921] 3 K. B. 23. *Mentd.* *Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727.

6484. Landlord—No distress put in before winding up.—*Re OAK PITS COLLIERY CO., No. 6663, post.*

—*See, also, No. 6643, post.*

(b) Amount of Proof.

6485. Effect of Judicature Act, 1875 (c. 77), s. 10—Winding up commenced before the Act.—*Re SUCHE (JOSEPH) & CO. (LTD.)*, No. 6400, *ante*.

6486. ——— When secured creditor must elect as to amount of proof.—In the winding up of a co.,

creditors of the co.—*Re LEINSTER CONTRACT CORPN., LTD.*, [1903] 1 I. R. —IR.

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f. *On failure of scheme of arrangement—Entitled to prove for whole of original claim—Less amount received under scheme.*—On the failure of a co. to carry out a scheme of arrangement which provided for payment of 12s. 6d. in the pound to the creditors, the creditors bound by the scheme were remitted to their original rights, & were at liberty to prove in the subsequent liquidation of the co. for the full amount of their original claims giving credit, however, for any amounts received under the scheme.—*Re ALFRED SHAW & CO.* (1897), 8 Q. L. J. 48.—AUS.

g. *Creditor's valuation of security—Cannot be withdrawn & security cannot be enforced.*—A creditor having valued his security against a co. upon

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secured creditors, whose position is, by the above sect. assimilated to the position of secured creditors in bkpcy., are not bound to make the election required in bkpcy. until the time arrives for proof of debts. They are therefore entitled to appear on the hearing of the winding-up petition without election.—*Re CARMARTHENSHIRE ANTHRACITE COAL & IRON CO.* (1875), 45 L. J. Ch. 200; 24 W. R. 109.

6487. Whether proof for total sum due at time of claim—Without valuing securities.]—(1) When a co. is being wound up under 1862 Act, a creditor holding security is entitled to prove for the whole amount that is due to him, & not merely, as in bkpcy., for the balance remaining due after realising or valuing his security.

(2) A secured creditor is entitled to prove for the amount due at the time when his claim is sent in, without regard to securities which have been realised by him between the sending in his claim & its being adjudicated upon.—*Re BARNED'S BANKING CO., KELLOCK'S CASE, Re XERES WINE SHIPPING CO., Ex p. ALLIANCE BANK* (1868), 3 Ch. App. 769; 39 L. J. Ch. 112; 18 L. T. 671; 16 W. R. 919, L. J.

Annotations:—As to (1) Distd. Re BARNED'S BANKING CO., Coupland's Claim (1869), 5 Ch. App. 167; *Re Humber Ironworks & Shipbuilding Co., Warrant Finance Co.'s Case* (1869), 4 Ch. App. 643. *Expld. Re BARNED'S BANKING CO., Forwoods' Claim* (1869), 5 Ch. App. 18. *Follid. Re BARNED'S BANKING CO., Johnston's Case* (1869), 20 L. T. 266. *Consd. Re Contract Corp., Ebbw Vale Co.'s Case* (1869), 5 Ch. App. 112; *Re Oxford & Canterbury Hall Co.* (1870), 5 Ch. App. 433. *Appld. Re BARNED'S BANKING CO., Ex p. Bank of England* (1870), 39 L. J. Ch. 759. *Distd. Re BARNED'S BANKING CO., Ex p. Joint Stock Discount Co.* (1875), 23 W. R. 281. *Consd. Re Coal Consumers Assocn.* (1876), 4 Ch. D. 625. *Refd. Re Joint Stock Discount Co., Warrant Finance Co.'s Case* (1869), 5 Ch. App. 86; *Re BARNED'S BANKING CO., Leech's Claim* (1871), 6 Ch. App. 388; *Stone v. City & County Bank, Collins v. City & County Bank* (1877), 3 C. P. D. 282; *Re Northern Counties of England Fire Insce.* (1880), 50 L. J. Ch. 273; *Re Land Financiers Assocn.* (1881), 16 Ch. D. 373; *Mersey Steel & Iron Co. v. Naylor* (1882), 9 Q. B. D. 648. *As to (2) Distd. Re Oriental Commercial Bank, Ex p. Maxoudoff* (1868), 16 W. R. 784; *Re BARNED'S BANKING CO., Forwoods' Claim* (1869), 5 Ch. App. 18; *Re Blakely Ordnance Co., Metropolitan & Provincial Bank's Claim* (1869), L. R. 8 Eq. 244. *Follid. Re BARNED'S BANKING CO., Johnston's Case* (1869), 20 L. T. 266. (See L. R. 5 H. L. 157.) *Appld. Re BARNED'S BANKING CO., Ex p. Bank of England* (1870), 39 L. J. Ch. 759. *Distd. Re Oxford & Canterbury Hall Co.* (1870), 5 Ch. App. 433. *Consd. Lovel v. Lovel* (1881), 45 L. T. 252. *Refd. Mersey Steel & Iron Co. v. Naylor* (1882), 9 Q. B. D. 648. *Generally, Mentd. Re Oriental Steam Co.* (1874), 22 W. R. 622.

6488. ———.]—BANNER v. JOHNSTON, No. 6379, ante.

6489. ——— Though agreement to contrary.]—By a deed the rolling stock of a railway co. was vested in trustees in trust to "pay to the creditors of the said co. the several sums now payable to or receivable by them respectively, *pari passu*, & without any preference or priority whatsoever." By the same deed it was provided that "no creditor holding security & claiming to take the benefit of the trusts aforesaid, should be entitled to any payment in respect of his debt without accounting for the value of his security

a winding up cannot withdraw such valuation & enforce the security, but the liquidator is entitled to obtain an assignment & delivery thereof to himself at that valuation. Under Winding-up Act (Can.), s. 62, it is compulsory on the creditor to value his security, leaving it to the liquidator to take it, or allow the creditor to keep it at that valuation.—*Re BRITISH COLUMBIA POTTERY CO. & WINDING-UP ACT* (1895), 4 B. C. R. 525.—CAN.

h. ——— Book-debts of company received in payment—Portion of company's debts represented thereby satisfied.]—Where upon the voluntary winding up of a co. under Cos. Act, R. S. B. C. 1911 (c. 39), a creditor, making its claim as such, valued its securities at a certain sum & accepted for that sum certain book debts of the co., the price thereof being deducted from the creditors' claim:—*Held*: the portion of the co.'s debt thereby repre-

according to the practice of the Ct. of Ch., in the administration of the estate of deceased persons":—*Held*: such creditors were entitled to prove for the full amount of their claims without deducting the value of their securities.—*WATERLOW v. SHARP, GARDNER v. SHARP* (1869), 20 L. T. 903.

6490. ——— Where securities realised before claim.]—C. being instructed to purchase cotton for D., the B. Co., at D.'s request, gave C. a letter of credit authorising him to draw upon them to a certain amount, the bills to be accompanied by bills of lading for cotton, to be delivered up to the co. on their accepting the bills. Bills were accordingly drawn, & were accepted by the co.; but before they came to maturity the co. stopped payment, & was afterwards ordered to be wound up. C. sent in a claim under the winding up, & afterwards received the proceeds of the sale of the cotton:—*Held*: under the terms of the letter of credit the bills of lading were to be a security to the co. & C. could only stand as a creditor for the balance.—*Re BARNED'S BANKING CO., COUPLAND'S CLAIM* (1869), 5 Ch. App. 167; 39 L. J. Ch. 287; 21 L. T. 807; 18 W. R. 122, L. J.

Annotations:—Distd. Re BARNED'S BANKING CO., Leech's Claim (1871), 6 Ch. App. 388. *Consd. Re BARNED'S BANKING CO., Ex p. Joint Stock Discount Co.* (1875), 31 L. T. 862.

6491. ———.]—A banking co., in consideration of F. accepting bills of exchange against a ship & her freight, agreed by letter of guarantee to provide him with funds to meet the acceptances, which were secured by a mtge. by B. Before the bills became due the co. was ordered to be wound up. When they became due, a notary took the guarantee to the bank, & requested payment, which the official liquidator refused. No further claim was made until after the security had been realised by F.:—*Held*: F. could only prove for the balance which remained due after he had received the proceeds of the securities.—*Re BARNED'S BANKING CO., FORWOOD'S CLAIM* (1869), 5 Ch. App. 18; 39 L. J. Ch. 133; 21 L. T. 411; 18 W. R. 53, L. J.

6492. ———.]—Re BARNED'S BANKING CO., LEECH'S CLAIM, No. 6380, ante.

6493. ——— Securities realised after claim.]—A Co. guaranteed bills for £35,000 accepted by B. Co. & B. Co. assigned to A. Co. certain property as security for the payment of the bills. Both cos. were wound up by the ct., & the holders of the bills, who had no notice of the security, proved against both estates for the whole amount of the bills, & recovered from A. Co. £21,000, & from B. Co. £5,250; afterwards the security was realised, & produced £23,500:—*Held*: the proceeds of the security were part of the estate of A. Co. & were divisible among its creditors.—*Re JOINT STOCK DISCOUNT CO., LODER'S CASE* (1868), L. R. 6 Eq. 491; 37 L. J. Ch. 846; 16 W. R. 1076.

6494. ———.]—Re BARNED'S BANKING CO., Ex p. JOINT STOCK DISCOUNT CO., No. 6381, ante.

6495. Debentures held as collateral security—Proof of amount of debt—Not nominal value of debentures.]—Where a co. is being wound up, &

sent was satisfied & that the sureties thereon were released.—*CANADIAN BANK OF COMMERCE v. MARTIN*, [1918] 1 W. W. R. 395; 24 B. C. R. 381.—CAN.

k. Whether bank can be ordered to value security—Personal guarantee of directors.]—A bank, to which the directors of a co. have given a personal guarantee, cannot be forced to value its security in the winding up of the co. & the position is not changed by

a creditor who holds the co.'s acceptances for the amount of his debt also holds debentures issued to him by the co. as a collateral security for the same debt, his right of proof is limited to the sum that is due to him, & does not extend to the amount secured by the debentures.—*Re BLAKELY ORDNANCE CO., METROPOLITAN & PROVINCIAL BANK'S CLAIM* (1869), L. R. 8 Eq. 244; 21 L. T. 12; 17 W. R. 869.

6496. — Proof for nominal value.—The directors of a co. were empowered to issue 100 mtge. debentures at £95 for £100. Sixty of these debentures were duly taken up; the other forty were afterwards mortgaged by the directors by way of collateral security for an advance of money. The co. was afterwards wound up:—*Held*: the mtge. was not *ultra vires*, & the mtgees. would receive dividends on the whole amount expressed to be secured by their debentures, *pari passu* with the holders of the other sixty debentures.—*Re REGENT'S CANAL IRONWORKS CO.* (1876), 3 Ch. D. 43; 45 L. J. Ch. 620; 35 L. T. 288; 24 W. R. 687, C. A.

Annotations:—*Appld. Re Queensland Land & Coal Co., Davis v. Martin*, [1894] 3 Ch. 181. *Refd. Re General South American Co.* (1876), 34 L. T. 202. *Mentd. Re Tasker, Hoare v. Tasker* [1905] 2 Ch. 587; *Re Perth, Electric Tramways, Lyons v. Tramways Syndicate & Perth Electric Tramways*, [1906] 2 Ch. 216.

6497. Securities deposited against general credit—Not available to holders of particular bills.—L. deposited certain securities with a co. upon an agreement that the co. might sell them & apply the proceeds in reimbursing themselves any money owing by L. to them. Subsequently the co. accepted bills for L.'s accommodation. Afterwards, before the bills were paid, the co. went into liquidation, & L. made an assignment for the benefit of his creditors. The only liability of L. to the co. was in respect of these bills:—*Held*: neither the bill holders nor L. were entitled to have the proceeds of the sale of the securities applied in payment of the bills.—*Re NEW ZEALAND BANKING CORPN., LEVI & CO.'S CASE* (1869), L. R. 7 Eq. 449; 39 L. J. Ch. 128; 20 L. T. 296; 17 W. R. 565.

(c) Amendment of Proof.

6498. When allowed—Uncertainty as to value of security—Right to increase or diminish proof.—Mtgees. of real estate of a limited co. which had been ordered to be wound up contracted to sell part of their security under their power of sale. The deposit was paid, but the contract was not completed. The mtgees. then claimed to prove in the winding up for the whole amount of their debt & costs. Afterwards they made a fresh contract for the sale of the property, the

deposit being retained as part of the new purchase-money. It being uncertain whether the contract would ever be completed & the rest of the purchase-money paid, the ct. made an order that the proof should be admitted for the whole amount of the debt less the amount of the purchase-money mentioned in the contract, without prejudice to the right of either party to increase or diminish the proof, & to the right of the mtgees. for further proof in respect of costs, charges & expenses.—*Re OXFORD & CANTERBURY HALL CO.* (1870), 5 Ch. App. 433; 39 L. J. Ch. 775; 18 W. R. 793, L. J.

6499. — Proof submitted under mistake of law—Future dividends allowed on amended proof—Previous dividends not disturbed.—A creditor accepted dividends on the balance of his debt after realising his securities:—*Held*: he was entitled out of future dividends to receive what would have been payable to him if he had originally proved for the whole amount due on the day his claim was sent in, but without disturbing dividends already paid.—*Re BARNED'S BANKING CO., Ex p. BANK OF ENGLAND* (1870), 39 L. J. Ch. 759; 22 L. T. 895; 18 W. R. 944.

6500. — Proof submitted under mistake of fact.—A bank, carrying on business in Bombay & London, sold to "C. & Sons," of Bombay, their acceptances for £25,000, payable in London three & four months after sight. In payment, "C. & Sons" gave the bank bills for £20,000, drawn on "C. & Co.," payable six months after sight, & £5,000 in cash, together with a further sum, by way of discount, in respect of the difference of times when the bills became due. "C. & Co." accepted the bills drawn on them, & "C. & Sons" indorsed to "C. & Co." the bank's acceptances for £25,000. The bank being unable to meet some of their acceptances, gave "C. & Co." a security for payment thereof. Subsequently the bank became insolvent, & was ordered to be wound up. Both "C. & Co." & "C. & Sons" executed assignments for benefit of their creditors. All the acceptances of "C. & Co." had been dealt with by the bank, & were in the hands of third parties, but "C. & Co." were the holders of the bank's acceptances to the extent of £19,000. The representatives of "C. & Co." acting on the erroneous assumption that the bank held their acceptances for £20,000 sent in a claim in the winding up of the bank for £5,000 only. Subsequently, upon discovering the fact that the bank had parted with all their acceptances, they claimed to be admitted to prove to the full amount of £19,000. They had in the meantime realised their security:—*Held*: the representatives of "C. & Co." as indorsees for value, were

the fact that the directors are mtgees. of the real estate of such co. by way of indemnity, as the bank is not entitled to the benefit of such mtge.—*Re HARDSTONE BRICK CO., LTD., MOLSONS BANK CLAIM*, [1917] 1 W. W. R. 541.—CAN.

1. Mortgagee—Entitled to prove for whole of security due—Not merely for balance due after realising security.—In an administration suit, or a proceeding for winding up under Cos. Acts, a mtgee., although he be pltf. or petitioner, is entitled to prove for the whole amount due to him, & not merely for the balance remaining due after realising his security.

Semle: he is entitled to prove for the amount due at the time when the claim was sent in, without regard to securities subsequently realised.—*FORTRELL v. KAVANAGH* (1876), 10 L. R. Eq. 256.—IR.

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m. When allowed—Inadvertence.—Creditors holding fully secured claims & content to rely thereon, without seeking to share in the distribution of the other assets, cannot be compelled to file their claims in the proceedings under Dominion Winding-up Act, R. S. C. (c. 129), & have them adjudicated upon therein; & where such creditors, without any intention to submit to such adjudication, had filed with the liquidator affidavits proving their claims, leave was given them to withdraw such claims, leave also being given to one of such creditors, who had an unsecured debt, to file a claim limited thereto.—*Re BRAMPTON GAS CO.* (1902), 4 O. L. R. 509; 22 C. L. T. 370; 1 O. W. R. 543.—CAN.

n. — Alternative claim.—Appeal by the E. Co. from the disallowance by the Master in Ordinary of their claim, in the proceedings to wind up the A. Co., to rank upon the estate of the latter in respect of a debenture of that co. for \$55,000, dated May 31, 1902, payable to the E. Co., or order, on Jan. 2, 1907, with interest at 5 per cent *per annum*, payable half-yearly, the whole being collaterally secured by 375 shares of the capital stock of the D. Co. Finding of the Master reversed, & a reference back, with directions to allow the claim of the E. Co. to the extent of the amount of the loan & interest upon it, & with leave to the E. Co., if they so desired, to amend the proof by making an alternative claim in respect of the moneys on deposit with the A. Co., & the E. Co. must value their security & give credit accordingly.—*Re ATLAS*

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entitled to prove against the bank in respect of the acceptances held by them; & since the claim for £5,000 had been made on an assumption of facts shown to be erroneous by the affidavit made in support of it, the case should be treated as if the claim for the whole £19,000 had been made at the time when the original claim for £5,000 was carried in, & that being before "C. & Co." had realised their security, they were entitled to retain the amount so realised as well as to prove for the whole amount in the winding up.—*Re LONDON, BOMBAY & MEDITERRANEAN BANK, Ex p. CAMA* (1874), 9 Ch. App. 686; 43 L. J. Ch. 683; 31 L. T. 234; 22 W. R. 809, L. JJ.

Annotation:—Folld. Lovel v. Lovel (1881), 45 L. T. 252.

6501. — Proof not sent in in belief that security sufficient—Proof allowed for unsecured balance—Previous dividends not disturbed.]—A creditor of a co., believing himself to be fully secured by the hypothecation under the hand of the managing director of a call on the co.'s shares, made no claim for his debt in the winding up. The security turning out defective, by reason of the call moneys having been paid away partly before & partly since the letter of hypothecation:—*Held*: the creditor, never having assessed the value of his security, was not prevented by Jud. Act, 1875 (c. 77), s. 10, & Bkpcy. Rules, 1870, r. 101, from coming in & proving for the unsecured balance of his debt, on the terms of his disturbing no past dividend.—*Re KIT HILL TUNNEL, Ex p. WILLIAMS* (1881), 16 Ch. D. 590; 50 L. J. Ch. 303; 44 L. T. 336; 29 W. R. 419.

6502. — "Inadvertence"—1890 (Winding up) Act, Sched. 1, r. 8—Direct security treated as collateral.]—Where, through inadvertence, a secured creditor in a winding up under above Act had carried in a proof of debt without deducting the value of a security, & had voted in respect of his whole debt, the ct. on his application allowed him to amend his proof by stating his security & valuing it, it not appearing that any party would be placed in a worse position by such amendment.—*Re LISTER (HENRY) & CO., LTD., Ex p. HUDDERSFIELD BANKING CO.*, [1892] 2 Ch. 417; 61 L. J. Ch. 721; 67 L. T. 180; 40 W. R. 589; 8 T. L. R. 538; 36 Sol. Jo. 488.

Annotation:—Distd. Re Piers, Ex p. Piers, [1898] 1 Q. B. 627.

6503. — Liquidator's position altered since proof.]—Where a solr., who is a creditor for costs against a co. in liquidation, claims a lien on documents of the co. in his possession, but omits to mention the lien in his proof of the debt due to him, & subsequently acts as an unsecured creditor, he will not be allowed as a matter of right under the above rule, to withdraw or amend his proof so as to claim his lien. Leave to amend will not be given unless the ct. is satisfied that the omission was due to inadvertence on his

part, & that the position of the liquidator has not been altered since the proof was carried in in a manner which is inconsistent with the lien claimed.—*Re SAFETY EXPLOSIVES, LTD.*, [1904] 1 Ch. 226; 73 L. J. Ch. 184; 90 L. T. 331; 52 W. R. 470; 11 Mans. 76, C. A.

Annotations:—Refd. Re Pawson, Ex p. Trustee, Re Pawson, Ex p. Bewicke (1917), 86 L. J. K. B. 1285; *Re Maxson, Ex p. The Trustee, Re Same, Ex p. Lawrence & Lawrence*, [1919] 2 K. B. 330.

6504. — Fresh proof by assignee in place of proof of original creditor—Subject to all equities between assignor & company.]—*Re GLOBE TRUST, LTD.*, [1916] W. N. 100.

(d) *Interest on Secured Debts.*

6505. May apply dividends from securities to interest since winding up.]—(1) The rule that a creditor of a co. which is being wound up is not entitled to dividends towards payment of interest accrued since the commencement of the winding up does not prevent a creditor who holds a security from receiving dividends to the full amount of the principal, & at the same time realising his security until the full amount of principal & interest has been satisfied. In such a case it makes no difference that the security is on part of the estate of the co. or that it is vested in trustees on behalf of the creditors & the co.

(2) No appeal will be allowed from an order made in chambers, unless the judge certifies that the case has been so fully argued before him in chambers, that he does not require it to be re-argued in ct.—*Re HUMBER IRONWORKS & SHIP-BUILDING CO., WARRANT FINANCE CO.'S CASE* (No. 2), (1869), 5 Ch. App. 88; 39 L. J. Ch. 185; 21 L. T. 626; 18 W. R. 154, L. J.

Annotations:—As to (1) *Refd. Re Sankey Brook Coal Co.* (1870), 39 L. J. Ch. 223; *Re Collicie, Ex p. Findlay* (1881), 50 L. J. Ch. 696.

6506. —.]—A secured creditor of a co. which is in liquidation, who has exhausted his security without satisfying his debt, is not entitled to apply the proceeds of the security in payment first of interest subsequent to the winding up, & then in reduction of principal, & to prove in the winding up for the balance of the principal. His proof must be limited to what was due for principal & interest at the commencement of the winding up after deducting therefrom proceeds of sale or realisation received in respect of the security. He is entitled to set off profits realised from the security since the winding up against interest accrued during the same period.—*Re LONDON, WINDSOR & GREENWICH HOTELS CO., QUARTERMAINE'S CASE*, [1892] 1 Ch. 639; 61 L. J. Ch. 273; 66 L. T. 19; 40 W. R. 298; 8 T. L. R. 204; 36 Sol. Jo. 185.

F. Practice on Proof of Debts.

See 1908 (Winding-up) Rules, rr. 89–93, 100–113.

6507. Mode of proof—Power to order viva voce examination of creditor.]—An order having been

LOAN CO., ELGIN LOAN CO.'S CLAIM (1905), 3 O. W. R. 794; 5 O. W. R. 24; 9 O. L. R. 250.—CAN.

*o. — Security overvalued.]—*A secured creditor who has by mistake overvalued his security in filing his claim under Assignment Act may be permitted to revalue it.—*CANADA FURNITURE CO. v. BANNING*, [1918] 1 W. W. R. 31; 39 D. L. R. 313.—CAN.

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E. (d).

*p. Interest on unpaid principal up to date of liquidation.]—*The Mer-

cantile Finance Trustees & Agency Co., under a deed of covenant with the Colonial Mutual Life Assurance Society covenanted, so long as any money remained due under a certain mtge., to pay to the society the interest from time to time to become due & payable under the mtge.; while the principal was unpaid the co. went into liquidation still owing a certain amount of interest under the covenant. A question then arose as to the amount of money for which the society should be allowed to prove in the liquidation:—*Held*: the society should be allowed to prove for the amount of the principal

unpaid, together with interest up to the date of liquidation, deducting the value of the security.—*Re MERCANTILE FINANCE TRUSTEES & AGENCY CO. OF AUSTRALIA, LTD., Re COLONIAL MUTUAL LIFE ASSURANCE SOCIETY* (1896), 22 V. L. R. 381.—AUS.

*q. Debentures bearing interest—To cover overdraft.]—**Re VINT & SONS, LTD.*, [1905] 1 I. R. 112.—IR.

PART III. SECT. 36, SUB-SECT. 11.—
F.

r. Mode of proof—Claims to be delivered to liquidator—At or before

made for the winding up of a joint-stock co., & an official manager having been appointed, under Joint Stock Companies Winding-up Act, 1848 (c. 45), a creditor of the co. proceeded to exhibit before the master proof of his claim against the co. The master was dissatisfied with proof by his affidavit alone, & directed him to attend to be examined *viva voce* on the subject. Instead of complying, the creditor next day brought an action, but did not make affidavit that he could not make any further proof than that which he had already given:—*Held*: this was a case in which the proceedings ought to be stayed under sect. 73 of the Act.—*HUTCHINSON v. HARDING* (1856), 11 Exch. 561; 25 L. J. Ex. 171; 26 L. T. O. S. 274; 2 Jur. N. S. 142; 4 W. R. 326; 156 E. R. 954.

6508. ——— **Right of contributory to attend & cross-examine.**—A contributory of a co. in course of winding up is entitled, under General Ord. of Nov. 11, 1862, r. 60, under 1862 Act, not only to attend the cross-examination by the official liquidator of a person claiming to be a creditor of the co., but also to cross-examine such claimant upon the matters referred to in the affidavit made in support of his claim.—*Re BRAMPTON & LONGTOWN RY. CO.* (1871), L. R. 11 Eq. 428; 40 L. J. Ch. 234; 24 L. T. 17.

Annotation:—*Reid Bates v. Eley* (1876), 1 Ch. D. 473.

6509. ——— **Creditor must produce all documents in support of claim.**—Under a winding up of a co., a party claiming as a creditor must either submit to produce all documents in his possession relating to his claim, or it will be disallowed.—*Re CONSTANTINOPLE & ALEXANDRA HOTEL CO.* (1866), 35 Beav. 349; 14 W. R. 553; 55 E. R. 930.

6510. **Costs of proof—Adjournment into court.**—Where a claim against a co. in liquidation is adjourned into ct. & allowed, with costs out of the estate, only the costs of the adjournment into ct. are meant to be given, & the costs incurred by the claimants in chambers must be added to the amount of the claim.—*Re GENERAL ESTATES CO., Ex p. WRIGHT & GAMBLE* (1869), L. R. 8 Eq. 123.

6511. ——— **Added to debt.**—A creditor claimed to prove in a winding up for sums parts of which were allowed. The liquidator made a claim against the creditor, which was disallowed:—

stated time.—*Re MERCHANTS' LIFE ASSOCN. OF TORONTO, HOOVER'S CLAIM*, 22 C. L. T. 21.—**CAN.**

s. ——— **Before liquidator.**—A secured creditor has a right to apply for & obtain leave to bring an action to enforce his security. It is not optional for a secured creditor to either prove his claim in a winding up or else proceed with an action to enforce it, & if he does commence an action it is still compulsory on him to proceed before the liquidator.—*Re LENORA MOUNT SICKER COPPER MINING CO., LTD.* (1902), 9 B. C. R. 471.—**CAN.**

t. **Unsecured creditor—Claim filed after payment of dividend to other creditors.**—Where upon the winding up of a co. under Winding-up Act, an unsecured creditor does not file his claim with the liquidator until after a dividend has been declared & paid to the other creditors, he is entitled to participate with the other unsecured creditors *pari passu* in the undistributed assets, but is not entitled to the dividend already paid.—*Re PEOPLE'S LOAN & DEPOSIT CO., DAVIDSON'S CASE*, [1917] 3 W. W. R. 981.—**CAN.**

u. **Amount of claim—Period of ascertainment—When claim filed.**—*Re LIGONIEL SPINNING CO., Ex p.*

Held: costs of the creditor so far as they resulted from his own claim were to be added to his debt, & so far as they resulted from the claim of the liquidator were to be paid in full out of the assets of the co.—*Re LOMBARD DEPOSIT BANK, Ex p. LOMBARD BUILDING SOCIETY* (1881), 50 L. J. Ch. 749; 45 L. T. 346.

6512. **Security for costs of proof—Creditor outside jurisdiction.**—*Re HOWE MACHINE CO., FONTAINE'S CASE*, No. 6749, *post*.

6513. **Appeals—From admission of proof—When not objected to at meeting.**—*Re CANADIAN PACIFIC COLONIZATION CORPN. LTD.*, No. 6039, *ante*.

6514. ——— **From official receiver acting as liquidator—Made in chambers.**—Appeals from the Official Receiver, which by 1892 (Winding-up) Rules, r. 3, are to be heard before the judge in open ct., are only appeals from the Official Receiver acting as such, & do not include appeals from the Official Receiver when acting as liquidator; applications by way of appeal from his decisions as liquidator must be made in chambers.

On a successful appeal from the rejection of a proof in the winding up of a co., the rule in *bkpcy.* is followed, that the appct. is allowed his costs, not of the proof, but of the appeal, out of the assets.—*Re NATIONAL WHOLEMEAL BREAD & BISCUIT CO.*, [1892] 2 Ch. 457; *sub nom. Re NATIONAL WHOLEMEAL BREAD & BISCUIT CO., LTD., Ex p. BAINES*, 61 L. J. Ch. 712; 67 L. T. 293; 40 W. R. 591; 36 Sol. Jo. 523, 540.

6515. **Costs of appeal from rejection of proof—Payable from assets.**—*Re NATIONAL WHOLEMEAL BREAD & BISCUIT CO.*, No. 6514, *ante*.

6516. **Right to insist on adjournment from registrar to judge.**—*Re NEWCASTLE & GATESHEAD THEATRES, LTD.* (1920), 150 L. T. Jo. 73.

6517. **Right to cross-examine on affidavits.**—*Re NEWCASTLE & GATESHEAD THEATRES, LTD.* (1920), 150 L. T. Jo. 73.

SUB-SECT. 12.—DISTRIBUTION OF ASSETS.

A. In General.

6518. **Rules of voluntary winding up applicable.**—*WEBB v. WHIFFIN*, No. 6047, *ante*.

BANK OF IRELAND, [1900] 1 I. R. 321.—**IR.**

b. **Appeals—Application by notice of motion—In absence of rules regulating such appeals.**—Cos. Act provides for an appeal to the ct. from the decision of a presiding officer at a meeting for the proof of claims against a co. in liquidation:—*Held*: in the absence of rules regulating such appeals, the proper procedure is to apply by notice of motion to have the decision set aside, or, if the circumstances do not permit of the matter being determined on affidavit, to proceed by way of action.—*JARDINE v. CRONSON*, [1919] W. L. D. 72.—**S. AF.**

PART III. SECT. 36, SUB-SECT. 12.—A.

c. **What are assets.**—*ROBERTSON, SANDERSON & CO., LTD. v. INCHES* (1917), 55 Sc. L. R. 88.—**SCOT.**

d. **Winding up of company in England & Victoria—Right of English shareholders to share *pari passu*—With shareholders of same class in Victoria.**—When a co. incorporated in England & registered in Victoria has gone into voluntary liquidation in England & has subsequently been compulsorily wound up in Victoria, the English creditors are entitled to share in the

assets in Victoria, *pari passu* with the Victorian creditors of the same class.—*Re AUSTRALIAN MIDAS GOLD ESTATES, LTD.*, [1916] V. L. R. 526.—**AUS.**

e. **Construction of words "surplus assets."**—*Companies Act*, 1899.—The memorandum for registration of a no liability mining co. provided that in the event of liquidation preference shares should have the preference provided for in the agreement under which the co. purchased the mine, which gave them priority over other shareholders out of surplus assets. Rule 2 of the rules for registration provided that the co. should enter into the agreement already prepared, but no rule contained express provision dealing with the distribution of assets in the event of liquidation. There were not sufficient assets to repay all capital:—*Held*: "surplus assets" in sect. 220 of the above Act means surplus assets remaining after payment of debts & liabilities, excluding paid-up capital, & costs & expenses of liquidation: there was no express provision in the rules providing for "a different mode of distribution" within the meaning of sect. 220 & consequently surplus assets upon liquidation were to be distributed among all classes of shareholders alike irrespective of the amount called up on

Sect. 36.—Winding up by court: Sub-sect. 12, A. & B. (a), (b), (c) & (d).]

Of building societies—Incorporated societies.]—See BUILDING SOCIETIES, Vol. VII., pp. 506, 507, Nos. 313-318.

—Unincorporated societies.]—See BUILDING SOCIETIES, Vol. VII., pp. 513-516, Nos. 361-371.

B. Payments of Fees, Costs, Charges and Expenses.

(a) Liquidator's Remuneration.

6519. Postponed till liabilities ascertained & apportioned.]—No order ought to be made for a call upon the contributories of a provisionally registered co., on account of the costs of winding up the co., until the liabilities of the contributories have been ascertained, or at least till the master has ascertained the liability of the contributories to the costs in respect of which the call is made.—*Re DIRECT BIRMINGHAM, OXFORD, READING & BRIGHTON RY. CO., HUNTER'S CASE* (1851), 1 Sim. N. S. 435; 20 L. J. Ch. 483; 17 L. T. O. S. 151; 15 Jur. 532; 61 E. R. 168.

Annotations:—*Distd. Re London & Birmingham Extension & Northampton, Daventry, Leamington & Warwick Ry., Gay's Case* (1852), 1 De G. M. & G. 347. **Refd. Ex p. Preece & Evans (1852), 20 L. T. O. S. 17; *Re Wolverhampton, Chester & Birkenhead Ry., Dale's Case* (1852), 1 De G. M. & G. 513.**

6520. Postponed till all costs of winding up satisfied.]—*Re MASSEY, Re FREEHOLD LAND & BRICKMAKING CO., No. 5993, ante.*

6521. —.]—(1) Where the assets of a co. in compulsory liquidation are insufficient for payment of the costs of the winding up, the official liquidator is not entitled to any remuneration.

(2) Where in the compulsory winding up of a co. the assets are insufficient for the payment in full of costs, the costs of realisation are payable out of the assets in priority to costs incurred in internal litigation, & these latter costs, including

those of the liquidator, are payable, ratably, without regard to priority in the dates of the orders under which such costs have been directed to be paid.—*Re DRONFIELD SILKSTONE COAL CO. (No. 2)* (1883), 23 Ch. D. 511; 52 L. J. Ch. 963; 31 W. R. 671.

Annotations:—*As to* (2) **N.F. Re Dominion of Canada Plumbago Co.** (1884), 27 Ch. D. 33. **Consd. Re Blundell, Blundell v. Blundell** (1890), 59 L. J. Ch. 269. **Refd. Re Staffordshire Gas & Coke Co., [1893]** 3 Ch. 523. **Generally, Refd. Batten v. Wedgewood Coal & Iron Co.** (1884), 28 Ch. D. 317.

(b) Costs of Petitioning Creditor.

6522. First charge on assets.]—*Re AUDLEY HALL COTTON SPINNING CO., No. 5748, ante.*

6523. —.]—Where in the course of winding up a co. orders have been made for the payment of costs out of the estate, the petitioners in the winding up are alone entitled to priority.—*Re MARLBOROUGH CLUB CO., Ex p. PERCIVAL* (1868), L. R. 6 Eq. 519.

Annotations:—**Expld. Re Dronfield Silkstone Coal Co.** (No. 2) (1883), 23 Ch. D. 511. **Consd. Re London Metallurgical Co., [1895]** 1 Ch. 758.

Whether set off against calls due.]—See No. 5750, *ante.*

(c) Charges of Company's Solicitor.

6524. Priority to liquidator's remuneration.]—*Re MASSEY, Re FREEHOLD LAND & BRICKMAKING CO., No. 5993, ante.*

6525. Lien on documents coming into possession before winding up—Not on those obtained in course of winding up.]—*Re CAPITAL FIRE INSURANCE ASSOCN., No. 5825, ante.*

6526. —.]—An action was brought by a co. against its creditors for penalties for acting without qualification. N. acted as solr. for the co., & documents came into his hands in the course of the action. The co. was ordered to be

the respective shares or classes of shares.—*Re KYLOE COPPER MINES* (1917), 17 S. R. N. S. W. 489.—**AUS.**

1. Balance after passing of final accounts paid into court—Payment out of court to person not entitled—Right of Receiver-General to recover.]—The liquidators of an insolvent bank passed their final accounts & paid a balance remaining in their hands, into ct. It appeared that by orders issued either through error or by inadvertence the balance so deposited had been paid out to a person who was not entitled to receive the money, & the Receiver-General for Canada, as trustee of the residue, intervened, & applied for an order to have the money repaid in order to be disposed of under Winding-up Act:—**Held:** the Receiver-General was entitled so to intervene, although the three years from the date of the deposit mentioned in Winding-up Act had not expired, & even if he was not so entitled to intervene, the provincial cts. had jurisdiction to compel repayment into ct. of the moneys improperly paid out.—*HOGABOOM v. RECEIVER-GENERAL OF CANADA, Re CENTRAL BANK OF CANADA* (1897), 28 S. C. R. 192.—**CAN.**

g. Priority of claims—Liens—Construction of Winding-up Act, 1906 (c. 144), s. 92.]—The priority given by the above sect. relates to such claims as existed against the co. at the time of going into liquidation, & does not extend to liens, hypothecations or pledges placed on the assets of the co., by the liquidators under an order of ct. for the purposes of the proper winding up of the affairs of the co.—*Re MIRIMICHI PULP & PAPER CO., KEYES v. HANINGTON* (1913), 13 E. L. R. 327.—**CAN.**

h. Dividend due to former solicitor—Whether part of official receiver's duties to pay solicitor's creditors.]—In the winding up of a joint-stock co. in bkcy. a considerable sum of money was declared to be due to the former solr. of the co. as a dividend on foot of his claim, & he gave to several creditors to whom he was himself indebted orders on the official liquidator in whose hands the fund was, for payment of those creditors:—**Held:** having such a duty cast upon either the official assignee or official liquidator, would be foreign to the legitimate purposes for which they were appointed; & as one of the parties to whom such orders were given filed a cause petition in Chancery to compel the official liquidator to pay it, the ct. refused the application, & directed the official liquidator to retain the funds until further order.—*Re DUBLIN CATTLE MARKET CO.* (1867), 16 L. T. 240.—**IR.**

k. Proceeds of mortgaged assets—Balance after payment of encumbrances to pay general costs of liquidation.]—Where assets belonging to a co. in liquidation are encumbered it is only the balance after payment of the encumbrance together with the costs of realisation or preservation of such assets which is available for the general costs of liquidation.—*GREEN-ACRE'S EXECUTORS v. KEMP*, [1916] T. P. D. 247.—**S. AF.**

1. Whether assets of company liable—For costs of persons successfully resisting being placed on list of contributories.]—The official liquidator of a co. found liable in expenses to persons who had successfully resisted being placed on the list of contributories although the assets of the co. in the

liquidator's hands were admittedly insufficient to meet these expenses.—*CONSOLIDATED COPPER CO. OF CANADA, LTD. v. PEDDIE* (1877), 5 R. (Ct. of Sess.) 393.—**SCOT.**

m. Assets insufficient to pay costs of liquidation—Petitioning creditor not entitled to preferential charge—On assets remaining after deduction of costs of realisation.]—The assets recovered under a liquidation were insufficient to meet the costs of the liquidation. In a competition between the liquidator, the liquidator's solr., & petitioning creditor:—**Held:** petitioning creditor was not entitled to a preferential charge on the assets remaining after deduction of the actual costs of realisation.—*WHIGHAM (OFFICIAL LIQUIDATOR) EDINBURGH PAVILION, LTD. v. WALKER* (1906), 44 Sc. L. R. 10.—**SCOT.**

n. Authority of liquidator to pay final dividend—To deceased debenture-holder's representatives.]—*Re SCOTTISH AMICABLE HERITABLE SECURITIES, LTD., [1916]* 2 S. L. T. 52.—**SCOT.**

o. Costs of liquidation—Whether payable out of proceeds belonging to debenture-holders.]—In the winding up of a co. the ct. will refuse to order the payment of the general costs of the liquidation out of proceeds in the hands of the official liquidator belonging to debenture-holders, even although the costs were incurred in an examination of the officers of the co. by the express leave of the ct., & although the co. was wound up on the petition of the debenture-holders, & the liquidator was appointed at their instance & by their request.—*Re J. G. WARD FARMERS' ASSOCN., LTD., Ex p. COOK* (1897), 16 N. Z. L. R. 322.—**N.Z.**

wound up compulsorily & a liquidator was appointed. The liquidator continued the action & retained N., but afterwards discharged him & appointed another solr., to whom he required N. to hand over all documents relating to the action. N. claimed a lien for costs. This summons was taken out by the liquidator for an order for the delivery of documents:—*Held*: N. had a good lien on, & was entitled to retain until his costs were paid, all documents which had come into his possession, & on which he had acquired a lien before the order for winding up, but must deliver those acquired in the course of the winding up.—*Re RAPID ROAD TRANSIT CO.*, [1909] 1 Ch. 96; 78 L. J. Ch. 132; 99 L. T. 774; 53 Sol. Jo. 83; 16 Mans. 289.

Annotations:—*Mentd.* *Re Caudery*, London Joint Stock Bank v. Wightman (1910), 54 Sol. Jo. 444; *Meguerditchian v. Lightbound*, [1917] 1 K. B. 297.

6527. — Documents delivered up in order that costs should be paid out of assets coming to liquidator—Debts of company settled by compromise—Delay in application by solicitors.]—*Re DOVER, HASTINGS & BRIGHTON JUNCTION RY. CO.*, *Ex p.* A'BECKETT & SYMPSON & PRANCE, No. 6062, *ante*.

6528. Lien on fund recovered by his exertions—Costs incurred before winding up.]—(1) Delay by a solr. in applying under Solicitors Act, 1860 (c. 127), for an order charging his costs on property recovered by him is no ground for refusing the order unless other rights in respect of the property have arisen in the meantime.

Solrs. employed by a limited co. recovered a claim against an estate in course of administration by the ct. The co. was subsequently wound up by the ct. Shortly after the winding-up order was made, the solrs. applied for an order charging their costs on the co.'s share of the fund in ct. to the credit of the administration action:—*Held*: as the charging order in this case conferred no new right but was only a cheap & speedy mode of enforcing the common law lien on the co.'s share of the fund in ct., which lien existed prior to the winding up, the ct., in the exercise of its discretion under the statute, would make the order.

(2) An order made under Solicitors Act, 1860 (c. 127), s. 28, on the interest of a co. in a fund in ct. is not such an execution on the assets of the co. as would be void under 1862 Act, s. 163.—*Re BORN, CURNOCK v. BORN*, [1900] 2 Ch. 433; 69 L. J. Ch. 669; 83 L. T. 51; 49 W. R. 23; 44 Sol. Jo. 611.

Annotations:—*As to* (1) *Folld.* *Re Meter Cabs*, [1911] 2 Ch. 557. *Generally*, *Mentd.* *The Birnam Wood*, [1907] P. 1.

6529. — — — — —.]—A solr. has a lien on a fund recovered by his exertions in the winding up of a co. as against the liquidators for his costs of recovering it incurred prior to the winding up as well as during the winding up, & also for the costs of establishing his retainer against the liquidators.—*Re METER CABS, LTD.*, [1911] 2 Ch. 557; 81 L. J. Ch. 82; 105 L. T. 572; 56 Sol. Jo. 36; 19 Mans. 92.

Annotations:—*Mentd.* *Meguerditchian v. Lightbound*, [1917] 1 K. B. 297; *Re Eden, Watkins v. Eden*, [1920] 2 K. B. 333.

6530. Taxation of bill of costs—Delivered more than twelve months before winding up.]—A solr. delivered to the directors of an abortive railway co. his bill of costs, No. 1. It was perused by an

experienced solr., named by the solr. retained, at the request of the directors, & items were taxed off, leaving £275 5s. 5d. as the amount due. The directors paid £200 on account, leaving a balance of £75 5s. 5d. due. An order to wind up the co. was obtained, & the solr. claimed a lien on the papers for his costs. He delivered a bill of costs, No. 2, commencing with the balance of £75 5s. 5d., amounting to £233 9s. 10d. On the petition of the official manager, seeking the taxation of the solr.'s bills of costs, No. 1 & No. 2, it appeared that the bill of costs No. 1 had been duly delivered more than twelve months before the date of the petition to tax:—*Held*: bill No. 1 could not be taxed, except under special circumstances, which did not exist in this case; & the ct. ordered bill No. 2 to be taxed, directing the master not to investigate the accuracy of the balance of bill No. 1, with which bill No. 2 commenced, further than to ascertain that that balance had not in fact been paid.—*Re JAMES, Ex p. QUILTER* (1850), 4 De G. & Sm. 183; 64 E. R. 789.

Annotations:—*Consd.* *Marseilles Extension Ry. & Land Co.*, *Ex p. Evans* (1870), L. R. 11 Eq. 151. *Refd.* *Re Foss, Bilbrough, Plaskitt & Foss*, [1912] 2 Ch. 161.

6531. — Delivered three months before winding up.]—Three months after a solr. to a co. had delivered his bill of costs, the co. was ordered to be wound up. Subsequently he delivered a further bill to the official liquidator. More than twelve months elapsed, & the solr. carried in a claim for payment of both bills:—*Held*: both bills must be referred for taxation before they could be paid.—*Re MARSEILLES EXTENSION RAILWAY & LAND CO.*, *Ex p. EVANS* (1870), L. R. 11 Eq. 151; 40 L. J. Ch. 197; 23 L. T. 647; 19 W. R. 379.

Annotations:—*Folld.* *Re Foss, Bilbrough, Plaskitt & Foss*, [1912] 2 Ch. 161. *Mentd.* *Re Park, Cole v. Park, Park v. Cole* (1889), 37 W. R. 742.

6532. Delivered less than twelve months before winding up.]—If a solr.'s bill of costs due from a limited co. be delivered less than twelve months before the co. is wound up it can be taxed at any time during the winding up.

Taxation of costs in a winding up whether voluntary or compulsory ought not to be made under Solrs. Act, 1843 (c. 73), but under the general jurisdiction of the ct. It is ordered only as a means of ascertaining the amount of the solr.'s claim against the assets. The form should be that generally adopted in winding up by the ct., in which there is no submission to pay, & as a rule the solr. is allowed to add the costs of taxation to his claim.—*Re FOSS, BILBROUGH, PLASKITT & FOSS*, [1912] 2 Ch. 161; 81 L. J. Ch. 558; 106 L. T. 835; 56 Sol. Jo. 574.

Annotation:—*Appld.* *Re Palace Restaurants*, [1914] 1 Ch. 492.

6533. Delivered in winding up in respect of costs incurred before winding up.]—*Re PALACE RESTAURANTS, LTD.*, No. 5309, *ante*.

(d) Costs of Actions by and against Company.

6534. Taxed costs ordered to be paid by company—Whether in priority to other creditors.]—Where the taxed costs of a successful application against a co. were directed to be paid by the co. which was being wound up:—*Held*: the official liquidator was justified in refusing payment of

PART III. SECT. 36, SUB-SECT. 12.—
B. (d).

p. Successful action against company begun before liquidation—Whether plaintiff's costs paid in priority to all other claims.]—After an action for

rescission of contract & repayment of sums paid thereunder was begun before liquidation & subsequently proceeded with, the successful pltf. was allowed to rank as an ordinary creditor in respect of the sums directed

to be repaid, but was held to be disentitled to an order for payments of his costs in priority to all other claims.—*FITZHERBERT v. DOMINION BED MANUFACTURING CO.*, [1917] 2 W. W. R. 727; 24 B. C. R. 38.—*CAN.*

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the costs in preference to the other debts of the co.—*Re SCOTTISH & UNIVERSAL FINANCE BANK, Ex p. SHIP* (1865), 12 L. T. 728; 11 Jur. N. S. 619; 13 W. R. 1016.

Annotations:—*Reid. Re Bank of Hindustan, China & Japan, Levick's Case* (1867), 17 L. T. 237; *Re London Metallurgical Co., Ex p. Parker* (1895), 64 L. J. Ch. 442.

6535. — Payable in full out of assets.]

Leave having been given to a claimant against a co. in liquidation to bring an action against the co. in respect to the subject-matter of the claim, & leave having also been given to the official liquidator to defend such action, the action was brought, & the claimant obtained a verdict which carried costs:—*Held*: the claimant was entitled to have his costs of the action, & also his costs of the application for leave to bring the action, paid in full out of the assets of the co., as well as his costs of the application to the ct. for an order establishing his right to such payment; all his other costs to be added to his debt.—*Re TRENT & HUMBER SHIP BUILDING CO., BAILEY & LEETHAM'S CASE* (1869), L. R. 8 Eq. 94; 38 L. J. Ch. 485; 20 L. T. 301; 17 W. R. 1079.

Annotations:—*Folld. Re Universal Non-Tariff Fire Assce., Ex p. Forbes* (1875), 23 W. R. 464; *Re Home Investment Soc.* (1880), 14 Ch. D. 167. **Consd. Re Dominion of Canada Plumbago Co. (1884), 27 Ch. D. 33. **Appld. Re Wenborn**, [1905] 1 Ch. 413. **Reid. Re Blundell, Blundell v. Blundell (1890), 59 L. J. Ch. 269; *Re London Metallurgical Co.*, [1895] 1 Ch. 758.****

6536. — Not proved as debt.]—Where a co. in course of liquidation is ordered to pay costs, such costs are not to be proved as a debt in the winding up, but are payable in full out of the assets of the co.—*MADRID BANK v. PELLY* (1869), L. R. 7 Eq. 442; 21 L. T. 13; 33 J. P. 596.

Annotation:—*Mentd. Re Imperial Land Co. of Marseilles* (1870), 22 L. T. 598.

6537. — — — — —.]—*Re PARAGUASSU STEAM TRAMROAD CO., FERRAO'S CASE*, No. 6007, *ante*.

6538. — — — — —.]—*Re HOME INVESTMENT SOCIETY*, No. 6010, *ante*.

6539. — — — — —.]—*Re DRONFIELD SILKSTONE COAL CO.* (No. 2), No. 6521, *ante*.

6540. — — — — — How far immediate payment ordered.]—In the winding up of a co. the liquidator changed his solr. The first solr. claimed to be paid his costs. The liquidator set up in defence that he had, in pursuance of an order of the ct., paid away part of the assets in discharging the costs of an unsuccessful attempt to settle an alleged shareholder on the list of contributories, & that the only remaining assets amounted to £9, which was quite insufficient to pay the appct., & which he claimed to retain for costs out of pocket:—*Held*: the successful litigant whose costs were ordered to be paid by the liquidator, was entitled to immediate payment of those costs in priority to the general costs of liquidation including costs of realisation; & the remaining assets, amounting to £9, must be apportioned equally between the liquidator & the appct.—*Re DOMINION OF CANADA PLUMBAGO CO.* (1884), 27 Ch. D. 33; 53 L. J. Ch. 702; *sub nom. Re DOMINION OF CANADA PLUMBAGO CO., LTD., Ex p. BEALL*, 50 L. T. 518; 33 W. R. 9, C. A.

Annotation:—*Appld. Re Blundell, Blundell v. Blundell* (1890), 44 Ch. D. 1. **Consd. Re Staffordshire Gas & Coke Co., [1893] 3 Ch. 523. **Folld. Re London Metallurgical Co., [1895] 1 Ch. 758.****

6541. — — — — —.]—Rule 31 of 1890 (Winding-up) Rules does not affect the priority which under the old practice attached to costs ordered to be paid by the liquidator out of the assets of the co. to a successful litigant, & the costs directed to be paid by an order in that form are

prima facie payable immediately & in full out of the net assets of the co. The onus is on the liquidator to show that the condition of the assets is such that immediate payment cannot be made; & if he shows that other persons have a prior right to, or are entitled *pari passu* with the successful litigant, no order for payment will be made without providing for the other claims.—*Re LONDON METALLURGICAL CO.*, [1895] 1 Ch. 758; 43 W. R. 476; 11 T. L. R. 308; 39 Sol. Jo. 363; 13 R. 436; *sub nom. Re LONDON METALLURGICAL CO., Ex p. PARKER*, 64 L. J. Ch. 442; 72 L. T. 421; 2 Mans. 276.

6542. — — — — —.]—Where there is a winding up of a co., whether compulsory or voluntary, all claims of creditors, including those in respect of costs, ought *prima facie* to be dealt with in the winding up in accordance with the rules applicable to the distribution of the assets; but if an action is pending to which the co. is a party, & the co. by its liquidator determines to prosecute or defend the proceedings for the estate, the estate must be treated as the party litigant, & must in case of failure pay the costs in full.

C. brought an action against a co. for damages for breach of contract. After a day had been fixed for the trial the co. passed an extraordinary resolution for voluntary winding up. Within a week afterwards C. wrote to the liquidator asking whether he was prepared to admit C.'s claim in whole or in part. The liquidator replied that he could not admit the claim. At the trial C. recovered judgment for damages & costs:—*Held*: the liquidator had adopted the defence of the action, & C.'s costs of it must be paid in full out of the assets of the co.—*Re WENBORN & CO.*, [1905] 1 Ch. 413; 74 L. J. Ch. 283; 92 L. T. 228; 53 W. R. 332; 21 T. L. R. 229; 49 Sol. Jo. 259; 12 Mans. 45.

Annotation:—*Appld. Re Free* (1911), 56 Sol. Jo. 175.

6543. — — — — — Though judgment under appeal.]—The mere fact of the judgment obtained against a liquidator being under appeal does not affect the application of the rule that the successful debt. is entitled to have his costs in full out of the assets of the co. of an action brought or defended by the co. & continued after winding up by the liquidator.—*Re FREE (THOMAS) & SONS, LTD.* (1911), 56 Sol. Jo. 175.

6544. — — — — —.]—Costs of unsuccessful litigation incurred by a liquidator, whether in a voluntary or compulsory winding up, are payable to the party entitled out of the assets of the co. in priority to the costs of the liquidation. This rule applies, whether the order simply directs payment of costs, or directs that the costs be paid out of the assets of the co. or that the liquidator do pay the costs with liberty to recoup himself out of the assets.—*Re PACIFIC COAST SYNDICATE, LTD.*, [1913] 2 Ch. 26; 108 L. T. 823; 57 Sol. Jo. 518; *sub nom. Re PACIFIC COAST SYNDICATE, LTD., Ex p. BRITISH COLUMBIAN FISHERIES, LTD.*, 82 L. J. Ch. 404; 20 Mans. 219.

6545. Representative action—Carried on without leave after winding up—Dismissed by consent.]—An action was commenced by two shareholders in a co., on behalf of themselves & all other shareholders, to impeach a contract made with the co. on the ground of fraud. Before the trial the co. was wound up, & pltf's. did not obtain leave in the winding up to carry on the action. At the trial the action was dismissed by consent without costs:—*Held*: the ct. had no jurisdiction to order pltf's. costs to be paid out of the assets in the winding up, although the judge who heard the action certified that the action was for the benefit of the

co., & gave liberty to the plffs. to apply in the liquidation for their costs.—*Re HULL CENTRAL DRAPERY CO.* (1880), 15 Ch. D. 326; 43 L. T. 679; 29 W. R. 164, C. A.

6546. Test action to rectify register—Costs of other actions incurred but not ordered to be paid before winding up—Added to sums due on rectification.]—*Re BRITISH GOLD FIELDS OF WEST AFRICA*, No. 6409, *ante*.

(c) *Realisation of Assets subject to Security.*

6547. What will be allowed out of fund—Costs of carrying on business—Costs of preservation.]—Under agreements made between a co. & G., from whom the co. had previously bought its works, G. was to advance money to the co., & all moneys due to the co. were to be received by G. who was to apply these moneys & also the money to be advanced by him in paying wages & salaries & other outgoings for the business of the co., & subject thereto was to repay himself. An order was made for winding up the co., under which G. & the liquidators made an agreement for an advance by G. of further sums on similar terms. G. advanced money for the payment of rent, rates, wages, & outgoings; a large balance remained due to him. The leasehold property, machinery, & plant of the co. were sold by the liquidators:—*Held*: the costs of carrying on the business were not payable out of the mtgd. property in priority to debentures as costs of preservation, & subject to the costs of realising the property, the fund belonged to the debenture holders in priority to the claims of G. or the liquidators for the costs so incurred.—*Re REGENT'S CANAL IRONWORKS CO.*, *Ex p.* GRISSELL (1875), 3 Ch. D. 411, C. A.

Annotations:—*Refd.* *Re Staffordshire Gas & Coke Co.*, [1893] 3 Ch. 523. *Mentd.* *Re General South American Co.* (1876), 34 L. T. 202; *Re New City Constitutional Club Co.*, *Ex p.* PURSELL (1887), 34 Ch. D. 646; *Re Ormerod, Grierson*, [1890] W. N. 217; *Securities & Properties Corpn. v. Brighton Alhambra* (1893), 62 L. J. Ch. 566; *Hand v. Blow*, [1901] 2 Ch. 721; *Davy v. Scarth*, [1906] 1 Ch. 55.

6548. ———.]—*Re ORMEROD, GRIERSON & Co.*, [1890] W. N. 217.

6549. ——— Costs of misfeasance proceedings—1890 (Winding up) Act, s. 10.]—Moneys recovered in a winding up in proceedings under the above sect., & by calls on contributories, belong to the holders of debentures charging all the undertaking & property of the co., present & future, including its uncalled capital for the time being, & are not, where the total assets are not sufficient to pay the debenture-holders in full, subject to costs directed by the winding up order to be paid out of the assets of the co.

Semble: the costs incurred by the liquidator in proceedings under the sect. must be paid out of the money recovered in those proceedings.—*Re ANGLO-AUSTRIAN PRINTING & PUBLISHING UNION, BRABOURNE v. SAME*, [1895] 2 Ch. 891; 65 L. J. Ch. 38; 73 L. T. 442; 44 W. R. 186; 12 T. L. R. 39; 40 Sol. Jo. 68; 2 Mans. 614.

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B. (e).

q. Sale of mortgaged premises—Amount realised insufficient to satisfy security—Right of liquidator to retain his costs of realisation.]—In the course of a compulsory winding up, the liquidator sold mortgaged premises with the consent of the mortgagee. The proceeds were insufficient to pay the mtge. in full:—*Held*: the liquidator was entitled to retain out of the proceeds the costs of realisation.—*Re NORTHERN MILLING CO.*, [1908] 1 I. R. 473.—*IR.*

PART III. SECT. 36, SUB-SECT. 12.—
C.

r. Right of English creditors to share in assets—Assets realised in Queensland.]—In the winding up of a co. in Queensland a decree was made that creditors in England were entitled to share with creditors in Queensland in the distribution of assets realised in Queensland.—*Re QUEENSLAND BANK, LTD.* (1867), 1 Q. S. C. R. 159.—*AUS.*

s. Claims of creditors—Estimated by statute.]—The railway co. having

C. *Distribution amongst Creditors.*

6550. Funds held for creditor—May be garnished.]—*Re WARWICK, ETC. RY. CO.*, PRICHARD'S CLAIM, *Ex p.* TURNER, *Ex p.* SMITH, No. 6293, *ante*.

6551. Payment to English creditor dying abroad—Production of English probate necessary.]—Where a creditor of an English co. which was being wound up by the ct. died domiciled abroad:—*Held*: the official liquidator could not send a dividend abroad to be paid to the foreign exors. but that the dividend could only be paid on production of an English probate.—*Re COMMERCIAL BANK CORPN. OF INDIA & THE EAST, FERNANDES' EXECUTORS CASE* (1870), 5 Ch. App. 314; 22 L. T. 219; 18 W. R. 411; *sub nom.* *Re COMMERCIAL BANK CORPN. OF INDIA & THE EAST, Ex p.* INLAND REVENUE COMRS., 39 L. J. Ch. 497, L. J.

Annotation:—*Consd.* *A.-G. v. New York Breweries Co.*, [1898] 1 Q. B. 205.

6552. Payment into court of assets to provide for claim—Liquidator entitled to costs of appearance on payment out.]—*Re BONELLI'S ELECTRIC TELEGRAPH CO.*, COOK'S CLAIM (No. 2), No. 6016, *ante*.

6553. Sum in court in name of two creditors—Claim by one creditor for payment of whole—Leave to serve notice of application out of jurisdiction.]—A co. being in liquidation, an order was made for closing the liquidation upon payment of a dividend upon the unpaid debts of the co. One of the claims certified to be due was made in the names of S. & P. & the dividend upon this claim was paid into ct. S. claimed to be entitled to the whole sum discharged from any claim of P. who was resident out of the jurisdiction, & took out a summons for payment to him. He asked for leave to serve this summons on P. out of the jurisdiction:—*Held*: leave should be given.—*Re LIEBIG'S (BARON) COCOA & CHOCOLATE WORKS, LTD.* (1888), 59 L. T. 315.

6554. "Final dividend"—What amounts to.]—Pltf. insured certain sums deposited in the M. Bank with defts. who undertook to pay him interest on such deposits should default be made by the bank "until the principal was paid by the bank &/or the undertakers; & the principal sums, less any portion of the principal previously received from the bank when the final dividend in bkpcy. or liquidation is declared." A few days after the policy was entered into the M. Bank went into liquidation. It was reconstructed, & subsequently again went into liquidation. Under this second liquidation dividends to the extent of 5s. 7d. in the pound were paid to pltf. The last of such dividends did not purport to be a final dividend, but practically the assets were exhausted, & what remained had been taken over by a new co. for realisation. This new co. offered shares to pltf. in payment of the balance of his deposits which he in accordance with the provisions of the insurance policy rejected. Pltf. then sued defts. for payment of the balance of the deposits. Defts.

become insolvent, an Act was passed estimating the claims of creditors for land taken by the co. at \$30,000, & the value of the whole railway property at \$100,000, & directing that \$30,000 should be applied on debts for land & the balance of the \$100,000 divided *pro rata* among the other creditors. The \$30,000 proved more than sufficient to pay the land debts in full, & the co. claimed the balance:—*Held*: the other creditors were entitled to it.—*Re COBOURG & PETERBOROUGH RY. CO.* (1869), 16 Gr. 571.—*CAN.*

t. ——— Admitted out of time —

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contended that they were not liable to repay until the final dividend was paid on the liquidation of the M. Bank, & that the last paid dividend was not final, & the liquidation was not yet completed:—*Held*: they were liable.—*MURDOCK v. HEATH* (1899), 80 L. T. 50.

6555. Creditor's claim compromised—Enforcement by summons in winding up.—The claim of a creditor in a winding up was compromised:—*Held*: there was jurisdiction to enforce that compromise against the creditor by summons in the winding up.—*Re GAUDET FRÈRES S.S. Co.* (1879), 12 Ch. D. 882; 41 L. T. 503; *sub nom. Re GAUDET FRÈRES, LTD., LESLIE'S CASE*, 48 L. J. Ch. 818.

D. Distribution amongst Contributories.

(a) In General.

6556. What are "surplus assets"—Amount after repaying paid-up capital & debts & liabilities of company.—The term "surplus assets," when used in arts. of assocn. providing for distribution among the shareholders on a winding up taking place, has no such recognised technical meaning that the ct. is bound to construe it as referring to the assets after providing only for debts, liabilities, & costs, without recouping paid-up capital.

The capital of a co. was £100,200 in 100,000 ordinary shares & 200 founders' shares respectively of £1 each, all of which, except one founders' share, were issued & fully paid-up. One of the arts. of assocn. was as follows: "If the co. shall be wound up, one-fifth of the surplus assets, if any, shall belong to & be divided among the holders of founders' shares, & the remaining four-fifths of such surplus assets shall belong to & be divided

among the holders of ordinary shares in proportion to the amount of capital paid up on the shares held by them." Another art. had provided that the profits in each year should be applicable in or towards payment of a dividend of 8 per cent. on the amount paid up on the ordinary shares, & that the surplus, if any, should be divided, as to one-fifth among the holders of founders' shares, & as to the other four-fifths among the holders of ordinary shares in proportion to the amounts for the time being paid up thereon. The co. went into voluntary liquidation, & after providing for all debts, costs, & liabilities, a sum of about £90,000 remained for distribution among the shareholders:—*Held*: having regard to both arts., "surplus assets" meant the assets remaining after providing for debts, costs, & liabilities, & also recouping the paid-up capital subscribed by all the shareholders.—*Re NEW TRANSVAAL CO.*, [1896] 2 Ch. 750; 65 L. J. Ch. 868; 75 L. T. 272; 40 Sol. Jo. 685; 3 Mans. 264.

Annotations:—*Fold.* *Re Peabody Gold Mining Corpn.* (1897), 42 Sol. Jo. 97. *Expld.* *Re Ramel Syndicate*, [1911] 1 Ch. 749.

6557. ———.—*Re PEABODY GOLD MINING CORPN., LTD.* (1897), 42 Sol. Jo. 97.

Annotation:—*Expld.* *Re Ramel Syndicate*, [1911] 1 Ch. 749.

6558. Share of assets of shareholder—Paid to "Companies Liquidation Account"—Cannot be garnished.—*SPENCE v. COLEMAN*, No. 5988, *ante*.

(b) Adjustment of Rights between Contributories.

6559. Right of court to adjust—Right of transferor to sue transferee in respect of indemnity for calls not affected.—By 1862 Act, s. 109, it is provided that the Ct. of Ch. shall adjust the rights of contributories amongst themselves & distribute any surplus that may remain amongst the parties thereto:—*Held*: this sect. does not prevent a transferrer of shares in a co. from suing

Claimant excluded from benefit of previous distribution.—A creditor of a co. in liquidation failed to bring in his claim by the date announced by the official liquidator for claims to be made. He subsequently applied that his claim might be admitted:—*Held*: the creditor was not precluded from coming in at a later stage, & the only penalty for failure to come in within the time stated in the notice was that prescribed by the statute, namely, that claimant would be excluded from the benefit of any distribution made before his debt was proved.—*ISACK JESUDASEN PILLAI v. DIWAN BAHADUR RAMASAMY CHETTY* (1904), 1 L. L. R. 27 Mad. 496.—*IND.*

a. Assets insufficient to satisfy debentures—Liquidator not receiver for debenture-holders—Application of profits arising from book-debts & leasehold premises.—A co. prior to liquidation had issued debentures charged upon substantially all its assets, which were insufficient to pay the debentures in full. The liquidator proceeded to realise with the sanction of the debenture-holders, but he was not appointed receiver for them, nor were they in possession as mtgees. By leave of the ct. granted with the consent of the debenture-holders, certain book debts were paid in grain instead of in cash, & the grain was resold at a profit. A profit was also made from the working of leasehold premises included in the assets:—*Held*: the profits on resale of the grain belonged to the debenture-holders, but the profits arising from the leasehold premises were free assets in the hands of the liquidator.—*Re J. G. WARD FARMERS' ASSOCN., LTD., Ex p. COOK* (1898), 18 N. Z. L. R. 158.—*N.Z.*

PART III. SECT. 36, SUB-SECT. 12.—D. (a).

b. What are "surplus assets"—Not difference between value of vendors' shares allotted to directors & price paid for them by directors.—In a voluntary winding up of a co. the sum of £1,400 was available for distribution among the shareholders of the co. This sum had been paid to the liquidator of the co. in compliance with demands made by him, by three directors of the co., & represented the difference between £2,400, the value of 2,400 vendor's shares allotted to the directors by direction of S., & £1,000, the price agreed to be paid by the three directors to S., prior to the formation of the co. for the 2,400 shares:—*Held*: in the winding up of the co. S., as a shareholder of the co., was not entitled, as against the three directors, to receive any portion of the £1,400.—*Re STAFFORD FELT CO.* (1919), 19 S. R. N. S. W. 461.—*AUS.*

c. ——— Rights of second preference shareholders to share.—A municipal water co., incorporated under Ontario Joint Stock Cos. Act, sold their undertaking & franchise to the municipality, & passed a resolution providing for payment at par value to the shareholders of the stock allotted to them in proportion to the amounts paid on their respective shares & for payment of the liabilities & the costs of winding up, etc., & directed that the surplus should be distributed amongst the members according to their interest. By a bye-law of the co., holders of second preference shares were to be paid dividends at 6 per cent., & for a period of five years were not to participate further in the profits of the co. In case of default in payment of any dividend, the

deficiency was to be paid out of the net profits of succeeding years, & no dividend was to be paid on the ordinary stock until such deficiency should be fully paid. Second preference shareholders also had the right, under the bye-law, upon foregoing their secured dividend of 6 per cent., to surrender their shares & receive the par value thereof, or a corresponding number of ordinary shares, in which case they would have the same rights & privileges as the ordinary shareholders; but none of them exercised this option. The bye-law also provided that, in the event of the co. being wound up, if any surplus of the capital assets of the co. was to be returned to shareholders, the holders of second preference shares were to be paid the full amount of their shares & all dividends before the return of the capital of any ordinary shares, "& subject thereto & to the first preference stock, the holders of the ordinary shares shall be entitled to such surplus of the capital assets":—*Held*: the second preference shareholders were not entitled to share in the surplus assets, & the surplus was divisible among the ordinary shareholders in proportion to the amount of their shares, not to the amounts paid on their shares.—*MORROW v. PETERBOROUGH WATER CO.* (1902), 4 O. L. R. 324; 22 C. L. T. 326; 1 O. W. R. 512.—*CAN.*

PART III. SECT. 36, SUB-SECT. 12.—D. (b).

d. Right of court to adjust—Winding up of company because of misrepresentation.—*EDINBURGH EMPLOYERS LIABILITY & GENERAL ASSURANCE CO. (LIQUIDATORS) v. SMITH* (1893), 31 Sc. L. R. 625; 1 S. L. T. 321.—*SCOT.*

a transferee in a ct. of law, on a contract of indemnity, for calls made upon him by the official liquidator during the winding up of the co. notwithstanding a compromise between the liquidator & the transferee.—*JOSEPH v. HOLROYD* (1874), 22 W. R. 614.

6560. What rights may be adjusted—Indemnity to contributory against calls.]—Under the jurisdiction to adjust the rights of the contributories amongst themselves given by 1862 Act, s. 109, the ct. will not, under the winding up, enforce an alleged contract by the promoters to indemnify persons signing the subscription contract against all liability in respect of the shares, by directing a call payable primarily by the promoters only.—*Re BRAMPTON & LONGTOWN RY. CO., ADDISON'S CASE* (1875), L. R. 20 Eq. 620; 44 L. J. Ch. 537; 32 L. T. 592; 24 W. R. 113.

6561. — As between tortfeasor & contributory.]—Under 1862 Act, s. 109, the ct. has jurisdiction to adjust the rights *inter se* of contributories *qua* contributories; it cannot enforce equities which persons who, as tortfeasors, being also contributories, have been ordered to pay money under sect. 165, may have against other persons, who happen also to be contributories, to compel them to make good the money so ordered to be paid.—*Re ALEXANDRA PALACE CO.* (1883), 23 Ch. D. 297; 48 L. T. 424; *sub nom. Re ALEXANDRA PALACE CO., Ex p. GOODSON*, 52 L. J. Ch. 428; 31 W. R. 808.

6562. How rights adjusted—Calls on shares not fully paid—To reimburse fully-paid shares.]—*Re ANGLESEA COLLIERY CO., No. 6215, ante.*

6563. — — — — —.]—The arts. of assocn. of a co. with a nominal capital divided into £1 shares provided that if on the winding up of the co. the surplus assets should be insufficient to repay the whole of the paid-up capital, such surplus assets should be distributed so that as nearly as might be the losses should be borne by the members in proportion to the capital paid, or which ought to have been paid, on the shares held by them respectively at the commencement of the winding up, other than amounts paid in advance of calls. Shortly after incorporation 100,000 shares were issued on each of which the sum of 5s. was paid up, & 25,000 further shares each of which was at once fully paid up. No calls were ever made.

6562 i. How rights adjusted—Calls on shares not fully paid—To reimburse fully-paid shares.]—A. & B., joint owners of the H. Mine, agreed to sell their interest therein to a co., which was being formed for the purpose of working that mine, for the sum of £400 cash, & 4,000 shares of the co. By clause 7 of the arts. of assocn. it was declared that those 4,000 shares should be considered as shares paid up in full, "so that no call was to be made in respect of same." The clause then provided that A. & B. should not have any greater or more extensive claim or demand against the capital or assets of the co. in respect of the 4,000 shares than the other shareholders in respect of their shares. The arts. then provided for the dissolution & winding up of the co. in the event of the mine not turning out a successful adventure; & that upon such dissolution, the property of the co. should be sold & divided amongst the shareholders "ratably according to the number of shares held by them respectively." A. & B. were two of the original members of the co. who had subscribed the memorandum of assocn. A petition having been presented for winding up the co. & the proceedings having been ordered to be had in the Ct. of Bkcy., A. & B. filed a charge

claiming to be holders of fully paid-up shares, &, as such, entitled to an order that, for the purpose of adjusting the rights of the contributories amongst themselves the liquidator should make a call on the holders of partly paid-up shares, in order that they, A. & B., might be recouped the excess of capital paid up, or treated as paid up, on their 4,000 shares. The charge having been disallowed, A. & B. appealed:—*Held*: having regard to the provisions of the arts. of assocn. applts. were not entitled to have such a call made.—*Re HOLYFORD MINING CO.* (1869), 3 L. R. Eq. 208.—*IR.*

e. — Holders of fully paid & partly paid shares—By payment of difference of amounts paid up—With interest to the former.]—Where the holders of fully paid-up shares are entitled, in a liquidation of a co. to be paid the difference between the amount of their shares & the amount paid up by other shareholders before the other shareholders receive any payment, they are entitled also to receive interest on this difference from the commencement of the winding up until payment, although no provision is made in the arts. of assocn. or otherwise for the payment

In the winding up of the co., after paying debts & expenses there remained assets sufficient to repay the holders of the 25,000 shares 15s. per share, but insufficient to repay all the paid-up capital on the 125,000 shares:—*Held*: a call, actual or in account, of 3s. per share must be made on the holders of the 100,000 shares, so as to make these shares paid up to the extent of 8s. per share; the amount so called must be applied in repayment of 12s. per share to the holders of the 25,000 shares, making their shares also paid up to the extent of 8s. per share, & the assets in hand would then be divisible among the holders of the whole of the 125,000 shares *pro rata*.—*Re ANGLO-CONTINENTAL CORPN. OF WESTERN AUSTRALIA*, [1898] 1 Ch. 327; 67 L. J. Ch. 179; 78 L. T. 157; 46 W. R. 413; 14 T. L. R. 218; 42 Sol. Jo. 270; 5 Mans. 184.

Annotations:—*Distd. Re Kinatan (Borneo) Rubber*, [1923] 1 Ch. 124; *Re Mutoscope & Biograph Syndicate*, [1899] 1 Ch. 896; *Re Welsh Whisky Distillery Co.* (1900), 16 T. L. R. 246.

6564. By return of capital to shareholder.]—By the arts. of assocn. of a co., the directors were authorised to declare a dividend to be paid to the shareholders in proportion to the number of their respective shares & the amount paid up thereon respectively; & in the prospectus it was stated that the directors reserved power to issue 1,000 fully paid-up shares, which were issued accordingly. The shares were of £25, on which the whole £25 was paid by some shareholders & only £20 by the others. Dividends had been paid to the shareholders on the amounts so paid by them respectively:—*Held*: in the distribution of the surplus assets of the co. after winding up, the holders of fully paid-up shares were entitled to receive £5 a share before the assets were divided.—*Re HODGE'S DISTILLERY CO., Ex p. MAUDE* (1870), 6 Ch. App. 51; 40 L. J. Ch. 21; 23 L. T. 749; 19 W. R. 113, L. JJ.

Annotations:—*Consd. Sheppard v. Seinde, Punjab & Delhi Ry. & Abbott* (1887), 56 L. J. Ch. 558. *Appld. Birch v. Cropper, Re Bridgewater Navigation Co.* (1889), 14 App. Cas. 525. *Folld. Re Weymouth & Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66. *Consd. Re Sheppard's Corn Malting Co., Ex p. Lowenfeld* (1893), 70 L. T. 3; *Re Anglo-Continental Corpn. of Western Australia*, [1898] 1 Ch. 327; *Re Driffeld Gas Light Co.*, [1898] 1 Ch. 451. *Distd. Re Kinatan (Borneo) Rubber*, [1923] 1 Ch. 124. *Repld. Re Eclipse Gold Mining Co.* (1874), L. R. 17 Eq. 490; *Re Welsh Whisky Distillery Co.* (1900), 16 T. L. R. 246;

of interest.—*Re WOOD (F. H.) & SONS, LTD.* (1905), 25 N. Z. L. R. 326.—*N.Z.*

f. — — — — —.]—Where the holders of fully paid-up shares are entitled in the winding up of a co. to be paid the difference between the amount paid upon their shares & that paid on the contributory shares before anything is paid to the holders, of the latter shares, they are not also entitled to interest on such difference unless such right is derived from some contract with the co. or from some provision in the co.'s arts. of assocn.—*Re LADYSMITH GOLD DREDGING CO., LTD.*, [1921] N. Z. L. R. 204.—*N.Z.*

g. Extension of company's works paid out of reserve & depreciation funds — Sale of company's undertaking — Rights of preference & ordinary shareholders.]—The directors of a Gas Co., as authorised by the arts. of assocn., from time to time carried parts of the co.'s profits to a reserve fund & a depreciation fund. The directors paid repairs of the works out of revenue & applied the whole of the reserve & depreciation funds to the extension of works & other capital purposes of the co. The co.'s undertaking having been sold, a question arose between the preference shareholders, who had

Sect. 36.—Winding up by court: Sub-sect. 12, D.
(b) & (c); sub-sect. 13, A.]

Re West Coast Gold Fields, Rowe's Trustee's Claim, [1906] 1 Ch. 1.

6565. — By calling up discount—On shares issued as fully-paid at discount.—It being *ultra vires* for a limited co. to issue shares at a discount or by way of bonus, although authorised to do so by the arts. of assocn., the holders of shares so issued are not thereby relieved from liability, in a winding up, to calls for the amounts unpaid on their shares for the adjustment of the rights of contributories *inter se*, as well as for the payment of the co.'s debts & the costs of winding up.—*WELTON v SAFFERY*, [1897] A. C. 299; 66 L. J. Ch. 362; 76 L. T. 505; 45 W. R. 508; 13 T. L. R. 340; 41 Sol. Jo. 437; 4 Mans. 269, H. L.; *affg.* S. C. *sub nom.* *Re RAILWAY TIME TABLES PUBLISHING CO.*, *Ex p.* *WELTON*, [1895] 1 Ch. 255, C. A.

Annotations:—Distd. *Re Home & Foreign Investment & Agency*, [1912] 1 Ch. 72. **Refd.** *Re Welsh Whisky Distillery Co.* (1900), 16 T. L. R. 246; *Randt Gold-Mining Co. v. New Balkis Eersteling* (1901), 71 L. J. K. B. 346; *Mother Lode Consolidated Gold Mines v. Hill* (1903), 19 T. L. R. 341; *Bisgood v. Henderson's Transvaal Estates*, [1908] 1 Ch. 743; *Dibble v. Wilts & Somerset Farmers*, [1923] 1 Ch. 342. **Mentd.** *Re Peveril Gold Mines*, [1898] 1 Ch. 122; *Re Baring-Gould & Sharpington Combined Pick & Shovel Syndicate* (1899), 68 L. J. Ch. 429; *Mosely v. Koffyfontein Mines*, [1904] 2 Ch. 108; *Hickman v. Kent & Romney Marsh Sheep-Breeders' Assocn.*, [1915] 1 Ch. 881.

(c) *Rights of Preference Shareholders.*

6566. To surplus assets—No provision in constitution—Division ratably among all classes.—Upon the formation of a co. for working certain patents, the A. shareholders contributed all the capital, & the B. shareholders received paid-up shares as a consideration for the patents & the premises on which they were worked. The A. shareholders were to receive out of the profits the whole amount of their capital with interest at £7 10s. per cent. before the B. shareholders could participate in the profits:—*Held*: upon the winding up of the co., no profits having been realised, there being a provision only for preferential dividend, & no provision as to the division of capital upon breaking up, the surplus assets must be distributed between both classes of shareholders *pro rata* without reference to their rights in respect of dividend.—*Re LONDON INDIA RUBBER CO.* (1868), L. R. 5 Eq. 519; 37 L. J. Ch. 235; 17 L. T. 530; 16 W. R. 334.

6567. — — — — —.—It was provided by

always received their full dividend, & the ordinary shareholders, as to the mode in which these funds should be dealt with:—*Held*: the ordinary shareholders were entitled to both funds, & that they fell to be deducted from the price of the works before a distribution among all the shareholders was made.—*PARTICK, HILLHEAD & MARYHILL GAS CO., LTD. v. TAYLOR* (1891), 18 R. (Ct. of Sess.) 1017; 28 Sc. L. R. 766.—SCOT.

PART III. SECT. 36, SUB-SECT. 12.—
D. (c).

h. To surplus assets—Transfer of undertaking—Agreement for transfer containing special terms.—An art. of B. Co., formed to take over the undertaking of A. Co., provided that on winding up any surplus assets should be distributed among members in proportion to the amount paid up on their shares, & that in ascertaining what were surplus assets no deduction of any amount should be made for the repayment of capital; but the art. was to be without prejudice to the holders of shares issued under special

conditions, when this art. was adopted no preference shares had been issued. B. Co. issued ordinary contributing shares of £1 each, paid up to 14s. to holders of shares in A. Co. who had applied for them. By the agreement for transfer between B. & A. Cos., holders of preference shares in A. Co. whose capital both on preference & ordinary shares was fully paid-up to £1 per share were entitled to take up preference shares in B. Co., which had, among special advantages, a right in the event of winding up to have the surplus assets applied first, in paying off the capital paid up or deemed to be paid up, on the preference shares; secondly, in paying off arrears of dividend, & thereafter, a right of participation, ratably with the other shares, in the residue of surplus assets which should remain after paying off the capital paid up, or deemed to be paid up, on such other shares. In the liquidation of B. Co. it was found that the assets were insufficient, without carrying up the unpaid capital, to meet its debts, liabilities, & the costs of winding up, but were more than

clause 5 of the memorandum of assocn. of a limited co. with a capital divided into ordinary & preference shares that the preference shares should entitle the holders to a fixed cumulative dividend of 7 per cent on the amount for the time being paid up thereon, & to the repayment of capital before any dividend was paid on the capital repaid to the holders of the ordinary shares, & to a further dividend calculated as therein mentioned. The co. had power to increase its capital & was desirous of doing so. Upon a summons by the co. asking questions on the construction of the clause:—*Held*: (1) the co. could pay dividends on the ordinary share capital subject only to the fixed cumulative dividend at 7 per cent on the preference shares & the further specified dividend; (2) the preference shares entitled the holders thereof in the event of a winding up of the co. to rank *pari passu* with the holders of the ordinary shares in any surplus assets of the co.—*ANGLO-FRENCH MUSIC CO. v. NICOLL*, [1921] 1 Ch. 386; 90 L. J. Ch. 183; 124 L. T. 592.

6568. — Rights of priority given at issue—Under powers in constitution.—A co. having power to increase its capital to such amount & upon such terms, & either with or without special privileges or preferences to the holders of the shares in such increased capital, as they should deem expedient, raised further capital by the issue of preference shares entitled to a preferential interest of 10 per cent *per annum*; the amount of such shares to be repaid on six months' notice with 25 per cent bonus, such payment of interest, repayment, & bonus to take place before any dividend, interest, or other money was payable to the original shareholders. The co. was wound up, & after payment of debts there remained a surplus for distribution:—*Held*: the co. had conferred a preference as to capital, as well as dividend, upon the new shareholders, & they were entitled to the surplus assets in priority to the original shareholders.—*Re BANGOR & PORTMADOC SLATE & SLAB CO.* (1875), L. R. 20 Eq. 59; 32 L. T. 389; 23 W. R. 784.

Annotations:—Refd. *Re Weymouth & Channel Islands Steam Packet Co.* (1890), 59 L. J. Ch. 714; *Re Wakefield Rolling Stock Co.* (1892), 61 L. J. Ch. 670.

6569. — How far shareholders can agree to division not in accordance with legal rights.—Where a meeting of shareholders of a co. had resolved by a majority upon a mode of distribution of surplus assets between preferred & deferred

sufficient to do so including this uncalled capital:—*Held*: the mode of distribution provided in the art. was subject to the special terms granted to the preference shareholders by the agreement; & surplus assets included the uncalled capital on the contributing shares, & the preference shareholders were entitled to have this balance called up to repay the capital paid on the preference shares, in priority to the repayment of the capital on the other shares.—*Re MAIL NEWSPAPERS, LTD.*, [1915] S. A. L. R. 209.—AUS.

k. Dividend—Articles providing for payment out of profits only.—*MONKLAND IRON & COAL CO. v. HENDERSON, ETC.* (1883), 10 R. (Ct. of Sess.) 494; 20 Sc. L. R. 318.—SCOT.

l. — Inconsistency between memorandum & articles of association.—The memorandum of assocn. of a co. provided "the capital of the co. is £250,000 divided into 139,092 shares of £1 each & 110,908 deferred shares of £1 each." The arts. of assocn. provided that the ordinary shares should have a preferential ranking as to

shareholders different from that to which the parties were legally entitled, the ct. refused to draw an inference that the shareholders absent or not represented at the meeting had assented to such mode of distribution.—*Re NORTH WEST ARGENTINE RY. CO.*, [1900] 2 Ch. 882; 70 L. J. Ch. 9; 83 L. T. 675; 49 W. R. 134; 17 T. L. R. 20; 45 Sol. Jo. 46.

6570. To arrears of dividend—Profits earned in previous year—No dividend declared in general meeting.]—A co.'s capital consisted of 5 per cent cumulative preference shares & ordinary shares, the preference shares having priority both as to capital & dividend, & the preferential dividend being payable before any profits could be carried to reserve. The arts. provided that no dividend should be payable except out of profits, & that, in the event of the co. being wound up, the surplus divisible assets for the time being remaining "after paying the liabilities of the co." should be applied first in repaying the preference capital & "secondly in paying the arrears, if any, of the 5 per cent preferential dividends thereon to the commencement of the winding up." The remainder of the surplus assets was to belong to the ordinary shareholders. No dividends were ever declared, but the profits were accumulated until the co. was wound up:—*Held*: the preference shareholders were entitled to their arrears of preferential dividends, though not declared, but only to the extent of the accumulated profits.—*Re HALL (W. J.) & Co., LTD.*, [1909] 1 Ch. 521; 78 L. J. Ch. 382; 100 L. T. 692; 16 Mans. 152.
Annotations:—*Consd.* *Re New Chinese Antimony Co.*, [1916] 2 Ch. 115; *Re Springbok Agricultural Estates*, [1920] 1 Ch. 563.

dividend; & that in the event of a winding up, the shares of the co. should be repaid "in the order in which the shares or stocks are entitled to rank for payment of dividend." In the winding up of the co. the deferred shareholders maintained that the provision in the arts. for the preferential ranking of the ordinary shareholders in a winding up was inconsistent with the memorandum of assocn. & was therefore invalid, & that the surplus fell to be divided equally among all shareholders:—*Held*: there was no inconsistency between the arts. & memorandum of assocn. & in the winding up the ordinary shareholders were entitled to payment of their capital in full before the deferred shareholders received anything on account of their capital.—*HUMBOLDT REDWOOD CO., LTD. (LIQUIDATOR) v. COATS*, [1908] S. C. 751.—*SCOT.*

*m. To arrears of dividend.]—*The arts. of assocn. of a co. provided that upon the dissolution of the co. the assets remaining after payment of the co.'s debts & obligations should be applied, first, in repaying shareholders of preference shares the whole amount paid up on such shares & the balance remaining thereafter shall be distributed among the holders of the ordinary shares in proportion to the amount paid up on such shares:—*Held*: in the liquidation of the co. the preference shareholders were not entitled to payment in priority of any repayment of capital to the ordinary shareholders of the arrears of cumulative preferential dividend on their shares out of an alleged profit, arising out of an appreciation of stock-in-trade earned but not declared prior to the liquidation.—*ROBERTSON, SANDERSON & CO., LTD. v. INCHES* (1917), 55 Sc. L. R. 88.—*SCOT.*

PART III. SECT. 36, SUB-SECT. 13.—
A.

*n. Nature of jurisdiction—To preserve assets.]—*The sects. of Dominion

Winding-up Act as to restraining actions or not allowing them to be carried on are intended not for the purpose of harassing or impeding or injuring third parties who are not members of the co., but for the purpose of preserving the limited assets of the co. in the best way for distributing among all creditors who have claims upon it.—*PLUMMER v. SULLIVAN MACHINERY CO.*, [1917] 2 W. W. R. 229; 24 B. C. R. 104.—*CAN.*

*o. Considerations influencing discretion of Court.]—*When the ct. is asked to stay an action the only material question to be considered is whether there are any circumstances which render it necessary that the action should be continued, or whether the claim of pltf. is not one which can be easily dealt with in the winding up or in any other way.—*CENTURY MERCANTILE CO. v. AUCKLAND PROVINCIAL FRUIT GROWERS CO-OPERATIVE SOCIETY, LTD.*, [1921] N. Z. L. R. 272.—*N.Z.*

*p. Extent of jurisdiction—What is "proceeding"—Enforcing an execution—Whether sale by sheriff can be set aside.]—*There is jurisdiction under Dominion Winding-up Act, s. 13, to restrain proceedings in any action, suit, or proceedings against the co., even in actions or suits beyond the ordinary territorial jurisdiction of the ct.; & the enforcing of an execution is a "proceeding" within this sect.; & therefore there was jurisdiction for the ct. to make an order staying proceedings under an execution in the hands of the sheriff of the county of V., in N. B., as had been done in this case. But the sheriff having, notwithstanding, proceeded with the sale under the execution against lands of the co., & executed a deed of the same to the purchaser:—*Held*: there was no jurisdiction in the ct. under above Act to make an order summarily declaring the sale void, such case not coming within the classes of cases which, under the Act, may be dealt with in a sum-

SUB-SECT. 13.—RESTRAINT OF PROCEEDINGS.

A. In General.

See 1908 Act, ss. 142, 211.

6571. Nature of jurisdiction—Purely discretionary—Interference by Court of Appeal.]—Where the judge in whose ct. a co. is being wound up has, under 1862 Act, s. 87, given leave to a pltf. to proceed with a suit against the co., the Ct. of Appeal will not interfere with the discretion of the judge.—*Re LAND & SEA TELEGRAPH CONSTRUCTION CO., THAMES PLATE GLASS CO. v. LAND & SEA TELEGRAPH CONSTRUCTION CO.* (1871), 6 Ch. App. 643; 25 L. T. 236; 19 W. R. 764, L. J. J. Annotation:—*Reid. Re Lloyd, Lloyd v. Lloyd* (1877), 6 Ch. D. 339.

6572. Extent of jurisdiction—What is "proceeding"—Sale under execution perfected by seizure before winding up.]—Proceeding to a sale under an execution perfected by seizure before the commencement of a winding up is a "proceeding" within 1862 Act, s. 87, & will be restrained if the ct. has reason to doubt the *bona fides* of the transaction.—*Re PERKINS BEACH LEAD MINING CO.* (1877), 7 Ch. D. 371; 37 L. T. 604; *sub nom. Re PERKINS BEACH LEAD MINE CO., Ex p. NOBLE*, 26 W. R. 164.

Annotations:—*Consd. Re Artistic Colour Printing Co.* (1880), 14 Ch. D. 502. *Reid. Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373.

—*See, further*, Nos. 6619-6622,

6624, *post*.

6573. — Inquiry by Board of Trade as to solvency of promoters.]—Under an order of the Board of Trade made in 1882, certain persons therein named as "promoters" were authorised

in many manner by a judge in the winding-up proceedings.—*Re TOBIQUE GYPSUM CO.* (1903), 6 O. L. R. 515; 23 C. L. T. 303; 2 O. W. R. 868.—*CAN.*

*q. To set aside garnishee summons.]—*In Sept. 1913, the Supreme Ct. of Ontario made an order under Winding-up Act, R. S. C. 1906, c. 144, & amending Acts, for the winding up of deft. co. In Oct. 1913, pltf. commenced an action in Alberta for debt against deft. co., & served a garnishee summons upon a city corpn.:—*Held*: the proceedings in the action should be stayed unless & until leave to proceed should be obtained from the Supreme Ct. of Ontario; & the garnishee summons was ineffective, & should be set aside.—*LAVELL v. CANADIAN MINERAL RUBBER CO., LTD.* (1913), 26 W. L. R. 111.—*CAN.*

*r. Company being wound up in England—Restraint of action in India.]—**BANK OF HINDUSTAN, ETC. v. PREMCHAND RAICHAND, ETC., AMED-BHAJ HABIBHAJ v. PREMCHAND RAICHAND, ETC.* (1868), 5 Bom. O. C. 83.—*IND.*

*s. Pending appointment of official manager—Extension of time for pleading.]—*Although the ct. has, pending the appointment of an official manager, under Winding-up Act, 1848, jurisdiction to stay proceedings in actions by creditors against a banking co. which has stopped payment, the ct. in which such action is brought, if a proper case be made, may extend the time for pleading, in order to allow time for the appointment of an official manager.—*CARROLL v. KENNEDY* (1856), 8 Ir. Jur. 268.—*IR.*

*t. Company domiciled in England.]—*The affairs of a joint-stock co., whose domicile was in England, having been sequestered under Winding-up Acts, after proceedings had been instituted by Scotch creditors of the co. in the Ct. of Session against certain partners within the jurisdiction

on which petition founded.]—*Re* BRITISH LIQUID AIR CO. (1908), 126 L. T. Jo. 77, C. A.

—.]—*See, also*, No. 7355, *post*.

6586. Removal of stay—No notice of application to stay served on creditors.—Where one contributory having agreed to pay all debts proved before the master & the costs of winding up a co., obtained an order to stay all proceedings under the winding-up order, without serving with notice of his application claimants who had tendered before the master proofs of alleged debts which had stood over for further investigation:—*Held*: claimants were entitled to have this obstruction to their proceedings removed, & to have the master's judgment on their claims.—*Re* DOVER & DEAL RY., CINQUE PORTS, THANET & COAST JUNCTION CO., CLIFTON'S CASE (1854), 5 De G. M. & G. 743; 3 W. R. 8; 43 E. R. 1059; *sub nom. Re* DOVER, DEAL & CINQUE PORTS RY. CO., *Ex p. CLIFTON*, *Ex p. HOOK*, *Ex p. THOMPSON*, 24 L. J. Ch. 83; 24 L. T. O. S. 85, L. JJ.

C. Actions, etc.

(a) *Institution of Proceedings.*

6587. Action to enforce lien—Over company's machinery & plant—Injunction to restrain liquidator from selling machinery & plant.—Where a bill was filed against a co. in liquidation to enforce an alleged lien for unpaid purchase-money against the property of the co., part of which property consisted of fixed machinery & plant; an injunction was granted to restrain the official liquidator from selling that fixed plant & machinery.—*BLAKELY v. DENT, Re BLAKELY ORDNANCE CO., LTD.* (1867), 15 W. R. 663, L. JJ.

Foreclosure action.—*See* Nos. 5044, 5100, *ante*.

6588. Action by contributory's solicitor—To recover assets—Leave to bring action on giving of indemnity—Indemnity not given.—Where an order is made in a winding up giving persons interested in the assets of the co. leave to take proceedings in the name of the co. on giving such indemnity as the ct. shall direct, the giving of the indemnity is a condition precedent to the institution of any such proceedings, & must be the subject of a substantive application before such proceedings are taken. Such leave will only be given to creditors or contributories of the co. Where, therefore, a contributory obtained an order that his taxed costs of an application in the winding up should be paid to him out of the assets of the co.,

1906, c. 44:—*Held*: all proceedings upon the winding-up order should be stayed until after trial & determination of a certain interpleader issue, directed to be tried because of the seizure of the co.'s goods by the sheriff under the execution of appct. & a claim thereto made by a chattel mtgco., who was the petitioner for the winding-up order.—*Re* INSTALLATIONS, LTD. (1913), 26 W. L. R. 254.—CAN.

PART III. SECT. 36, SUB-SECT. 13.—*C. (a).*

d. Action to attach steamer—Plaintiff's action delayed—Representations of solvency by company.—After a winding-up order had been made, P., a resident of O., brought an action against the co. in M., U.S.A., with a view of attaching a steamer wintering there, which was the property of the co. It was shown that representations that the co. was perfectly solvent had been made by both the secretary & managing director to P., & P. swore that but for these representations he would have taken proceedings before he did, which might have enabled him to obtain a judgment before the wind-

ing-up order was made. In an action for an injunction to restrain P. from proceeding with his action in M., in which it was shown that other creditors of the co., who were residents of U.S. & so not within the jurisdiction of the ct., were also proceeding against the steamer:—*Held*: the continuance of the injunction, which had been granted *ex parte* was refused.—*Re* LAKE SUPERIOR NATIVE COPPER CO., LTD., *Re* PLUMMER (1885), 9 O. R. 277.—CAN.

e. Action for specific performance of contract to purchase land.—Pltf. co. entered into an agreement with deft. co. for the sale to the latter of certain lands the consideration for which consisted of other lands. It was agreed that conveyances were to be executed by the parties upon the happening of certain contingencies. Deft. took possession of pltf.'s property & entered into agreements with respect to it. Upon the happening of the said contingencies deft. co. which had gone into liquidation refused to carry out its agreement with pltf. co.:—*Held*: the master rightly exercised his discretion

& the contributory having become bkpt., & the liquidators of the co. alleging that they had no assets to meet such costs, the solrs. obtained an order that on giving such indemnity as the ct. should direct they might bring an action in the name of the co. against the former directors & promoters of the co. with a view to increase the assets in the winding-up, & forthwith commenced such an action; on an application by defts. in the action:—*Held*: the order giving leave to bring the action must be set aside, & all proceedings in the action must be stayed, on the grounds, that the giving of the indemnity was a condition precedent which had not been complied with; & that the order itself was made without jurisdiction, as the solrs. were not persons interested in the assets of the co.—*CAPE BRETON CO. v. FENN* (1881), 17 Ch. D. 198; 50 L. J. Ch. 321; 44 L. T. 445; 29 W. R. 386, C. A.

Annotations:—*Re*fd. *Adams v. London Motor Builders*, [1921] 1 K. B. 495. *Mentd. Re* Dronfield Silkstone Coal Co. (No. 2) (1883), 23 Ch. D. 511; *Re* London Metallurgical Co., [1895] 1 Ch. 758; *Fricker v. Van Grutten*, [1896] 2 Ch. 649; *Geilinger v. Gibbs*, [1897] 1 Ch. 479.

6589. Action in Scotland—As means of obtaining fruits of previous action.—Leave was granted under 1908 Act, s. 142, to appets. to bring a fresh action in Scotland after the winding-up order had been made, when it was shown that such fresh action was in reality only a method of obtaining the fruits of a previous action.—*Re* NATIONAL PROVINCIAL INSURANCE CORPN., LTD., *COOPER v. THE CORPN.* (1912), 56 Sol. Jo. 290.

Action to recover possession—On breach of covenant by company.—*See* No. 6679, *post*.
See, also, No. 6588, *ante*.

(b) *Continuation of Proceedings.*
i. *After Winding-up Petition.*

See, now, 1908 Act, s. 140.

6590. General rule.—Where a petition for winding up a co. under 1856 Act & Joint Stock Companies Act, 1857 (c. 14), has been presented, the ct. will restrain creditor from suing the co. until the petition has been disposed of.—*Re* NORTHUMBERLAND & DURHAM DISTRICT BANKING CO. (1858), 27 L. J. Ch. 354; 30 L. T. O. S. 346; 4 Jur. N. S. 154; 6 W. R. 267; *On appeal*, 2 De G. & J. 357, L. JJ.

Annotations:—*Mentd. Re* Nassau Phosphate Co. (1876), 2 Ch. D. 610; *Hill v. Hill* (1886), 55 L. T. 769; *Wenlock v. River Dee Co.* (1887), 36 Ch. D. 674; *Re* National Debenture & Assets Corpn., [1891] 2 Ch. 505; *Young v.*

in granting leave to pltf. co., which was ready & willing to carry out its part of the agreement, to bring an action, after the making of a winding-up order, for specific performance of the said agreement or in default for its cancellation.—*Re* TRANSCONTINENTAL TOWNSITE CO. (1915), 30 W. L. R. 833; 8 W. W. R. 93; 21 D. L. R. 291.—CAN.

1. Omission to get leave—Liability for costs.—Pltf. who has, without the consent of the ct. brought an action against a co. in liquidation, must pay the costs of the action incurred after receipt of notice of the co.'s position.—*LILLY (CHARLES H.) CO. v. JOHNSTON FISHERIES CO.* (1909), 11 B. C. R. 174.—CAN.

PART III. SECT. 36, SUB-SECT. 13.—*C. (b) i.*

6590 i. General rule.—A winding-up order is not of itself a stay of proceedings, & notice of trial given after such order will not on account of it be set aside.—*NORTH WEST TIMBER CO. v. McMILLAN* (1886), 3 Man. L. R. 277.—CAN.

Sect. 36.—Winding up by court: Sub-sect. 13, C.
(b) i. & ii. & D. (a).]

South African & Australian Exploration & Development Syndicate, [1896] 2 Ch. 268.

6591. Summons before magistrate to recover penalties.]—A petition had been presented for the winding up of a co., but before any order was made for that purpose summonses were taken out against the co., by a person not interested in the affairs of the co., to recover penalties for alleged offences under 1862 Act, & Life Assurance Companies Act, 1870 (c. 61). On motion for an injunction to restrain the proceedings against the co. before the magistrate:—*Held*: the ct. had jurisdiction under 1862 Act, s. 85, to make the order.—*Re BRITON MEDICAL & GENERAL LIFE ASSURANCE ASSOCN.* (1886), 32 Ch. D. 503; 55 L. J. Ch. 416; 54 L. T. 152; 34 W. R. 390; 2 T. L. R. 344.

Annotation:—*Mertd. Re Vexatious Actions Act, 1896, Re Boaler*, [1915] 1 K. B. 21.

6592. Summons to enforce rates.]—Where a petition has been presented for the winding up of a co., the ct. has jurisdiction under 1862 Act, s. 85, to restrain proceedings on a summons for the enforcement of poor rates owing by the co.—*Re FLINT, COAL & CANNEL CO., LTD.* (1887), 56 L. J. Ch. 232; 56 L. T. 16; 3 T. L. R. 276.

ii. After Winding-up Order.

See, now, 1908 Act, s. 142.

6593. General rule.]—Special circumstances must be shown to induce the ct. to give leave under 1862 Act, s. 87, to continue a suit against a co. after it has gone into liquidation.

A suit for specific performance of an alleged contract to purchase was commenced against a co., which thereupon went into voluntary liquidation; & after extended time to answer had expired, a supervision order was made. On an application for that purpose, leave was given to enforce an answer, but no further proceedings were to be taken without leave of the ct.—*THAMES PLATE GLASS CO. v. LAND & SEA TELEGRAPH CO.* (1870), L. R. 11 Eq. 248; 40 L. J. Ch. 165; *sub nom. Re LAND & SEA TELEGRAPH CO., LTD., THAMES PLATE GLASS CO., LTD. v. LAND & SEA TELEGRAPH CO., LTD.*, 19 W. R. 303.

6594. Action by creditor—Insufficient proof of debt.]—*HUTCHINSON v. HARDING*, No. 6507, *ante*.

6595. Action for purpose of making company bankrupt.]—*Re NATIONAL INSURANCE & INVESTMENT ASSOCN., DAVIES'S CASE, ABERCORN'S (LORD) CASE*, No. 6218, *ante*.

6596. Action to restrain trespass.]—In a suit against a co. to restrain trespass, liberty was given, under 1862 Act, s. 87, to pltf., after a winding-up order, to proceed with the suit.—*WYLEY v. EXHALL COAL MINING CO., LTD.* (1864), 33 Beav. 538; 55 E. R. 478.

6597. Action against company & third party—Company necessary party.]—Pltf. having commenced a suit against a banking co. & another person, subsequently to which an order for winding up the co. was made, & the Vice-Chancellor having

refused to pltf. leave to proceed with the suit:—*Held*: (1) 1862 Act, s. 87, was not intended to prevent the prosecution of such a suit to which a co. in liquidation was a necessary party; (2) pltf. should give an undertaking not to enforce against the co., without leave of the ct., any decree he might thereafter obtain.

(2) The ct. will not order pltf. in such a case to give security for costs unless special circumstances are shown to justify such an order.—*McEWEN v. LONDON, BOMBAY & MEDITERRANEAN BANK, LTD., Re LONDON, BOMBAY & MEDITERRANEAN BANK, LTD.* (1866), 15 L. T. 495; 15 W. R. 245, L. J. J.

Annotation:—*As to* (2) *Folld. Re Marine Investment Co., Ltd.* (1868), 17 L. T. 535.

6598. —.]—A private individual, who is deft. in the same suit with a joint-stock co., against which a winding-up order has been made, but no application has been made under 1862 Act, s. 87, for leave to proceed with the suit, is not entitled to have further proceedings stayed.—*WELLS v. ESTATES INVESTMENT CO., LTD.* (1867), 15 W. R. 762.

6599. After cause called on—& jury sworn.]—Where an order for the winding up of a co. has been made by the Ct. of Ch. under 1862 Act, a judge will not stop all further proceedings in an action brought against the co.—as provided by 1862 Act, s. 87—after the cause has been called on & the jury sworn.

Semble: the proper course to be pursued is to apply on affidavit setting out the fact of the order having been made to the judge before the cause has been called on.—*HENDERSON v. PERUVIAN RY. CO., LTD.* (1867), 16 L. T. 297.

6600. Action against debtor to company—Against whom garnishee order obtained.]—H. recovered judgment against a co., & afterwards obtained a garnishee order against S., an alleged debtor to the co., who subsequently denied that he was indebted to the co. H. then, by leave, brought an action against S., & pending the proceedings the co. was ordered to be wound up, & a liquidator was appointed. A motion by the liquidator to restrain the proceedings at law was refused, but it was ordered that in case H. should recover a verdict he should not put in force any execution against the estate of the co. in the hands of S.—*Re UNITED ENGLISH & SCOTTISH LIFE INSURANCE CO.* (1868), L. R. 5 Eq. 300; 17 L. T. 526; 16 W. R. 451.

6601. Action against directors.]—The Ct. of Ch. has no jurisdiction to stay actions at law against the directors of a co. being wound up by the ct.—*Re NEW ZEALAND BANKING CORPN.* (1869), 39 L. J. Ch. 128; *sub nom. Re NEW ZEALAND BANKING CORPN., Ex p. HANKEY*, 21 L. T. 481.

6602. Action to enforce lien—Over assets abroad—Proceedings commenced abroad.]—*Re SOUTH EASTERN OF PORTUGAL RY. CO.* (1869), 17 W. R. 982.

Annotation:—*Apld. Re Oriental Steam Co.* (1874), 30 L. T. 317.

.]—*Re HERMANN LOOG, LTD.*, No. 5981, *ante*.

PART III. SECT. 36, SUB-SECT. 13.—
C. (b) ii.

g. Action by creditor—Against shareholder.]—No action maintainable by creditor against shareholder after winding-up order is made.—*SHAYER v. COTTON* (1895), 27 O. R. 131; 23 A. R. 426.—*CAN.*

h. Action by company.]—Cos. Act, 1913, s. 269, is not applicable to a suit brought by the co. & such suit can proceed in spite of an order for winding up made after its commence-

ment.—*RUP RAM v. FAZAL DIN* (1919), 1 L. R. 1 Lah. 237.—*IND.*

k. Action for salary—Set-off in respect of shares issued as unpaid—Issue to be decided in the winding up.]—To an action by pltf. for salary against a co. incorporated under Imperial Joint-Stock Cos. Acts, defts. pleaded a set-off. It appeared that pltf. & one H. held shares which had been issued as paid up, but that that fact not having been registered, they had been placed on the list of contributories under the

Winding-up Acts in England, as liable for the debts of the co. to the extent of their shares. Pltf. also held similar shares in his own name:—*Held*: defts.' proper remedy was to apply to stay the action under the equity of the Imperial Acts.—*HOWELL v. DOMINION OF CANADA OILS REFINERY CO.* (1875), 37 U. C. R. 484.—*CAN.*

l. Action for cancellation of shares—Relief available in winding up.]—Previous to an order for the winding up of the co. under Dominion Winding-up

6604. Claim for matters comprised in previous unsuccessful proceedings—Costs of previous proceedings unpaid.]—On a summons by an official liquidator of a co. that further proceedings against the co. by the exors. of A. upon a claim by A. should be stayed until they had paid certain costs, comprising (1) costs in an action by A. against the co., (2) costs of a petition by A. to wind up the co. that was dismissed, (3) costs of a claim by A. in the winding up, & (4) costs of the appeal from the order refusing such claim: the order asked for was made with respect to costs (3) & (4), but not with respect to costs (1) & (2).—*Re UNITED KINGDOM ELECTRIC TELEGRAPH CO., LTD., ALLAN'S EXECUTORS' CLAIM* (1876), 45 L. J. Ch. 366; 34 L. T. 707; 24 W. R. 593, C. A.; *Varying S. C. sub nom. Re UNITED KINGDOM ELECTRIC TELEGRAPH CO., Ex p. CROLL*, 34 L. T. 238.

Annotation:—Apld. Re Orrell Colliery & Fire-Brick Co. (1879), 28 W. R. 145.

6605. Action to recover money lost by improper investment—More convenient that matter at issue should be investigated in winding up.]—Early in 1877 the A. co., a Scottish co., having their registered offices in Edinburgh, brought an action in Scotland against the Q. co., an Australian co. having their registered office in Brisbane, claiming to recover from the Q. co. money which the Scottish co. has sent out for investment, & which had been, as the Scottish co. alleged, lost by fraudulent or improper investment. For the purpose of founding jurisdiction, arrestment had been made in Scotland of unpaid capital on shares of the Q. co. held in Scotland. The pleadings in the Scottish action were closed in May, 1887. In Oct. 1887 an order to wind up the Q. co. was made by the ct. in Queensland, & shortly afterwards an order to wind up the same co. was made in England, & directed to be ancillary to the order of the colonial ct. The English liquidator moved to stay the proceedings in the Scottish action, & the Scottish co. made a cross-motion that their action might be allowed to proceed, notwithstanding the winding up:—*Held*: it was more convenient that the matter should be investigated in the liquidation than in the Scottish action, & if the Australian co. had gained any priority or security by virtue of the process of arrestment it could be preserved in the winding up; there was therefore no reason for allowing the Scottish proceedings to continue, & they must be stayed.—*Re QUEENSLAND MERCANTILE AGENCY CO., LTD.* (1888), 58 L. T. 878; *sub nom. Re QUEENSLAND MERCANTILE AGENCY CO., LTD., Ex p. AUSTRALIAN INVESTMENT CO.*, 4 T. L. R. 387.

Act, an action had been brought by the co. against a shareholder for unpaid calls, & the shareholder had delivered a defence & counterclaim praying that his application for shares should be cancelled on the ground of misrepresentation & of false & fraudulent statements in the prospectus:—*Held*: the shareholder could have in the winding-up proceedings all the relief that he claimed by his defence & counterclaim; & his application for leave to proceed in the action notwithstanding the winding-up order, was refused.—*Re PAKENHAM PORK PACKING CO.* (1903), 6 O. L. R. 582; 24 C. L. T. 18.—CAN.

m. Action for declaration of title to certain shares—Alternatively for damages.]—MAIN v. AZOTINE, LTD., [1916] 2 S. L. T. 252.—SCOT.

PART III. SECT. 36, SUB-SECT. 13.—D. (a).

n. Scire facias—By creditor against contributory.]—There is nothing in the

Winding-up Act, R. S. C., c. 129, which makes it a bar, either expressly or by implication, to an action of *scire facias*, brought by a creditor of the co. without the leave of the ct. against a contributory.—*SHAVER v. COTTON* (1895), 27 O. R. 131.—CAN.

o. Execution against company for purpose of founding proceedings against directors—Limited execution.]—Notwithstanding Dominion Winding-up Act, s. 23, providing that "every execution put in force against the estate or effects of the co. after the making of the winding-up order shall be void," a pltf. may by leave of the ct. proceed to judgment & execution, & such leave should be given where the purpose of such proceedings is to fulfil the conditions so as to justify proceedings by pltf. against directors of the co. under Cos. Ordinance (Alta.), s. 54. The sheriff's return is sufficient for that purpose in stating that by reason of the winding-up order the execution is unsatisfied; & the sheriff's

6606. Action to enforce security—Not enforceable by proceedings in winding up—Scottish arrestment.]—Persons claiming to be creditors of an English co. commenced an action against the co. in Scotland, & attached or arrested assets of the co. in Scotland under a process of the Scottish cts., by which, without establishing their debt by a judgment of the ct., they became, according to Scottish law, secured creditors of the co., subject to their obtaining a decree in the Scottish cts. establishing their debt. After the arrestments had been executed, the co. passed a resolution for a voluntary liquidation, which was continued under the supervision of the ct.:—*Held*: the creditors not being able to enforce their security by proceedings in the winding up, the action & arrestments in the Scottish ct. ought to be allowed to continue.—*Re WEST CUMBERLAND IRON & STEEL CO.*, [1893] 1 Ch. 713; 62 L. J. Ch. 367; 68 L. T. 751; 41 W. R. 265; 37 Sol. Jo. 213; 3 R. 260.

Annotation:—Refd. Re Derwent Rolling Mills Co., York City & County Banking Co. v. Derwent Rolling Mills Co. (1904), 21 T. L. R. 81.

D. Execution.

(a) In General.

See 1908 Act, s. 211, & generally, EXECUTION.

6607. "Attachment"—Garnishee order nisi.]—*Re STANHOPE SILKSTONE COLLIERIES CO.*, No. 6481, *ante*.

6608. ———.]—*Re NATIONAL UNITED INVESTMENT CORPN.*, No. 6482, *ante*.

6609. "Sequestration"—Arrest of ship.]—*Re AUSTRALIAN DIRECT STEAM NAVIGATION CO.*, No. 6682, *post*.

6610. ——— Scottish sequestration—For future rent.]—A Scottish proceeding in sequestration by a landlord against a tenant co. for future rent is a sequestration within 1862 Act, s. 163, & is prohibited by that sect. from being put in force after the commencement of the winding up of the co.; but under sect. 87 of the Act the ct. has power to give leave to the landlord to proceed with such a sequestration.—*Re WANZER, LTD.*, [1891] 1 Ch. 305; 60 L. J. Ch. 492; 39 W. R. 343; 7 T. L. R. 151.

6611. "Execution"—Charging order—Solicitors Act, 1860 (c. 127), s. 28.]—*Re BORN, CURNOCK v. BORN*, No. 6528, *ante*.

6612. "Put into force"—Seizure before beginning of winding up—Sale after beginning of winding up.]—*Re GREAT SHIP CO., LTD., PARRY'S CASE*, No. 6619, *post*.

6613. ——— Writ given to sheriff before petition presented—Possession of property not taken until

proceedings should be limited to such a return, & he should not be permitted to levy under the writ of execution.—*RISLER v. ALBERTA NEWSPAPERS, LTD.*, *GARNET v. ALBERTA NEWSPAPERS, LTD.*, [1919] 2 W. W. R. 326.—CAN.

p. Garnishee—Money in the hands of the official liquidator.]—Where a co. is being wound up in bkpey., & a dividend is in the hands of the official liquidator, who was also official assignee, no garnishee order can be made on such official liquidator, but an order may be made against the co.—*DAWSON v. MALLEY* (1867), 15 W. R. 791.—IR.

**q. "Attachment, sequestration, distress or execution"—What amounts to—Action of poinding of ground.]*—Act 1862, s. 163, provides, "where any co. is being wound up by the ct. or subject to the supervision of the ct., any attachment, sequestration, distress or execution put in force against the estate or effects of the co. after the commencement of the winding up

Winding up by court: Sub-sect. 13, D.

after petition presented.]—A creditor having obtained judgment in an action against a co., placed the writ of execution in the hands of the sheriff three hours before a petition was presented for winding up the co., but possession of the property was not taken by the sheriff until three hours after the presentation of the petition:—*Held*: execution was not “put in force” within 1862 Act, s. 163, until possession was actually taken; & as it appeared that the debt of the creditor was already secured by a guarantee of the directors, & the object of the winding up was to secure a *bond fide* distribution equally among all the creditors, there were no grounds for the exercise of the discretion given to the ct. by sect. 87 of the Act, & a motion to stay the proceedings under the writ of execution was acceded to.—*Re LONDON & DEVON BISCUIT CO.* (1871), L. R. 12 Eq. 190; 40 L. J. Ch. 574; 24 L. T. 650; 19 W. R. 943.

Annotations:—*Consd.* *Re Dimson's Estate Fire-Clay Co.* (1874), L. R. 19 Eq. 202. *Apld.* *Westbury v. Twiggs, Gregson, Claimant* (1891), 61 L. J. Q. B. 32. *Refd.* *Re Regent United Service Stores* (1878), 38 L. T. 493; *Crowshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154.

“Estate or effects” of company—Property charged to debenture-holders.]—See Sect. 34 (3), *ante*.

6614. Avoidance of execution—Effect.]—Where an execution against the goods of a co. which is being wound up is avoided by 1862 Act, s. 163, it is avoided altogether & the creditor retains no interest under it.—*Re ARTISTIC COLOUR PRINTING CO., Ex p. FOURDRINIER* (1882), 21 Ch. D. 510; 48 L. T. 46; 31 W. R. 149, C. A.

6615. ———.]—*Re STANLEY & Co., LTD.* (1923), 155 L. T. Jo. 233.

(b) Issued or levied before Winding-up Petition.

6616. General rule.]—Where a co. has issued debentures which are a floating charge on its

chattels, a distress under a power conferred either before the debentures were issued, or while they were a floating security & levied before the debentures ceased to be a floating security is valid against the holders of the debentures. The debentures would not cease to be a floating security for this purpose by reason of the passing by the co. of the first only of the two special resolutions to wind up, nor by reason of the making of an order in the debenture-holders' action appointing a receiver subject to his giving security, which order was never drawn up & never came to the notice of the landlord distraining.

Semle: in a compulsory winding up the ct. has power to restrain further proceedings under a distress levied, or execution issued at the commencement of the winding up but not completed by sale. But the power, if it exists will not be exercised unless special reasons exist making it inequitable to allow the sale.—*Re ROUNDWOOD COLLIERY CO., LEE v. ROUNDWOOD COLLIERY CO.*, [1897] 1 Ch. 373; 66 L. J. Ch. 186; 75 L. T. 641; 45 W. R. 324; 13 T. L. R. 175; 41 Sol. Jo. 240, C. A.

Annotation:—*Folld.* *Venner's Electrical Cooking & Heating Appliances v. Thorpe*, [1915] 2 Ch. 401.

6617. Issue of writ before winding up—Whether execution stayed—Execution of writ prevented by resistance to sheriff's officer.]—*Re LONDON COTTON CO., No. 5815, ante*.

6618. ——— Sheriff in possession before winding up on behalf of another creditor.]—*Re HILLE INDIA RUBBER CO. (No. 2)*, [1897] W. N. 20.

6619. Seizure before winding up—Whether sale restrained.]—(1) A., a creditor of an unregistered co., sued for his debt, & after long hostile litigation obtained judgment & issued a writ of *fi. fa.*, which was duly executed by seizure on Sept. 29. On Oct. 6, a petition was presented, under 1862 Act, for the winding-up of the co.; & on Oct. 9 an order was made *ex p.*, to restrain the sale by the sheriff of the property seized, the M. R. being of

shall be void to all intents”:—*Held*: an action of poinding of the ground at the instance of a heritable creditor is not an attachment, sequestration, execution or distress within the meaning of the above sect. & therefore the action may proceed, though the summons is executed after the commencement of the winding up.—*ATHOLE HYDROPATHIC CO., LTD. v. SCOTTISH PROVINCIAL ASSURANCE CO.* (1886), 13 R. (Cl. of Sess.) 818.—SCOT.

PART III. SECT. 36, SUB-SECT. 13.—D. (b).

r. Seizure before winding up—Creditor cannot obtain withdrawal of sheriff—But stay of proceedings under execution.]—A creditor, who has presented a petition to wind up a co., is not entitled to an order directing an execution creditor to withdraw the sheriff from possession of goods seized under the execution prior to the presentation of the petition but is merely entitled to a stay of proceedings under the execution pending the hearing.—*Re WHOLESALE TRADERS, LTD.* (1922), 22 S. R. N. S. W. 274.—AUS.

s. ——— Jurisdiction to order sheriff to give up to liquidator.]—*MERCHANTS BANK v. ROCHE PERCEE COAL CO.* (1897), 3 Terr. L. R. 463.—CAN.

t. ———.]—An order having been made by the High Ct. of Justice for Ontario directing the winding up of the co., under the Dominion Winding-up Act, the provisional liquidator applied to a judge of the Territorial ct. of the Yukon Territory for an order directing the sheriff to release the

goods and chattels of the co. held by him after seizure under a writ of *fi. fa.* issued pursuant to a judgment recovered against the co. in the Territorial Ct.:—*Held*: there was no jurisdiction to make the order asked for, the winding up not having been transferred by order to the Territorial Ct., & that ct. could not assume jurisdiction upon the consent of the parties.—*Re DOME LOPE DEVELOPMENT CO.* (1911), 17 W. L. R. 610.—CAN.

a. ——— Custody pending decision of adverse claims.]—At the time when an order was made, under Winding-up Act, 1906, for the winding-up of a co., goods, which were admittedly at one time the property of the co., were in the custody of the sheriff in the building occupied by the co., & in which its business had been carried on, under a writ of *fi. fa.* against the goods & lands of the co. The goods were claimed by the applts., who asserted that they had bought the goods from the co.:—*Held*: the winding-up order superseded the execution, & the liquidator should have the custody of the goods, pending an inquiry into the validity of applts.' claims, & without impairing those claims.—*Re IDEAL FOUNDRY & HARDWARE CO.* (1918), 42 O. L. R. 411.—CAN.

b. ——— Injunction to restrain sale by sheriff.]—A liquidator of a co. has no right to demand that the sheriff should hand over to him the goods of the co. seized under a *fi. fa.* before the commencement of the winding up. If he wishes to prevent

the sheriff from selling such goods his proper course is to apply to the ct. for an injunction restraining the execution creditor from proceeding with the execution.—*Re MUNN'S MAIZENA, LTD.* (1912), 12 S. R. N. S. W. 614; 29 S. R. N. S. W. 152.—AUS.

c. ——— Sale & payment of proceeds into court—Priority of execution creditor & liquidator.]—Under various executions against debt. co. goods were seized. Upon adverse claims being made the sheriff sold the goods & paid the money into ct. under the terms of an interpleader order to abide the result of an issue. Before the determination of the issue the co. was ordered to be wound up. The execution creditors, having succeeded in the issue, moved for payment to them of the money in ct., & were opposed by the liquidator:—*Held*: the execution creditors were entitled to the money. They were not estopped from setting up such claim because they had filed claims before the liquidator.—*GALT v. SASKATCHEWAN COAL CO.* (1887), 4 Man. L. R. 304.—CAN.

d. Garnishee summons served on shareholder before winding up—Priorities between garnishee & liquidator on proceeds of call.]—A creditor who, prior to the granting of a winding-up order, has served a garnishee summons on a shareholder, & obtained judgment against the co., is entitled to be paid the amount of his judgment out of monies due by the shareholders for calls on stock at the time of the service of the garnishee summons, in priority to the claims of the liquidator in the winding-up proceedings.—*CROSS v.*

opinion that the object of the Act was to secure equal distribution amongst all creditors. On appeal:—*Held*: the creditor ought not, under the circumstances, to be restrained from reaping the fruits of his action by sale of the property taken in execution.

Qu.: whether, where an execution has been duly perfected by seizure before the presentation of a petition for winding up, the ct. has jurisdiction, under 1862 Act, s. 201, to restrain a sale.

Qu.: whether in any case an injunction can properly be granted *ex p.*, under that sect.

(2) Where an execution has been perfected by seizure before the commencement of the winding up, a sale after the commencement is not a "putting in force of the execution within 1862 Act, s. 163" (*TURNER, L.J.*).—*Re GREAT SHIP CO., LTD., PARRY'S CASE* (1863), 4 De G. J. & Sm. 63; 3 New Rep. 181; 33 L. J. Ch. 245; 9 L. T. 432; 10 Jur. N. S. 3; 12 W. R. 139; 46 E. R. 839, L. J.J.

Annotations:—*As to* (1) *Distd.* *Re Bank of Hindustan, China & Japan, Ex p. Levick* (1867), L. R. 5 Eq. 69. *Consd.* *Re Bastow* (1867), L. R. 4 Eq. 681; *Re London & Devon Biscuit Co.* (1871), L. R. 12 Eq. 190. *Follid.* *Ex p. Milwood Colliery Co.* (1876), 24 W. R. 898. *Distd.* *Re Perkins Beach Lead Mining Co.* (1877), 7 Ch. D. 371. *Consd.* *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373; *Venner's Electrical Cooking & Heating Appliances v. Thorpe*, [1915] 2 Ch. 404. *Refd.* *Re Imperial Steam & Household Coal Co.* (1868), 37 L. J. Ch. 517; *Re United English & Scottish Assce., Ex p. Hawkins* (1868), 3 Ch. App. 787; *Re Progress Assce., Ex p. Liverpool Exchange Co.* (1870), L. R. 9 Eq. 370; *Re Richards* (1879), 48 L. J. Ch. 555; *Re Vron Colliery Co.* (1882), 51 L. J. Ch. 389; *Re Thurso New Gas Co.* (1889), 42 Ch. D. 486; *Croshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154. *As to* (2) *Follid.* *Re London Cotton Co.* (1866), L. R. 2 Eq. 53.

6620. ———.]—After a petition has been presented for the winding up of a co., the ct. has jurisdiction under 1862 Act, s. 85, to restrain the sale by the sheriff of property of the co. seized under a writ of *fi. fa.* before the presentation of the petition.—*Re HILL POTTERY CO.* (1866), L. R. 1 Eq. 649; 15 W. R. 97.

Annotation:—*N.F. Ex p. Milwood Colliery Co.* (1876), 24 W. R. 898.

6621. ———.]—At the time of the presentation of a petition to wind up a co., the sheriff was in possession of the property of the co. under executions issued at the suit of several judgment creditors. After the petition was presented, the ct., upon the *ex p.* application of petitioner, restrained the sheriff from selling the property until after the hearing of the petition; & after making an order for the compulsory winding up, the ct. ordered the sheriff to deliver up the property to the official liquidator to be sold in the winding up, reserving to the creditors the same priority against the proceeds of the sale as if it had been made by the sheriff.—*Re PLAS-YN-MHOWYS COAL CO.* (1867), L. R. 4 Eq. 689.

Annotations:—*Distd.* *Re London & Devon Biscuit Co.*

ALBERTA BRICK CO. (1907), 1 Alta. L. R. 103.—*CAN.*

e. Leave to proceed to execution—Winding-up petition pending—Whether leave affected by winding-up order.—*Re INDIAN COMPANIES ACT, 1866, & SYLHET & CACHAR TEA CO.* (1866), 2 Ind. Jur. N. S. 123.—*IND.*

f. Advertisement of sale for future date—Winding-up order in meantime—Injunction.—On Dec. 13, 1867, a resolution was passed to wind up a limited co. voluntarily. On Dec. 16, a creditor marked judgment, issued a *fi. fa.*, & lodged the writ with the sheriff, who was unable to seize any movable goods, the co. having closed the doors of their premises. On Jan. 27, 1868, he advertised for sale by auction, on Feb. 1, debts' leasehold interests in the lands on which their buildings

were erected. On Dec. 20, a petition was presented for winding up the co. On Jan. 28, 1868, the ct. ordered the voluntarily winding up to be continued under its supervision. On a motion for an injunction:—*Held*: the sale should be restrained, the execution creditors being secured priority for the full amount of their debt, with interest.—*Re DUBLIN EXHIBITION PALACE CO., LTD.* (1868), 2 I. R. Eq. 158.—*IR.*

g. Issue of warrant of distress—Petition filed same day—Possession under warrant taken five days later.—A creditor, having obtained judgment in the magistrate's ct. in an action against a co., issued a warrant of distress to levy the amount of the judgment debt. On the same day that the warrant was issued a petition by contributors of the co. for a winding-up

(1871), L. R. 12 Eq. 190. *N.F. Ex p. Milwood Colliery Co.* (1876), 24 W. R. 898. *Consd.* *Re Taylor, Ex p. Ry. Steel & Plant Co.* (1878), 8 Ch. D. 183.

6622. ———.]—The presentation of a petition to wind up a co. is no ground for restraining a sale by the sheriff of property of the co. then already seized under an execution.—*Ex p. MILWOOD COLLIERY CO., LTD.* (1876), 24 W. R. 898, C. A.

6623. ———.]—*Re PERKINS BEACH LEAD MINING CO., No. 6572, ante.*

6624. ———.]—A creditor having recovered judgment against a co., the sheriff, on July 10, 1880, seized the goods of the co. under a *fi. fa.* for £89. On July 14, a winding-up petition was presented, & on July 15, an order was made restraining all further proceedings in the action until the petition was disposed of or withdrawn. The sheriff thereupon withdrew from possession. On July 30, a winding-up order was made. On July 31, the creditor applied for leave to enforce his judgment, & the value of the goods seized being much greater than the amount of the debt, an order was made that the liquidator should pay the amount of the debt:—*Held*: on appeal, this order was right.

Bkpcy. Act, 1869 (c. 71), s. 87, which deprives execution creditors of the fruits of the execution where the sheriff has notice of a *bkpcy.* within fourteen days after sale, is not made applicable to the winding up of cos. by *Jud. Act, 1875, s. 10.*—*Re WITHERNSEA BRICKWORKS* (1880), 16 Ch. D. 337; 50 L. J. Ch. 185; 43 L. T. 713; 29 W. R. 178, C. A.

Annotations:—*Appld.* *Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250; *Gorringe v. Irwell India Rubber & Gutta Percha Works* (1886), 34 Ch. D. 128. *Refd.* *Re Northern Counties of England Fire Insee. Co., Macfarlane's Claim* (1880), 17 Ch. D. 337; *Re Vron Colliery Co.* (1882), 20 Ch. D. 442; *Re National United Investment Corp., [1901] 1 Ch. 950.* *Mentd.* *Re Hopkins, Williams v. Hopkins* (1881), 18 Ch. D. 370; *Re D'Epineuil, Tadman v. D'Epineuil* (1882), 20 Ch. D. 217; *Re Maggi, Winehouse v. Winehouse* (1882), 20 Ch. D. 545; *Re Gould, Ex p. Official Receiver* (1887), 19 Q. B. D. 92; *Pratt v. Inman* (1889), 43 Ch. D. 175; *Re Leng, Tarn v. Emmerson*, [1895] 1 Ch. 652; *Hasluck v. Clark*, [1899] 1 Q. B. 699; *Re Whitaker, Whitaker v. Palmer* (1900), 83 L. T. 342.

6625. Sale before winding up—Presentation of petition within fourteen days of sale—Whether creditor deprived of fruits of execution.—*Re PRINTING & NUMERICAL REGISTERING CO., No. 6478, ante.*

6626. ———.]—*Notice of winding up within fourteen days of sale—Whether creditor deprived of fruits of execution.*—*Re RICHARDS & CO., No. 6635, post.*

6627. ———.]—*Re WITHERNSEA BRICKWORKS, No. 6624, ante.*

(c) *Issued or levied after Winding-up Petition.*

6628. General rule.—In the absence of special circumstances, the ct. ought to exercise the

order was filed in the Supreme Ct. Possession under the warrant was taken by the bailiff five days after the filing of the petition. An order was subsequently made for the compulsory winding up of the co. Upon an application by the creditor, under Cos. Act, 1882, s. 150, for leave to proceed with the execution under the warrant:—*Held*: in the absence of special circumstances sufficient to justify the ct. in exercising its discretionary power, the creditor was not entitled to the leave asked for.—*Re POVERTY BAY FARMERS' CO-OPERATIVE ASSOCN., LTD.* (1897), 16 N. Z. L. R. 695.—*N.Z.*

PART III. SECT. 36, SUB-SECT. 13.—*D. (c).*

h. General rule—Execution void.—Where an order was made prior to

Sect. 36.—Winding up by court: Sub-sect. 13, D. (c),

discretion vested in it by 1908 Act, s. 140, by staying or restraining proceedings with a view of securing equal distribution of the assets among creditors of the same class.

A co. being unable to meet its obligations a petition was on Aug. 18, 1920, presented to wind it up. Proposals for a scheme of reconstruction & arrangement with creditors were then made & a scheme was in process of preparation with a view to obtaining the sanction of the ct. thereto under 1908 Act, s. 120. On Aug. 28, 1920, a creditor brought an action & got judgment for £41 & was about to issue execution. The co. issued a summons under sect. 140 of the Act to stay execution on the judgment:—*Held*: there being no special circumstances in the case, the execution ought to be stayed.—*BOWKETT v. FULLER'S UNITED ELECTRIC WORKS, LTD.*, [1923] 1 K. B. 160; 92 L. J. K. B. 412; 128 L. T. 203; [1923] B. & C. R. 75, C. A.

6629. Writ issued on day of winding-up order—Possession taken by liquidator before sheriff.]—Where, on the day on which a winding-up order was made, but before the order was pronounced, a judgment creditor of the company issued a *fi. fa.* against the effects of the co., but before the execution was levied, the official liquidator was in possession of such effects under the order, the ct. granted an injunction to restrain the creditor & sheriff from proceeding to execution.—*Re WATERLOO LIFE, ETC., INSURANCE CO. (No. 2)* (1862), 31 Beav. 589; 32 L. J. Ch. 371; 7 L. T. 459; 9 Jur. N. S. 292; 11 W. R. 159; 34 E. R. 1267.

Annotations:—*Refd.* *Re* London Cotton Co. (1866), L. R. 2 Eq. 53; *Great Southern & Western Ry. v. Corry & Turquand* (1867), 15 W. R. 650.

6630. Action commenced before presentation of petition—Execution issued before winding-up order made—Creditors put on terms as to description of property to be seized.]—Creditors of a co. issued a writ before the presentation of a petition for winding up. Execution was issued afterwards, but before the winding-up order was made:—*Held*: the ct. had a discretion, under 1862 Act, ss. 87 & 163, & injunction refused to stay proceedings under the execution; but the creditors were put upon terms in regard to the description of property to be taken.—*Re BASTOW & CO.* (1867), L. R. 4 Eq. 681; 36 L. J. Ch. 899; 16 L. T. 788; 15 W. R. 1033.

Annotations:—*Apld.* *Re* Imperial Steam & Household Coal Co. (1868), 37 L. J. Ch. 517. *Distd.* *Re* London & Devon Biscuit Co. (1871), L. R. 12 Eq. 190. *Refd.* *Re* Progress Assce., *Ex p.* Liverpool Exchange (1870), L. R. 19 Eq. 370; *Re* Dimson's Estate Fire-Clay Co. (1874), L. R. 19 Eq. 202; *Re* Universal Disinfecter Co. (1875), 44 L. J. Ch. 478; *Re* Vron Colliery Co. (1882), 20 Ch. D. 442; *Re* Opera (1890), 62 L. T. 859.

6631. ——— Vexatious delay in company's defence.]—A limited co., which had been carrying on business with little more than one-fifteenth part of its stated capital, was sued by creditors for goods supplied to it, & after vexatious delays in its defence to the action, presented by its own manager a petition to wind up. The sheriff entered under a *fi. fa.* two days after the petition was presented, but was restrained from selling by an *ex p.* injunction, obtained on a second petition to wind up presented by the co.'s clerk

the day after he had entered. On motion by the creditors to discharge this injunction, the ct., in the exercise of its discretion, under 1862 Act, s. 87, & treating the case as identical with *In re Bastow & Co.*, No. 6630, *ante*, discharged the injunction with costs.—*Re* IMPERIAL STEAM & HOUSEHOLD COAL CO., LTD. (1868), 37 L. J. Ch. 517; 18 L. T. 390; 16 W. R. 689.

Annotation:—*Refd.* *Re* Universal Disinfecter Co. (1875), 23 W. R. 721.

6632. ———.]—A creditor of a co., whose debt was incurred by giving acceptances on their behalf, having obtained judgment against the co. after the presentation of a petition, but before the order for winding up, was refused leave to enforce execution upon his judgment, although the ct. was of opinion that he had been hardly dealt with by the co.; but the costs of the application & of the action were given after the costs of the official liquidator.—*Re* DIMSON'S ESTATE FIRE-CLAY CO. (1874), L. R. 19 Eq. 202; 23 W. R. 435.

Annotation:—*Mentd.* *Re* London Metallurgical Co., [1895] 1 Ch. 758.

6633. ———.]—*Re* VRON COLLIERY CO., No. 5498, *ante*.

6634. ——— Execution delayed at company's instance—Requests for indulgence.]—The ct. has a discretion under 1862 Act to permit an execution put in force after the commencement of winding up to be proceeded with.

An execution creditor who had not seized till after the petition had been presented:—*Held*: entitled to the benefit of his execution where it appeared that the delay in his proceedings had been owing to representations & applications for indulgence on behalf of the co.—*Re* TAYLOR, *Re* WILLIAMS, *Ex p.* RAILWAY STEEL & PLANT CO. (1878), 8 Ch. D. 183; 47 L. J. Ch. 321; *sub nom.* *Re* RAILWAY STEEL & PLANT CO., LTD., *TAYLOR v. RAILWAY STEEL & PLANT CO., LTD.*, *WILLIAMS v. RAILWAY STEEL & PLANT CO., LTD.*, 38 L. T. 475; 26 W. R. 418.

Annotations:—*Distd.* *Re* Vron Colliery Co. (1882), 20 Ch. D. 442. *Refd.* *Re* Richards (1879), 11 Ch. D. 676; *Rudow v. Great Britain Mutual Life Assce. Soc.* (1881), 17 Ch. D. 600.

6635. ———.]—(1) Where a petition for winding up has been presented, whether by the co. or by creditors thereof, the ct. will not allow a judgment creditor, who has been induced by the representations & prayers of a co. for delay of execution not to issue execution, to be deprived of the benefits which he would otherwise have obtained.

(2) Bkpcy. Act, 1869 (c. 71), s. 87, which deprives execution creditors, where the sheriff has notice of a bkpcy. within fourteen days, of the fruits of their execution, is not applied to the winding up of cos. by Jud. Act, 1875, s. 10.—*Re* RICHARDS & CO. (1879), 11 Ch. D. 676; 48 L. J. Ch. 555; 27 W. R. 530; *sub nom.* *Re* RICHARDS & CO., LTD., *Ex p.* CRAWSHAY, 40 L. T. 315.

Annotations:—*Distd.* *Re* Vron Colliery Co. (1882), 20 Ch. D. 442. *Refd.* *Re* Withersea Brickworks (1880), 16 Ch. D. 337.

6636. Writ handed to sheriff before presentation of petition—Execution not levied until afterwards.]—*Re* LONDON & DEVON BISCUIT CO., No. *ante*.

seizure, by the Supreme Ct. of Ontario, winding up the co., a judgment debtor, the execution is void under Winding-up Act, s. 23, & after the making of the order the power of dealing with, & collecting the assets of the co. is vested

solely with the liquidator.—*RICHARDS v. PRODUCERS ROCK & GRAVEL CO.* (1914), 20 B. C. R. 109.—*CAN.*

k. Garnishee summons—Served after winding-up order.]—In Sept. 1913, the Supreme Ct. of Ontario made

an order under the Winding-up Act, R. S. C. 1906 (c. 144), & amending Acts, for the winding up of debt. co. In Oct. 1913, pltf. commenced an action in Alberta for debt against debt. co. & served a garnishee summons upon

6637. Execution levied after notice of presentation of petition.]—After a petition had been presented to wind up a co., judgment was given in an action against the co.; the sheriff took possession of property of the co. & advertised a sale. The co. applied to the Vice-Chancellor before whom the petition, but not the action, was pending, for an order to stay proceedings:—*Held*: notwithstanding Jud. Act, 1873, s. 24 (5), the Vice-Chancellor had power, under 1862 Act, s. 85, to stay the proceedings.—*Re STAPLEFORD COLLIERY Co., LTD.* (1875), 24 W. R. 173; 1 Char. Pr. Cas. 32.

6638. Delay in application for stay—Company not knowing of judgment until execution levied—Stay on payment into court of amount for which execution issued.]—*EVERINGHAM v. CO-OPERATIVE PURE FAMILY BEER Co.*, [1880] W. N. 99, C. A.

6639. In action against debtor to company—Against whom garnishee order obtained.]—*Re UNITED ENGLISH & SCOTTISH LIFE INSURANCE Co.*, No. 6600, *ante*.

6640. Foreign execution issued after judgment obtained in foreign court—Jurisdiction of English court.]—*Re FIELD (R.) LTD.* (1900), 44 Sol. Jo. 689.

(d) *Leave to Issue Execution.*

6641. Creditor unfairly delayed by company.]—A co. against which a writ had been issued obtained leave to defend the action upon affidavit made by their secretary, containing statements to the effect that pltf. in the action was a holder of a stolen bill, & had not given value for it; & that to his—the secretary's—knowledge the co. was perfectly solvent. After pltf. had been interrogated in the action, the defence was abandoned & judgment signed; but before pltf. issued execution he received notice that the co. had presented a winding-up petition. An order having been made on the petition, the judgment creditor applied for leave to issue execution, on the ground that he had been unfairly delayed in prosecuting his action:—*Held*: the case was not one in which leave ought to be given.

Qu.: whether leave ought to be given in any case where execution has not been issued previously to the winding-up order.—*Re UNIVERSAL DISINFECTOR Co.* (1875), L. R. 20 Eq. 162; 44 L. J. Ch. 478; 23 W. R. 721.

Annotation:—*Appld. Re Ry. Steel & Plant Co.*, *Taylor v. Ry. Steel & Plant Co.*, *Williams v. Ry. Steel & Plant Co.* (1878), 38 L. T. 475.

E. Distress.

(a) *In General.*

See, 1908 Act, s. 211, & generally, DISTRESS.

6642. Application of section—Effect of Jud. Act, 1875, s. 10.]—Jud. Act, 1875, s. 10, does not so far assimilate the rules in the winding up of cos. to the Rules in Bkpcy. as to give the landlord of property of which a co. in liquidation are tenants a right to distrain for rent due before the winding-up order.—*Re COAL CONSUMERS' ASSOCN.* (1876), 4 Ch. D. 625; 46 L. J. Ch. 501; 35 L. T. 729; *sub nom. Re COAL CONSUMERS' Co., LTD.*, *Ex p. HUGHES*, 25 W. R. 300.

Annotations:—*Consd. Re Albion Steel & Wire Co.* (1878), 7 Ch. D. 547. *Follid. Re Bridgewater Engineering Co.* (1879), 12 Ch. D. 181. *Reifd. Re North Yorkshire Iron Co.* (1878), 7 Ch. D. 661; *Re Richards* (1879), 11 Ch. D. 676; *Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322.

a city corpn.:—*Held*: the proceedings should be stayed unless & until leave to proceed should be obtained from the Supreme Ct. of Ontario; & the garnishee summons was ineffective, & should be set aside.—*LAVELL v.*

CANADIAN MINERAL RUBBER Co., LTD. (1913), 26 W. L. R. 111.—CAN.

PART III. SECT. 36, SUB-SECT. 13.—*E. (a).*

1. *Application of Winding-up Act,*

6643. —.]—A landlord is not by reason of his power of distress a secured creditor within Jud. Act, 1875, s. 10; & therefore the bkpcy. law permitting distress for one year's arrears of rent has not superseded the old rule in winding up.—*Re BRIDGEWATER ENGINEERING Co.* (1879), 12 Ch. D. 181; 48 L. J. Ch. 389.

Annotation:—*Reifd. Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322.

6644. —.]—*THOMAS v. PATENT LIONITE Co.*, No. 6650, *post*.

— **Where company not immediate tenants.]**—*See Nos.* 6653, 6655, 6656, 6660, *post*.

— **Scottish sequestration—For future rent.]**—*See No.* 6610, *ante*.

— **"Estate or effects" of company—Property charged to debenture-holders.]**—*See Nos.* 4742, 4743, *ante*.

6645. Effect of distress with leave—Proceeds of distress—Applicable to rent accrued both before & after winding up.]—A lease whereby certain mines were granted to a co. provided that if the rent should be unpaid for 42 days the landlord might distrain. The rents fell in arrear on two occasions for more than the 42 days, & were both still owing when the lessor entered & distrained on Feb. 20, 1864. On Feb. 6, a petition for winding up the co. was presented, & on Feb. 20—but after the distress—a winding-up order was made. The lessor obtained the leave of the ct. to proceed with his distress, & on May 1, another half-year's rent became due. On May 21, an agreement was made between the lessor & the co. that the distress should be withdrawn, that the plant & effects should be sold, & that the rent for which the distress had been levied should be paid out of the first proceeds, & it was provided that the agreement should in no way prejudice or affect the lessor's rights & remedies in respect of the half-year's rent which became due on May 1. The co., however, refused to pay that amount out of the proceeds of sale:—*Held*: they were bound to pay it.—*Re EXHALL COAL MINING Co., LTD.*, *Ex p. FIELD* (1864), 11 L. T. 526; 13 W. R. 219, L. JJ.

6646. Effect of distress without leave.]—*Re PROGRESS ASSURANCE Co.*, *Ex p. LIVERPOOL EXCHANGE Co.*, No. 6659, *post*.

6647. —.]—*Re TRADERS' NORTH STAFFORDSHIRE CARRYING Co.*, *Ex p. NORTH STAFFORDSHIRE RY. Co.*, No. 6655, *post*.

6648. —.]—*THOMAS v. PATENT LIONITE Co.*, No. 6650, *post*.

6649. Seizure by sheriff under writ of fieri facias before winding up—Payment to landlord by sheriff—Validity.]—Where before the presentation of a winding-up petition the sheriff has seized under a *fi. fa.* goods of the co. & after the presentation of the petition the ct. has dismissed a summons for a stay of proceedings under the *fi. fa.*, it is the duty of the sheriff to proceed with the execution pursuant to Landlord & Tenant Act, 1709 (c. 18), & pay to the landlord of the premises the amount due for rent of the premises not exceeding one year's arrears. The duty of the sheriff & the right of the landlord in this respect are not affected by 1908 Act, imposing general restrictions on the landlord's right to distrain, & the payment by the sheriff of the amount so due for rent to the landlord is a good payment as against the

s. 84.]—Winding-up Act, s. 84, only applies to judicial proceedings & not to a distress.—*NATIONAL TRUST Co., LTD. v. LEESON & LINEHAM EXECUTORS* (1916), 83 W. L. R. 587; 9 W. W. R. 1132.—CAN.

Sect. 36.—Winding up by court: Sub-sect. 13, E.
(a), (b) & (c).]

liquidator in the winding up of the co.—*Re* BRITISH SALICYLATES, LTD., [1919] 2 Ch. 155; 88 L. J. Ch. 258; 121 L. T. 77; 63 Sol. Jo. 517; [1919] B. & C. R. 160.

(b) *For Rent.*

6650. General rule.]—(1) Jud. Act, 1875, s. 10, does not import into a winding up, Bkpcy. Act, 1869 (c. 71), s. 34, so as to enable a landlord to distrain after the commencement of a winding up for rent due to him from the co.

(2) A compulsory order, which “supersedes” a voluntary winding up as from the date of such order, does not thereby entirely put an end to everything previously done under the voluntary winding up.

(3) Where, therefore, landlords, after the commencement of the voluntary winding up of the co., but before the date of the compulsory order, distrained for rent due to them prior to the commencement of the voluntary winding up:—*Held*: the distress was invalid, no special grounds being shown why the judicial discretion vested in the ct. under 1862 Act, s. 87, should be exercised in their favour.—*THOMAS v. PATENT LIONITE CO.* (1881), 17 Ch. D. 250; 50 L. J. Ch. 544; 44 L. T. 392; 29 W. R. 596, C. A.

Annotations:—*As to* (2) *Consd.* *Re* Taurine Co. (1883), 25 Ch. D. 118. *As to* (3) *Refd.* *Re* Oak Pits Colliery Co. (1882), 21 Ch. D. 322.

6651. —.—*Re* LANCASHIRE COTTON SPINNING CO., *Ex p.* CARNELLEY, No. 6674, *post*.

6652. —.—*Re* ROUNDWOOD COLLIERY CO., *LEE v. ROUNDWOOD COLLIERY CO.*, No. 6616, *ante*.

6653. Company not immediate tenants.]—A landlord demised a colliery to certain persons who declared themselves trustees for a co. The rent fell into arrear, & the landlord put in a distress upon the premises. At that time a petition had been presented, upon which an order to wind up the co. was afterwards made. Upon a petition by the landlord for leave to remove & sell the goods distrained:—*Held*: notwithstanding 1862 Act, ss. 84, 163, he was entitled to proceed with the distress & sell the goods of the co. upon the premises, & leave was given accordingly.

Semble: the prohibition contained in 1862 Act, s. 163, against enforcing a distress against the effects of a co. which has been ordered to be wound up, applies only where the co. is the tenant.

—*Re* EXHALL COAL MINING CO., LTD. (1864), 4 De G. J. & Sm. 377; 4 New Rep. 127; 33 L. J. Ch. 569, n.; 10 Jur. N. S. 576; 46 E. R. 964, L. J.J.

Annotations:—*Consd.* *Re* London Cotton Manufacturing Co. (1866), 35 L. J. Ch. 425; *Re* Imperial Steam & Household Coal Co. (1868), 37 L. J. Ch. 517; *Re* Traders' North Staffordshire Carrying Co., *Ex p.* North Staffordshire Ry. (1874), L. R. 19 Eq. 60. *Fold.* *Re* Lancashire Cotton Spinning Co., *Ex p.* Carnelley (1887), 35 Ch. D. 656. *Consd.* *Re* Higginshaw Mills & Spinning Co., [1896] 2 Ch. 544. *Refd.* *Re* Oak Pits Colliery Co. (1882), 21 Ch. D. 322; *Re* New City Constitutional Club Co., *Ex p.* Purssell (1887), 34 Ch. D. 646; *Re* Roundwood Colliery Co., *Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373. *Mentd.* *Re* Pooley Hall Colliery Co. (1869), 18 W. R. 201.

6654. —.—*Re* LUNDY GRANITE CO., *Ex p.* HEAVAN, No. 6660, *post*.

6655. — Landlord not able to prove in winding up.]—A railway co. being owners of a canal & having a special Act enabling them to

take tolls on barges using the canal, & to recover such tolls by action or distress, distrained on the barges of a carrying co., after a resolution had been passed for voluntarily winding up the latter co. The voluntary winding up was continued under the supervision of the ct.:—*Held*: (1) the proceeds of the distress belonged to the official liquidator of the carrying co.; (2) 1862 Act, s. 163, does not apply to a landlord distraining for his rent, where the co. are not his immediate tenants, & the goods of the co. have been allowed to remain on the land by the official assignee.—*Re* TRADERS' NORTH STAFFORDSHIRE CARRYING CO., *Ex p.* NORTH STAFFORDSHIRE RY. CO. (1874), L. R. 19 Eq. 60; 44 L. J. Ch. 172; 31 L. T. 716; 39 J. P. 212; 23 W. R. 205.

Annotations:—*As to* (1) *Consd.* *Re* Brown, Bayley & Dixon, *Ex p.* Roberts & Wright (1881), 18 Ch. D. 649. *Refd.* *Re* North Yorkshire Iron Co. (1878), 7 Ch. D. 661; *Re* Oak Pits Colliery Co. (1882), 21 Ch. D. 322. *As to* (2) *Consd.* *Re* New City Constitutional Club Co., *Ex p.* Purssell (1887), 34 Ch. D. 646. *Refd.* *Re* Regent United Service Stores (1878), 38 L. T. 493. *Generally, Mentd.* *Re* Stranton Iron & Steel Co., *Ex p.* Barnett (1875), 44 L. J. Ch. 233.

6656. —.—1862 Act, s. 163, only applies to cases in which a creditor of the co. is proceeding against the estate & effects of the co. Where, therefore, a superior landlord levied a distress for rent & seized the goods of a co. in liquidation which were on the premises of his lessee, the co. being in occupation of the premises under an arrangement with the lessee, but no assignment or underlease having been made to the co.:—*Held*: the superior landlord, not being a creditor of the co., could not be restrained from proceeding with his distress.—*Re* REGENT UNITED SERVICE STORES (1878), 8 Ch. D. 616; 38 L. T. 493; 42 J. P. 630; 26 W. R. 579; *sub nom.* *Re* REGENT UNITED SERVICE STORES, *Ex p.* BURKE, 47 L. J. Ch. 677, C. A.

Annotation:—*Refd.* *Re* Oak Pits Colliery Co. (1882), 21 Ch. D. 322.

6657. — Under-tenants—Landlord also holding promissory note of company—In respect of overdue rent.]—The rule that a landlord will not be allowed to realise a distress for rent levied on the goods of a co. between the presentation of a winding-up petition & the making of a winding-up order, if he is a creditor entitled to prove in the winding up for the rent distrained for:—*Held*: not to apply to a case in which the co. were not tenants of the landlord, but under-tenants of his lessee, & the landlord had accepted as collateral security for the overdue rent a promissory note of the co. upon which he was entitled to prove in the winding up; in such a case the landlord ought to be allowed to realise his distress.—*Re* CARRIAGE CO-OPERATIVE SUPPLY ASSOCN., *Ex p.* CLEMENCE (1883), 23 Ch. D. 154; 52 L. J. Ch. 472; 48 L. T. 308; 31 W. R. 397.

Annotations:—*Dbtd.* *Re* New City Constitutional Club Co., *Ex p.* Purssell (1887), 34 Ch. D. 646; *Re* Harpur's Cycle Fittings Co., [1900] 2 Ch. 731.

6658. Distress put in on day of winding-up order.]—*Re* EXHALL COAL MINING CO., LTD., *Ex p.* FIELD, No. 6645, *ante*.

6659. Possession retained by liquidator for benefit of winding up—Rent accrued due since winding up.]—Where offices had been let to a co. which was ordered to be wound up by the ct., a distress was subsequently put in for rent by the lessors, under which the office furniture was seized:—*Held*: as possession of the offices had

PART III. SECT. 36, SUB-SECT. 13.—
E. (b).

*m. General rule—Distress levied before winding up.]—*A distress for rent is not avoided by proceedings taken

under Winding-up Act, to put a co. into liquidation, if the distress be made before the winding-up order. *Qu.*: whether a sale may be made under the distress without the leave of the ct.—*Re*

COLWELL (E. C.) CANDY CO. (1902), 35 N. B. R. 613.—*CAN.*

*n. —. —.]—*Where rent is due & distress has been levied

not, in the opinion of the ct., been retained for the purpose of the co.'s business, the distress was illegal under 1862 Act, s. 163, & the lessors were only entitled to prove for the amount due to them.—*Re PROGRESS ASSURANCE CO., Ex p. LIVERPOOL EXCHANGE CO.* (1870), L. R. 9 Eq. 370; 39 L. J. Ch. 504; 22 L. T. 707.

Annotations:—*Refd.* *Re North Yorkshire Iron Co.* (1878), 7 Ch. D. 661; *Re Bridgewater Engineering Co.* (1879), 12 Ch. D. 181; *Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322.

6660. ———.]—1862 Act, s. 163, has no application where the distress is against a tenant other than the co., although the co.'s goods may be taken in distress.

Semble: where the liquidator of a co. continues, for the purposes of the winding up, in occupation of land of which the co. was lessee, the landlord ought to be permitted to enforce, by distress or otherwise, his right to the full amount of rent, in respect of the time during which the liquidator so continues in possession & enjoyment.—*Re LUNDY GRANITE CO., Ex p. HEAVAN* (1871), 6 Ch. App. 462; 40 L. J. Ch. 588; 24 L. T. 922; 35 J. P. 692; 19 W. R. 609, L. J.J.

Annotations:—*Consd.* *Re Traders' North Staffordshire Carrying Co., Ex p. North Staffordshire Ry.* (1874), L. R. 19 Eq. 60; *Re North Yorkshire Iron Co.* (1878), 7 Ch. D. 661. *Fold.* *Re Regent United Service Stores* (1878), 8 Ch. D. 616. *Apld.* *Re Silkstone & Dodworth Coal & Iron Co.* (1881), 17 Ch. D. 158. *Consd.* *Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322; *Re National Arms & Ammunition Co.* (1885), 28 Ch. D. 474; *Re New City Constitutional Club Co., Ex p. Purcell* (1887), 34 Ch. D. 646; *Re Levi*, [1919] 1 Ch. 416. *Refd.* *Re Stranton Iron & Steel Co., Barnett's Case* (1875), L. R. 19 Eq. 449; *Re Universal Disinfectors Co.* (1875), L. R. 20 Eq. 162; *Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250; *Re Lancashire Cotton Spinning Co., Ex p. Carnelley* (1887), 35 Ch. D. 656; *Re Blazer Fire Lighter* (1894), 71 L. T. 665; *Re Kildgrove Steel, Iron, & Coal Co.* (1894), 38 Sol. Jo. 252. *Mentd.* *Jacobs v. Brett* (1875), L. R. 20 Eq. 1.

6661. Possession retained for better realisation of company's property.]—Where in the winding up of a co. the liquidator, for the convenience of the winding up & with a view to the better realisation of the co.'s assets, retains possession of leasehold property belonging to the co., leave will be granted to the lessor of the co. to distrain for rent which has accrued due to him after the commencement of the winding up, but as to previous arrears of rent, he will not be allowed to distrain, but must prove in the winding up.—*Re NORTH YORKSHIRE IRON CO.* (1878), 7 Ch. D. 661; 26 W. R. 367; *sub nom.* *Re NORTH YORKSHIRE IRON CO., LTD., Ex p. RICHARDSON, JOHNSON & CO.*, 47 L. J. Ch. 333; 38 L. T. 143.

Annotations:—*Consd.* *Re South Kensington Co-op. Stores* (1881), 17 Ch. D. 161; *Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322.

6662. ———.]—*Re SOUTH KENSINGTON CO-OPERATIVE STORES*, No. 6377, *ante*.

6663. ——— Possession retained for benefit of landlord as well as of company.]—A landlord is entitled to distrain for, or be paid in full, rent accruing after the commencement of the winding up, if the liquidator has retained possession for the purposes of the winding up, *i.e.*, if he has used the property for carrying on the co.'s business, or has kept the property in order to sell it or to do the best he can with it. But the landlord is not entitled to such priority if the liquidator has kept possession by arrangement with the landlord, & for his benefit as well as for the benefit of

the co., & has not agreed with the landlord to pay rent, nor if he has done nothing except abstain from trying to get rid of the property which the co. holds as lessee. Where, at the date of the winding up, the colliery of the co. was in the possession of their mtgees., & the liquidator took no steps to surrender the co.'s interest in the colliery, but left the co.'s plant & machinery where he found them until he sold them, although he had had them valued with a view to sale, which did not take place:—*Held*: the landlord was not entitled to priority in respect of the rent which accrued after the commencement of the winding up.—*Re OAK PITS COLLIERY CO.* (1882), 21 Ch. D. 322; 51 L. J. Ch. 768; 30 W. R. 759; *sub nom.* *Re OAK PITS COLLIERY CO., LTD., EYTON'S CLAIM*, 47 L. T. 7, C. A.

Annotations:—*Consd.* *Re Watson, Kipling* (1883), 23 Ch. D. 500. *Apld.* *Re International Marine Hydropathic Co.* (1884), 28 Ch. D. 470; *Re National Arms & Ammunition Co.* (1885), 28 Ch. D. 474. *Consd.* *Re Higginshaw Mills & Spinning Co.*, [1896] 2 Ch. 544; *Hand v. Blow*, [1901] 2 Ch. 721. *Apld.* *Re Levi*, [1919] 1 Ch. 416. *Refd.* *Re Blazer Fire Lighter*, [1895] 1 Ch. 402; *Re Rylands Glass Co., York, etc., Bank v. Rylands Glass Co.* (1904), 49 Sol. Jo. 67.

6664. ——— Indirect advantage to liquidator not sufficient.]—In order to entitle a landlord to distrain for rent accrued since the winding up the liquidator must have either adopted the contract or used the property for the beneficial winding up of the co.; it will not be sufficient if the liquidator has only derived an indirect advantage from the demised property.—*Re HOUSE & LAND INVESTMENT TRUST, Ex p. SMITH* (1894), 42 W. R. 572; 1 Mans. 148; 8 R. 232.

6665. ——— Rent accrued due before winding up.]—*Re SOUTH KENSINGTON CO-OPERATIVE STORES*, No. 6377, *ante*.

— — — — —.]—*See, also*, Sect. 37, sub-sect. 8, *post*.

6666. Possession retained by liquidator for advantage of company—After notice requiring payment of rent.]—The owner of a coal-mine leased to a co., having power to distrain for rent in arrear & to stop the working of the mine, gave notice to the liquidator requiring payment of a half-year's rent which became due after the winding up of the co., or that the working should be stopped. The liquidator neither paid the rent nor stopped the working:—*Held*: upon summons by the lessor for leave to distrain, the liquidator having elected to continue the working for the advantage of the co., must pay the full rent out of the first assets.—*Re SILKSTONE & DODSWORTH COAL & IRON CO.* (1881), 17 Ch. D. 158; *sub nom.* *Re SILKSTONE & DODSWORTH COAL & IRON CO., Ex p. PERKINS*, 50 L. J. Ch. 444; 44 L. T. 405; 29 W. R. 484.

Annotations:—*Consd.* *Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322; *Re Levi*, [1919] 1 Ch. 416. *Refd.* *Re Brown, Bayley & Dixon, Ex p. Roberts & Wright* (1881), 30 W. R. 5; *Re South Kensington Co-op. Stores* (1881), 17 Ch. D. 161.

6667. ———.]—*Re HIGGINSHAW MILLS & SPINNING CO.*, No. 6678, *post*.

See, also, Sub-sect. 13, E. (a), *ante*.

(c) For Rates and Taxes.

Compare Sub-sect. 11, D. (c), *ante*.

6668. Rates—Made after date of winding up—General rule.]—The right of a rating authority to

previously to the commencement of winding-up proceedings, there is nothing in the Winding-up Act which prevents the landlord from realising on the same.—*Re SHIRLEYS, LTD., LAIRD'S CASE* (1916), 34 W. L. R. 805.—CAN.

PART III. SECT. 36, SUB-SECT. 13.—E. (c).

o. County council assessments.]—A pointing of the effects of a co. by a collector of county council assessments after the date of the commencement

of the winding up of a co. by the ct. is inept & ineffectual, & an application by the collector for power to sell the pointed effects for payment of rates due by the co. was refused by the ct.—*ALLAN v. COWAN* (1892), 20 R. (Ct. of Sess.) 36.—SCOT.

Sect. 36.—Winding up by court: Sub-sect. 13, E. (c) . (a).]

payment in full of rates on the property of a co. in liquidation made subsequently to the commencement of the winding up is not necessarily governed by the same principle as that of a landlord in respect of rent. In order to entitle the rating authority to payment in full, it must be shown that there has been an actual beneficial occupation or enjoyment of the property by the liquidator on behalf of the co.

Where the property of a co. in liquidation consisted of chemical & other works & blast furnaces which had ceased to be used for manufacturing purposes or purposes of profit, but the liquidator kept some of the furnaces alight with a view to a sale of the property & had used part of the works for the storage of plant:—*Held*: there was no such beneficial occupation or enjoyment of the property by the liquidator as would entitle a rating authority to payment in full of rates made subsequently to the winding up of the co.; the ct., in exercising its discretion on the matter, was at liberty to have, & would have, regard to the fact that the amount of the rates was excessive.—*Re WATSON, KIPLING & Co.* (1883), 23 Ch. D. 500; 52 L. J. Ch. 473; 49 L. T. 115; 31 W. R. 574.

Annotations:—*Distd.* *Re International Marine Hydropathic Co.* (1884), 28 Ch. D. 470. *Consd.* *Re National Arms & Ammunition Co.* (1885), 28 Ch. D. 474. *N.F.* *Re Blazer Fire Lighter*, [1895] 1 Ch. 402.

6669. — Possession by liquidator for purposes of winding up.—An hotel co. was wound up under an order of the ct., & the liquidator was directed to sell the hotel, but with liberty to carry on the business till the sale, so as to sell it as a going concern. The liquidator accordingly carried on the business in the hotel, but made no profit by it. Shortly after the commencement of the winding up a poor rate was made, & the overseers claimed payment of the rate from the liquidator in respect of his occupation of the hotel:—*Held*: the rate must be paid in full.—*Re INTERNATIONAL MARINE HYDROPATHIC CO.* (1884), 28 Ch. D. 470; 33 W. R. 587, C. A.

Annotation:—*Consd.* *Re National Arms & Ammunition Co.* (1885), 28 Ch. D. 474.

6670. — — — — —.—The true test to be applied, in order to ascertain whether rates ought to be paid in full in respect of property of a co., possession of which has been retained by the liquidator, is that suggested in *In re National Arms & Ammunition Company*, No. 7363, *post*, whether there has been a “beneficial occupation” within the rating statutes.

Therefore where a caretaker is employed by the liquidator to take possession of the co.’s premises & the plant thereon to prevent trespass & injury, though the business is not carried on & there is no intention to sell it as a going concern, there is a “beneficial occupation” in respect of which rates must be paid in full.—*Re BLAZER FIRE LIGHTER, LTD.*, [1895] 1 Ch. 402; 64 L. J. Ch. 161; 71 L. T. 665; 43 W. R. 364; 11 T. L. R. 65; 39 Sol. Jo. 81; 1 Mans. 530; 13 R. 52.

—*See, also*, No. 6592, *ante*, & Nos. 7363, 7364, *post*.

6671. Tithe rentcharge.—An injunction will not be granted under 1862 Act, ss. 87 & 163, to restrain proceedings under a distress for arrears of a tithe rentcharge.—*Re TRIMSARAN COAL, IRON & STEEL CO.* (1876), 24 W. R. 900.

6672. Taxes—Effect of Jud. Act, 1875, s. 10.—The above sect. does not so far assimilate the rules in the winding up of cos. to the rules in

bkpcy. as to give the collector of taxes a right to distrain on the goods of a co. in liquidation.—*Re REGENT UNITED SERVICE STORES* (1878), 38 L. T. 130; 42 J. P. 279.

Annotation:—*Reid.* *Re Webb* (Smithfield London), [1922] 2 Ch. 369.

6673. — Effect of 5 & 6 Vict. (c. 35), s. 70.—The right of the Crown to distrain for property tax under 5 & 6 Vict. (c. 35), s. 70, is not taken away by 1862 Act.

In the administration of assets under a winding up the Crown is entitled to be paid in priority to the other creditors.—*Re HENLEY & Co.* (1878), 9 Ch. D. 469; 48 L. J. Ch. 147; 39 L. T. 53; 26 W. R. 885; 1 Tax Cas. 209, C. A.

Annotations:—*Consd.* *Re Oriental Bank Corpn., Ex p. R.* (1884), 28 Ch. D. 643. *Expld. & Distd.* *Food Controller v. Cork*, [1923] A. C. 647. *Reid.* *New South Wales Taxation Comrs. v. Palmer*, [1907] A. C. 179.

(d) By Mortgagees.

6674. For interest—General rule.—(1) To entitle a landlord to obtain leave to distrain under 1862 Act, s. 87, he must show, either that it is inequitable for the co. or its liquidator to insist on sect. 163 of that Act, or that the rent in respect of which leave to distrain is sought ought to be treated as part of the costs, charges, & expenses of the winding up.

(2) A mtgee. applying for liberty to distrain under an attornment clause in his mtge. is not in as favourable a position as a landlord.—*Re LANCASHIRE COTTON SPINNING CO., Ex p. CARNELLEY* (1887), 35 Ch. D. 656; 56 L. J. Ch. 761; 57 L. T. 511; 36 W. R. 305, C. A.

Annotations:—*As to* (1) *Consd.* *Shackell v. Chorlton*, [1895] 1 Ch. 378. *Reid.* *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373. *As to* (2) *Appld.* *Re Higginshaw Mills & Spinning Co.*, [1896] 2 Ch. 544.

6675. — — — — —.—*Re HIGGINSHAW MILLS & SPINNING CO., No. 6678, post.*

6676. — Accrued before winding up.—Mtgees. having a right of distress to enforce payment of interest will be allowed to distrain after a winding up for interest accrued while the liquidators were in possession, but not for arrears accrued before the winding up.—*Re BROWN, BAYLEY, & DIXON, Ex p. ROBERTS & WRIGHT* (1881), 18 Ch. D. 649; 50 L. J. Ch. 738; 45 L. T. 347; 30 W. R. 5.

Annotations:—*Consd.* *Re Higginshaw Mills & Spinning Co.*, [1896] 2 Ch. 544. *Reid.* *Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322; *Re Levi*, [1919] 1 Ch. 416.

6677. — Accrued while liquidator in possession.—*Re BROWN, BAYLEY, & DIXON, Ex p. ROBERTS & WRIGHT*, No. 6676, *ante*.

6678. — — — — —.—Where the liquidators & receivers of a cotton mill co. in liquidation & whose mill was in mtge. took possession of the mill without any objection on the part of the mtgee., & kept it in working order so as to prevent deterioration & to enable them to sell it as a going concern the ct. refused to give the mtgee. leave to distrain for interest accrued since the date of taking possession, holding that the possession of the liquidators & receivers was as much for the benefit of the mtgee. as of the co.

It is easier for a landlord to obtain leave to distrain for rent accrued after a winding-up order than for a mtgee. to obtain leave to distrain for interest.—*Re HIGGINSHAW MILLS & SPINNING CO.*, [1896] 2 Ch. 544; *sub nom.* *Re HIGGINSHAW MILLS & COTTON SPINNING CO., LTD., MANCHESTER & COUNTY BANK v. HIGGINSHAW MILLS & COTTON SPINNING CO., LTD.*, 65 L. J. Ch. 771; 75 L. T. 5; 45 W. R. 56; 40 Sol. Jo. 634, C. A.

Other remedies of lenders for enforcing securities.—*See* Sect. 34, sub-sects. 5 & 6, *ante*.

F. For Recovery of Possession.

6679. On breach of covenant—Non-payment of rent.]—*Re STRAND HOTEL CO.*, [1868] W. N. 2, L. J.

6680. ——— Reconstruction of company in contemplation.]—*Re NEW NORTH STAFFORDSHIRE COAL & IRON CO.*, [1884] W. N. 106.

6681. Proviso in lease for re-entry in case of winding up—Duty of court to enforce proviso.]—Mines were demised to a co. by a lease which contained a power of re-entry if the rents or royalties, or any part thereof, should be in arrear for thirty days, or if the co. "should be wound up voluntarily or by compulsion or otherwise under the provisions of any Act or Acts of Parliament." An action was brought against the co. by the debenture-holders, & a receiver was appointed. Rent being in arrear, the landlord took out a summons for leave to distrain or re-enter. After the summons had been returnable, but before it was heard, an order was made for winding up the co. The summons was then amended by intituling it in the winding up as well as in the action:—*Held*: by the Ct. of Appeal, according to the true construction of the proviso for re-entry, a right to re-enter accrued on the making of a winding-up order, & the title of the landlord to re-enter being clear, the ct. ought to order possession to be given to him, & ought not to put him to the useless expense of bringing an action to which there was no defence.—*GENERAL SHARE & TRUST CO. v. WETLEY BRICK & POTTERY CO.* (1882), 20 Ch. D. 260; *sub nom. Re WETLEY BRICK & POTTERY CO.*, 30 W. R. 445, C. A.
Annotation:—*Refd. Horsey Estate v. Steiger*, [1898] 2 Q. B. 259.

G. To Enforce Maritime Lien.

6682. Whether enforceable in court having jurisdiction over winding up—Or in Admiralty Court.]—(1) The proper mode of enforcing a maritime lien on a vessel belonging to a co. which has been ordered to be wound up, is by a proceeding in the winding up & not by a proceeding *in rem* in the Admlty. Ct.

The arrest of a vessel by the Admlty. Ct. is a "sequestration" within 1862 Act, s. 163.—*Re AUSTRALIAN DIRECT STEAM NAVIGATION CO.* (1875), L. R. 20 Eq. 325; *sub nom. Re AUSTRALIA DIRECT STEAM NAVIGATION CO.*, *Ex p. BAKER*, 44 L. J. Ch. 676.

Annotation:—*As to* (1) *Distd. Re Rio Grande do Sul S.S. Co.* (1877), 5 Ch. D. 282.

6683. ———.]—An order having been made to wind up a co. who were owners of a ship, & the ship being in the possession of mtgees.:—*Held*: as the ct. in the winding up had no jurisdiction over the mtgees., an order had been properly made giving leave to the master of the ship to proceed in the Ct. of Admlty. to enforce his maritime lien for disbursements on behalf of the ship.—*Re RIO GRANDE DO SUL S.S. CO.* (1877), 5 Ch. D. 282; 36 L. T. 603; 25 W. R. 328; 3 Asp. M. L. C. 424; *sub nom. Re RIO GRANDE DO SUL S.S. CO., TURNER'S CLAIM*, 46 L. J. Ch. 277, C. A.

Annotations:—*Mentd. The Fairport* (1882), 8 P. D. 48; *The Ringdove* (1886), 11 P. D. 120; *Hamilton v. Baker*, *The Sara* (1889), 14 App. Cas. 209.

6684. Enforced in foreign court—Right to retain proceeds against liquidator.]—Whilst a ship owned by pltf., an English co., was loading at Bombay

for a voyage to Hamburg, her master was induced by fraud to sign bills of lading for goods which were never put on board. The bills of lading were indorsed for value without notice of the fraud to defts., an English banking co. By the law of Germany non-delivery of the goods specified in a bill of lading entitles the holder of the bill to a lien upon the vessel. The ship sailed, & whilst she was at sea a petition was presented for the winding up of pltf. co., & on the day on which the ship arrived at Hamburg a winding-up order was made. On the same day defts., who had in the meantime discovered the fraud took proceedings in the German ct. at Hamburg to arrest the ship & to enforce their lien. The German ct. ordered the ship to be sold, declared defts. to be entitled to the lien claimed, & ordered that lien to be satisfied out of the proceeds of the sale. The liquidator of pltf. co., who had not appeared in the proceedings in the German ct. brought an action in England in the name of the co. against defts. to recover from them the amount which they had received under the German judgment as money had & received to pltf.'s use, seeking to make them liable as trustees of the money for the benefit of the general body of the co.'s creditors:—*Held*: the judgment of the German ct. being a judgment *in rem* the money received by defts. under it was not subject to any trust in favour of the general body of the co.'s creditors, & the action was not maintainable.—*MINNA CRAIG S.S. CO. v. CHARTERED MERCANTILE BANK OF INDIA, LONDON & CHINA*, [1897] 1 Q. B. 460; 66 L. J. Q. B. 339; 76 L. T. 310; 45 W. R. 338; 13 T. L. R. 241; 41 Sol. Jo. 310; 8 Asp. M. L. C. 241; 2 Com. Cas. 110, C. A.

H. Practice and Procedure.

(a) *To What Court Application must be made.*

6685. Whether to court having jurisdiction over winding up—Or to court in which action pending.]—*WILSON v. NATAL INVESTMENT CO.*, No. 6250, *ante*.

6686. ———.]—*Re LAND & SEA TELEGRAPH CONSTRUCTION CO., THAMES PLATE GLASS CO. v. LAND & SEA TELEGRAPH CONSTRUCTION CO.*, No. 6571, *ante*.

6687. ——— Divisional court.]—Where a petition for winding up a co. has been presented, an application under 1862 Act, s. 85, to stay a pending action against the co., ought to be made to a div. ct. of the division before which, or—where a judge can be selected—to the judge before whom the action is pending, & not to the judge of the Ch. Div. to whose ct. the winding-up petition is attached.—*Re PEOPLE'S GARDEN CO.* (1875), 1 Ch. D. 44; 45 L. J. Ch. 129; 24 W. R. 40; 1 Char. Pr. Cas. 19.

Annotations:—*Refd. Garbutt v. Fawcus* (1875), 45 L. J. Ch. 133; *Kingchurch v. People's Garden Co.* (1875), 24 W. R. 41; *Re Stapleford Colliery Co.* (1875), 24 W. R. 173; *Walker v. Banagher Distillery Co.* (1875), 1 Char. Pr. Cas. 31.

6688. ———.]—The proper tribunal to stay an action in either division of the High Ct. of Justice is the div. ct. of that division in which the action is commenced; subject to this, the Jud. Acts have not taken away from the Ch. Div. of the High Ct. the jurisdiction to restrain any action against a co. which is being wound up by it under the Cos. Acts.—*GARBUTT v. FAWCUS* (1875),

PART III. SECT. 36, SUB-SECT. 13.—
G.

*p. Action to enforce in Admiralty Court—No leave obtained.]—*Where a

co. is being wound up pursuant to Dominion Winding-up Act, in the Supreme Ct., proceedings in the Admlty. Ct. on a claim for seamen's wages, taken without leave of the ct.

having charge of the winding up, are not void but only irregular.—*Re BRITISH COLUMBIA TIE & TIMBER CO., LTD.* (No. 2), *COLAN v. THE SHIP RUSTLER* (1909), 14 B. C. R. 204.—*CAN.*

Sect. 36.—Winding up by court: Sub-sect. 13, H. 1, (b), (c), (d) & (e); sub-sect. 14, A. & B

1 Ch. D. 155; 45 L. J. Ch. 133; 33 L. T. 617; 24 W. R. 89, C. A.

Annotation:—Apprvd. Re Stapleford Colliery Co. (1875), 24 W. R. 173.

6689. ———.]—*Re MAIN PUBLISHING CO. (1875), cited in 24 W. R. at p. 173.*

Annotation:—Folld. Re Stapleford Colliery Co. (1875), 24 W. R. 173.

6690. ———.]—*Re STAPLEFORD COLLIERY CO., No. 6637, ante.*

6691. ———.]—Where a co. is being wound up & actions are pending against it, an injunction in restraint of those actions may be granted by the ct. to which the winding-up petition is presented, & not only by the cts. in which the actions are pending.—*Re LONDON CITY SUPPLY ASSOCN. & CLERKS' CLUB (1876), 34 L. T. 846.*

6692. ———.]—*Re MORRISTON PATENT FUEL & BRICK CO., [1877] W. N. 20.*

6693. ———.]—Where an action has been brought against a limited co. in a common law division any application under 1862 Act, s. 85, to stay proceedings in the action during the pendency of a winding-up petition in the Ch. Div.—as for instance an application to restrain proceeding with an execution against the co. under the judgment—should, having regard to Jud. Act, 1873, s. 4 (5) & Jud. Act, 1875, s. 11 (1), be made in the common law division to which the action is attached & not in the Ch. Div.—*Re ARTISTIC COLOUR PRINTING CO. (1880), 14 Ch. D. 502; 49 L. J. Ch. 526; 42 L. T. 802; 28 W. R. 943.*

Annotations:—Folld. Re General Service Co-op. Stores, [1891] 1 Ch. 496. Refd. Re Liverpool Household Stores Asscn. (1888), 4 T. L. R. 722. Mentd. Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co., [1897] 1 Ch. 373.

6694. ———.]—When a petition has been presented in the Ch. Div. to wind up a co., an application to stay an action against the co. in the Q. B. Div. must still be made in the division in which the action is pending, the practice in this respect not being altered by 1890 (Winding-up) Act, & the General Ord. under it.—*Re GENERAL SERVICE CO-OPERATIVE STORES, [1891] 1 Ch. 496; 60 L. J. Ch. 586; 64 L. T. 272; 7 T. L. R. 231, C. A.*

6695. ———.]—*Stay of execution obtained before winding-up order made.*—*Re TWENTIETH CENTURY EQUITABLE FRIENDLY SOCIETY, [1910] W. N. 236.*

6696. ———.]—*Or to Court of Appeal.*—The Ct. of Appeal having made orders dismissing certain appeals brought by a co., & execution being about to issue, on application to the ct. by a creditor, who had, since the date of the orders, presented a winding-up petition, & by the provisional liquidator, for a stay of proceedings under the orders, the ct. refused to decide whether the application should have been made to it under Jud. Act, 1873, s. 24 (5), or, under 1862 Act, s. 85, to the judge before whom the petition would be heard. The ct. granted a stay of proceedings in exercise of its general jurisdiction.—*Re LIVERPOOL HOUSEHOLD*

STORES ASSOCN., LTD. (1888), 4 T. L. R. 722; 1 Meg. 83, C. A.

(b) Mode of Application.

6697. By summons.—*HAGELL v. CURRIE, Re BREECH-LOADING ARMOURY CO., [1867] W. N. 75.*

6698. After case called on—& jury sworn.—*HENDERSON v. PERUVIAN RY. CO., LTD., No. 6599, ante.*

6699. Ex parte.—Pending the hearing of a petition to wind up a co. the ct., upon an *ex p.* application without notice, & upon appct. giving the usual undertaking as to damages, will restrain an action against the co. until the petition is disposed of.—*Re LONDON & SUBURBAN BANK, LTD. (1871), 25 L. T. 23; 19 W. R. 950.*

6700. ———.]—*WILLIAMS v. BRISTOL MARINE INSURANCE CO. (1870), 39 L. J. Ch. 504.*

6701. ———.]—*Rule absolute granted in first instance.*—An application, under 1862 Act, s. 85, to stay proceedings in an action against a co., on the ground that a petition for winding up the co. has been presented, may be made *ex p.*, & a rule absolute may be granted in the first instance.—*MASBACH v. ANDERSON & CO., SCHOFIELD v. ANDERSON & CO. (1877), 37 L. T. 440; 26 W. R. 100.*

6702. ———.]—*Leave to commence action.*—Leave to commence an action against a co. in liquidation should not be given on an *ex p.* application.—*WESTERN & BRAZILIAN TELEGRAPH CO. v. BIBBY (1880), 42 L. T. 821.*

6703. Necessity for affidavit—Verifying allegations in action sought to be brought.—*Re ST. CUTHBERT'S LEAD SMELTING CO. (No. 2), [1866] W. N. 154.*

(c) Grounds for Granting Application.

See Sub-sect. 13, B., C., D. (b)-(d), E. (b)-(d), F., G., ante.

(d) On What Terms Application granted.

6704. Security for costs.—*McEWEN v. LONDON, BOMBAY & MEDITERRANEAN BANK, LTD., Re LONDON, BOMBAY & MEDITERRANEAN BANK, LTD., No. 6597, ante.*

Undertaking as to damages.—*See No. 6699, ante.*

6705. Undertaking not to enforce decree obtained except with leave of court.—Where a suit is instituted by a shareholder in a co. to restrain that co. from amalgamating itself with another co., which since the resolution for amalgamation is ordered to be wound up, the ct. will, on summons, give leave to pltf. to proceed with the suits on his undertaking not to enforce any decree which he may obtain, without the leave of the ct.—*Re MARINE INVESTMENT CO., LTD. (1868), 17 L. T. 535.*

6706. ———.]—*HAGELL v. CURRIE, Re BREECH-LOADING ARMOURY CO., [1867] W. N. 75.*

6707. Amendment of parties—Addition of liquidator—Undertaking to indemnify liquidator.—On a petition by a member of a co. in course of winding up for leave to appeal to the House of Lords in a

PART III. SECT. 36, SUB-SECT. 13.—H. (b).

q. By motion.—If before a winding-up order, under R. S. C., c. 129, is made, a suit is brought against a co. by a shareholder to have his subscription set aside for fraud, he will be authorised on motion to continue his proceedings after the order has been obtained.—*JOHNSTON v. EWART CO., LTD. (1907), Q. R. 31 S. C. 336.—CAN.*

r. ———.]—*PIERCE v. WEXFORD*

PICTURE HOUSE CO., LTD., [1915] 2 I. R. 310.—IR.

s. Presentation of petition.—A restraining order to prevent the execution of process at the instance of judgment creditors can only be applied for after presentation of the petition & such petition can only be presented after four days' notice. Any earlier presentation or application is irregular.—*Re ELDERADO UNION STORE CO. (1886), 6 I. R. & G. 514; 6 C. L. T. 542.—CAN.*

PART III. SECT. 36, SUB-SECT. 13.—H. (d).

t. Security of costs—Non-removal of assets—Undertaking to wind up company.—Where liquidators had been appointed by the Cape Ct. to wind up a co. registered & carrying on business in Natal the ct. granted a rule *nisi* recognising the appointment in Natal of the Cape liquidators & staying all actions of local creditors until further order subject to the following conditions:—

suit instituted before the winding up to dispute a debt, permission was given to amend the bill in the name of the official liquidator, petitioner undertaking to indemnify him completely.—*Re PERUVIAN RYS. CO., LTD. & THAMES & MERSEY MARINE INSURANCE CO., LTD.* (1869), 18 W. R. 34.

6708. Leave of court to be obtained before proceeding further.]—*THAMES PLATE GLASS CO. v. LAND & SEA TELEGRAPH CO.*, No. 6593, *ante*.

(e) *Other Cases.*

6709. Enforcement of order—Foreign order.]—*Re SCOTTISH PACIFIC COAST MINING CO.*, [1886] W. N. 63.

—*See, further*, Sub-sect. 17, *post*.

6710. Costs—Incurred in action before winding up.]—A creditor of a joint-stock co. commenced an action against one of the shareholders. A petition for winding up was then presented, & notice given to the creditor of such petition, but the creditor continued proceedings in the action until the advertisement appeared for a creditors' representative:—*Held*: the creditor was entitled to his costs of action up to the period of advertisement.—*Re WELSH POTASI MINING CO., Ex p. TOBIN* (1858), 28 L. J. Ch. 44; 32 L. T. O. S. 100; 7 W. R. 4.

Annotation:—*Mentd.* *Re Plumstead, Woolwich & Charlton Consumers Pure Water Co. & Plumstead, Woolwich & Charlton Consumers Pure Water Co., Ltd., Same Co. v. Davis, Ellis v. Same Co.* (1860), 29 L. J. Ch. 741.

6711. Application to proceed—Included in costs of action.]—The costs of an application in the liquidation in another branch of the ct. for leave to proceed in a suit were ordered to be included in the costs of the suit.—*HENDERSON v. LACON* (1867), L. R. 5 Eq. 249; 17 L. T. 527; 32 J. P. 326; 16 W. R. 328.

Annotations:—*Mentd.* *Ship v. Crosskill* (1870), L. R. 10 Eq. 73; *Hall v. Old Talargoch Lead Mining Co.* (1876), 3 Ch. D. 749; *Weir v. Bell* (1878), 3 Ex. D. 238; *Arkwright v. Newbold* (1881), 17 Ch. D. 301; *Capel v. Sim's Ships Compositions Co.* (1888), 57 L. J. Ch. 713; *Arnison v. Smith* (1889), 41 Ch. D. 348; *Re London & Colonial Finance Corp.* (1897), 77 L. T. 116.

SUB-SECT. 14.—TRANSFER OF PROCEEDINGS.

See R. S. C., Ord. 49, r. 5.

A. *Winding-up Proceedings.*

6712. Second petition subsequently presented in different branch—Transfer to same branch as first petition.]—When a petition to wind up a co. has been presented, another petition for the same purpose subsequently presented & attached to a different branch of the ct. will be ordered to be transferred to that branch of the ct. to which the first petition is attached.—*Re WEST HARTLEPOOL IRONWORKS CO.* (1875), 10 Ch. App. 629; 44 L. J. Ch. 529, L. JJ.

6713. Second petition presented before different judge of same division.]—R. S. C. Ord. 51, r. 2a, does not enable a judge of the Ch. Div., who has made an order for winding up a co., to direct the transfer

to himself of a winding-up petition pending before another judge of the division.—*Re NATIONAL FUNDS ASSURANCE CO., LTD.* (1876), 25 W. R. 23.

6714. From county court—Who may order—High Court—Notwithstanding petition opened in county court.]—The High Ct. has jurisdiction to order the transfer of a winding-up petition from the county ct. to itself, notwithstanding that the petition has been opened in the county ct.—*Re EAST DULWICH NO. 295 STARR-BOWKETT BUILDING SOCIETY* (1890), 39 W. R. 32; 6 T. L. R. 448.

6715. ——— 1890 (Winding up) Act, s. 3.]—A co. was registered as a limited co.; but two of the subscribers of the memorandum of assocn. were infants. A petition by creditors was presented for winding it up as an unregistered co.; or, in the alternative, as a limited co. The capital being under £10,000, the petition was presented in the county ct.; but before it came on for hearing an order was made transferring it to the High Ct.:—*Held*: on appeal, the power given by 1890 (Winding up) Act, to transfer "the winding up of a co., or any proceedings therein," extended to a petition on which no order had been made; the judge, therefore, had jurisdiction to order a transfer; & having regard to the importance of having a valid winding-up order, & to the nature of the question as to the status of the co., good cause was shown for making the order.—*Re LAXON & CO.*, [1892] 3 Ch. 31; 62 L. J. Ch. 79; 67 L. T. 584; 40 W. R. 614; 8 T. L. R. 652; 36 Sol. Jo. 592; 2 R. 7, C. A.

6716. ——— When ordered—Misfeasance summons.]—*Re VESTAL HOSIERY CO.*, No. 6204, *ante*.

6717. To county court—1890 (Winding up) Act, s. 3.]—*Re MILFORD HAVEN SHIPPING CO.*, [1895] W. N. 16.

, *also*, No. 7046, *post*.

6718. To City of London Court.]—There is no power to transfer the winding up of a co. to a ct. which has been excluded by the Lord Chancellor from having jurisdiction, under 1890 (Winding up) Act, to wind up such co.—*Re REAL ESTATES CO.*, [1893] 1 Ch. 398; 62 L. J. Ch. 213; 68 L. T. 24; 41 W. R. 157; 9 T. L. R. 118; 37 Sol. Jo. 102; 3 R. 192.

To Stannaries Court.]—*See* Nos. 7806, 7807, 7808, *post*.

6719. From district registry—R. S. C., Ord. 35, r. 16.]—*Re NEATH & BRISTOL S.S. CO.* (1888), 58 L. T. 180; 4 T. L. R. 227.

Annotation:—*Refd.* *Re Porrett*, [1891] 2 Ch. 433.

B. *Actions, etc.*

6720. Who may order—Transfer from one judge of Chancery Division to another.]—When an order has been made by a judge of the Ch. Div. for the winding up of a co. under 1862 & 1867 Acts, the judge in whose ct. such winding up shall be pending has no jurisdiction under R. S. C., 1875, Ord. 51, r. 2a, to order the transfer to him of an action pending against the co. in another ct. of the same division; such a transfer can only be made

(1) filing of security; (2) non-removal of any assets of the co. from the jurisdiction of the ct.; (3) the discharge of the order if within one month no proceedings were taken under Law 19 of 1866 to wind up the co.—*Ex p. MYBURGH KRONE EN KOMPANIE BEPERKT* (1921), 42 N. L. R. 296.—S. AF.

PART III. SECT. 36, SUB-SECT. 13.—H. (e).

a. *Costs of application—Delay of liquidator.]*—Where an action is brought

against a co. in liquidation, but no steps are taken by the liquidator until the case comes before the Ct. of Appeal, when he appears & impugns the validity of the proceedings, he is only entitled to such costs as he could have obtained on an application in chambers.—*CHARLES H. LILLY CO. v. JOHNSTON FISHERIES CO.* (1909), 14 B. C. R. 174.—CAN.

b. ———.]—If in addition to absence of notice, the official liquidator has been guilty of delay in making the application, he will be

ordered to pay the costs of the judgment & of the motion.—*HARTFORD v. AMICABLE MUTUAL LIFE ASSURANCE CO.* (1871), L. R. 5 C. L. 368.—IR.

c. *Costs of motion to stay.]*—Where, under 1908 Act, s. 140, an application is made by notice of motion to stay an action against a co. on the ground that a petition has been presented for its winding up, pltt. in the action is entitled to receive from applt. his costs of the motion.—*PIERCE v. WEXFORD PICTURE HOUSE CO., LTD.*, [1915] 2 L. R. 310.—IR.

Sect. 36.—Winding up by court: Sub-sect. 14, B.; sub-sect. 15, A.

by the Lord Chancellor under Ord. 51, r. 1.—*Re MADRAS IRRIGATION & CANAL CO.* (1881), 16 Ch. D. 702; 29 W. R. 520.

6721. — Transfer from King's Bench Division to Chancery Division—Action against company & other defendants.]—Certain shareholders of a co. brought an action in the K. B. Div. to set aside an agreement of compromise entered into between pl'tfs. & de'ft. co. & its directors, upon the ground that it had been obtained by fraud & misrepresentation, & for other relief. The co. was subsequently ordered to be compulsorily wound up, & the liquidator having applied that the action should be transferred to the winding up judge in the Ch. Div., the judge, being of opinion that he had jurisdiction under 1909 (Winding up) Rules, r. 42 (1), to do so, although the directors were added as de'fts., ordered the action to be transferred to him. On appeal by pl'tfs. from that order:—*Held*: the object of r. 42 being to give to the winding-up ct. control over the whole assets of a co., the judge had jurisdiction to make the order in question, & as it was in the circumstances a proper one, the Ct. of Appeal would not interfere with the discretion exercised by the judge.—*Re PACAYA RUBBER & PRODUCE CO., LTD.*, [1913] 1 Ch. 218; 82 L. J. Ch. 134; 108 L. T. 21; 29 T. L. R. 129; 57 Sol. Jo. 143; 20 Mans. 37, C. A.

6722. How application for transfer made—Ex parte—Transfer from one judge of Chancery Division to another.]—Where an order for the compulsory winding up of a co. has been made, an action against the co. pending in another division of the ct. will be transferred on an application *ex p.*—*Re LANDORE SIEMENS STEEL CO.* (1879), 10 Ch. D. 489; 40 L. T. 35; 27 W. R. 304.
Annotation:—*N.F. Re Madras Irrigation & Canal Co.* (1881), 16 Ch. D. 702.

6723. — Transfer from another division to Chancery Division.]—The transfer to a judge of the Ch. Div., under Ord. 51, r. 2a, of an action pending in another division can be ordered *ex p.*—*Re UNITED KINGDOM ELECTRIC TELEGRAPH CO., LTD.* (1881), 29 W. R. 332.

6724. When ordered—Plaintiff undertaking to amend writ by suing liquidator personally & not as liquidator—Without prejudice to right of proof against company.]—An action was commenced in the Exch. Div. against the liquidator of a co. which was being wound up in the Ch. Div., claiming damages for injuries sustained through the negligence of the co. A motion by the liquidator to transfer the action from the Exch. Div. to the Ch. Div. was refused on pl'tf. undertaking to amend his writ by suing the liquidator personally; pl'tf.'s right to prove against the co. in the winding up not to be prejudiced thereby.—*Re THAMES STEAM FERRY CO.* (1879), 40 L. T. 422; 27 W. R. 503.

6725. — Action in district registry.]—*Re EBERSLEY'S HOTEL CO.*, [1884] W. N. 252.

—*See, also*, No. 7045, *post*.

6726. Effect of—Applications in transferred action—How made.]—PRACTICE NOTE, [1905] W. N. 128.

PART III. SECT. 36, SUB-SECT. 15.—A.

6727 i. Who may take advantage of fraudulent preference—Only general body of creditors—Not debenture-holders.]—Proceedings were instituted by the official liquidator of a co. in the name of the co. to recover property alleged to have been delivered to a creditor by way of fraudulent preference. The co. had issued debentures over all its assets & when the suit came on

for hearing it appeared that the debenture-holder were indemnifying the liquidator against costs & expected to derive the benefit of any decree made in favour of the liquidator. It was contended on behalf of de'fts. that the suit could not be maintained by the liquidator on the ground that any property recovered would pass to the debenture-holders under their debentures:—*Held*: the suit could be maintained by the

SUB-SECT. 15.—FRAUDULENT PREFERENCE.

A. In General.

See, now, 1908 Act, s. 210.

6727. Who may take advantage of fraudulent preference—Only general body of creditors—Not debenture-holders.]—The rule of bkpcy. law, that the doctrine of fraudulent preference can only be taken advantage of for the benefit of the general body of creditors, & not for the benefit only of any particular creditor or class of creditors, applies in the winding up of cos.—*WILLMOTT v. LONDON CELLULOSE CO.* (1886), 34 Ch. D. 147; 56 L. J. Ch. 89; 55 L. T. 696; 35 W. R. 145; 3 T. L. R. 121, C. A.

Annotations:—*Mentd. Re Faure Electric Accumulator Co.* (1888), 58 L. J. Ch. 48; *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95; *Hamer v. London, City & Midland Bank* (1918), 87 L. J. K. B. 973.

6728. Construction of 1862 Act, s. 164—What bankruptcy law referred to—Bankruptcy law for time being in force.]—In May, 1878, the directors of a co. resolved that any advances then or thereafter made by directors for urgent claims should be first paid. G., S., & M., directors, had made, & subsequently made such advances. In June, 1878, the directors borrowed on mtge. of unpaid calls & applied part of the money towards repaying these advances. In July, 1878, G., S., & M. decided to pay up their shares in full, there being then directors' fees due to them, & the amount they purported to pay up was set off against their fees & advances. The co. was in an embarrassed state in June, 1878, but it did not appear that it was then in debt, except to the directors. A petition to wind up was presented by the directors in Jan. 1879, & the order made in Feb. The liquidator took out a summons to compel G., S., & M. to refund the moneys so received & set-off on the ground of fraudulent preference under the above Act:—*Held*: (1) the meaning of Bkpcy. Act, 1869 (c. 71), s. 92, is, that an act which would otherwise be a fraudulent preference cannot be impeached unless a bkpcy. follows within three months; (2) the above sect. refers to the law of bkpcy. for the time being, & not to the law at the date of that Act, therefore, the winding up not having commenced for more than three months after the transaction complained of, there was no case of fraudulent preference.—*Re LIVERPOOL & LONDON GUARANTEE & ACCIDENT INSURANCE CO., GALLAGHER'S CASE* (1882), 46 L. T. 54; *sub nom. Re LIVERPOOL & LONDON GUARANTEE & ACCIDENT INSURANCE CO., LTD., MASON, GALLAGHER & SLATER'S CASE*, 30 W. R. 378.

Annotations:—*Generally, Mentd. Re Woods' Ships' Woodite Protection Co.* (1890), 62 L. T. 760; *Re Ilkley Hotel Co.* (1893), 68 L. T. 164.

6729. — Effect on Bankruptcy Act, 1883 (c. 52), s. 48—"Undue or fraudulent preference."]—1862 Act, s. 164, although it uses the words "undue or fraudulent preference," does not extend the operation of the fraudulent preference clause of 1883 Act, s. 48, which is thereby applied to cos. being wound up under the Cos. Acts.

Within three months before the commencement of its winding up a co. was indebted to H.,

& it was unnecessary to decide whether or not any property recovered in the suit would pass to the debenture-holders under their debentures inasmuch as although an official liquidator ought not to bring proceedings to set aside a transaction as fraudulent when the proceedings will only benefit secured creditors yet he has a right to do so if he sees fit.—*GREGORY (ALBERT), LTD. v. NICCOL, LTD.* (1916), 16 S. R. N. S. W. 214.—AUS.

& was to the knowledge of its directors unable to pay its debts as they became due from its own moneys. The chairman of its directors was personally liable on an acceptance of the co. for part of the debt due to H. In pursuance of a scheme resolved upon by the directors with the very object of relieving the chairman from his liability, debentures of the co. were allotted to H. as a collateral security for his debts:—*Held*: the transaction was not a fraudulent preference, & the debentures were valid.—*Re STENOTYPER, LTD., HASTINGS BROTHERS v. STENOTYPER, LTD.*, [1901] 1 Ch. 250; 70 L. J. Ch. 94; 84 L. T. 149; 17 T. L. R. 151; 8 Mans. 203.

6730. — “Creditors” — Shareholder in industrial society.—By the rules of a co-operative society for supplying goods to its members, which was registered under the Industrial & Provident Societies Act, 1893 (c. 39), each member was required to hold a certain number of shares in the society, & was at liberty to withdraw his share capital under certain conditions upon giving notice to the manager. Applt., a member of the society, being unable owing to a strike to pay for goods supplied to him, the managing committee on four occasions debited the amount standing to his credit as a shareholder with sums due from him to the society for goods, the total amount so debited being about equal to the amount of his share capital; no notice under the rules to withdraw his capital had been given by applt. The society was in financial difficulties & was at the date of the last two transactions hopelessly insolvent to the knowledge of the managing committee; but the committee, who had adopted the same course with other shareholders, acted *bonâ fide* & without intent to prefer any particular shareholder. Upon a summons taken out by the liquidator of the society to set aside the transactions:—*Held*: the last transaction, although within three months of the passing of a resolution for winding up the society, was not void under the above sect. as an undue or fraudulent preference of a creditor, applt. not being a creditor of the society within the meaning of that sect.—*Re GWAWR-Y-GWEITHYR INDUSTRIAL & PROVIDENT SOCIETY, DOVEY v. MORGAN*, [1901] 2 K. B. 477; 70 L. J. K. B. 614; 84 L. T. 824; 49 W. R. 655; 45 Sol. Jo. 522, D. C.

See, further, INDUSTRIAL, PROVIDENT & SIMILAR SOCIETIES.

PART III. SECT. 36, SUB-SECT. 15.—
B.

d. Bonâ fide belief in prospects of solvency.—A co. being indebted to L. & B. in a large amount, & believing that their charter did not allow a mtge. on their property to secure an overdue debt, made an agreement to give such mtge. for an advance of a larger sum, agreeing to return the amount of the debt to the mtgees. At the time of this transaction the co. believed that by getting time from this creditor they would be able to carry on their business & avoid failure. This hope was not realised, however, as the co. were subsequently compelled to stop payment, & resps., who were also creditors, obtained judgments & issued executions against the goods secured by the mtge.:—*Held*: inasmuch as the co. *bonâ fide* believed that by giving this mtge. & getting an extension of time for payment of pltf.'s debt they would be able to carry on their business, the mtge. was not a preference of this debt over those of the other creditors, & not a fraudulent preference.—*LONG v. HANCOCK* (1885), 12 S. C. R. 532.—CAN.

e. Collusion between company &

particular creditor—Pressure.—T. Co. being insolvent, pltf. on Dec. 29, obtained a default judgment against it, but did not issue execution thereon. On Jan. 13, T. Co. obtained a chamber summons, signed by a judge, to set aside pltf.'s judgment as irregular & in breach of an agreement not to proceed. The summons contained the words “in the meantime let all proceedings be stayed.” On Jan. 17, the Bank of B. C. commenced an action against T. Co. by specially endorsed writ, & on the morning of Jan. 24, before the hour for the regular sitting of the judge in chambers, T. Co., by their counsel, attended without summons in the judge's private room & consented to an order for judgment thereon, which was immediately registered & execution issued. Afterwards, on the same morning, in chambers, the summons of the T. Co. to set aside pltf.'s judgment was argued; judgment was reserved, & on Jan. 27, was delivered, dismissing the application. In an action to set aside or postpone the judgment & execution of the bank, as being a confession of judgment by the T. Co. obtained by collusion, & therefore void within Fraudulent Preference

6731. How “three months” calculated—Voluntary winding up followed by compulsory winding up.—When a co. already in voluntary liquidation is wound up by the ct., the date which for the purposes of the above sect. is to be deemed to correspond with the act of bkpey. in the case of an individual trader is that, not of the resolution to wind up, but of the petition; & consequently the acts enumerated in the sect. must, in order to be deemed fraudulent preferences, be committed within three months, not of the former, but of the latter date.—*Re RUSSELL HUNTING RECORD Co., LTD.*, [1910] 2 Ch. 78; 79 L. J. Ch. 498; 103 L. T. 57; 54 Sol. Jo. 539; 17 Mans. 229.

Annotation:—*Consd. Re Havana Exploration Co., Nathan's Claim*, [1916] 1 Ch. 8.

B. What amounts to.

6732. Issue of debentures—Under agreement for composition with creditors—Failure of agreement.—The directors of a co. having power to issue debentures & to borrow money on mtge. or otherwise, under an arrangement with certain creditors of the co., issued debentures in payment of existing debts due from the co. The arrangement was intended to extend to all the creditors, but certain creditors dissented therefrom & only came into its terms on the very day when a petition for winding up the co. was presented, three weeks after the arrangement was made. The co. was wound up voluntarily under supervision:—*Held*: the debentures were not invalidated either by reason of their having been issued in payment of existing debts, or of the arrangement with the creditors not having been fully carried out; & there had been no fraudulent preference of those creditors who had taken them in payment of their debts.—*Re INNS OF COURT HOTEL Co.* (1868), L. R. 6 Eq. 82; 37 L. J. Ch. 692.

Annotations:—*Consd. Sellman v. Prince*, [1895] 2 Ch. 617. *Refd. Re Patent Ivory Manufacturing Co., Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156; *Re Pyle Works* (1890), 44 Ch. D. 531; *Re Ilkley Hotel Co.* (1893), 68 L. T. 164.

6733. — To creditors of founder of company—One-man company.—P., a tailor, formed a private co. to take over his business, which was insolvent, on the terms, *inter alia*, that he was to be indemnified against his business debts. At this time P. was being pressed for payment of a business debt due to pltf. The co. had power to raise money by debentures. In pursuance of

Act:—*Held*: what took place was a confession of judgment; & there was pressure rebutting the intent to prefer.—*EDISON GENERAL ELECTRIC Co. v. VANCOUVER & NEW WESTMINSTER TRAMWAY Co. & BANK OF BRITISH COLUMBIA* (1896), 4 B. C. R. 460.—CAN.

f. Mortgage — To secure previous advances made on understanding that security would be given—“Antecedent contract.”—A co., incorporated in M., while in insolvent circumstances, had given a mtge. upon chattels in O. to debt., a M. creditor, to secure previous cash advances made to the co. under verbal promises by two directors that security would be given. The effect of the mtge. was to delay & prejudice other creditors & give debt. a preference over them:—*Held*: (1) under 48 Vict. c. 26, without regard at all to any question of *bona fides*, pressure, or knowledge of the co.'s financial position by its officers, or by debt., the effect alone of the transaction avoided it; (2) this mtge. was not given in pursuance of any antecedent contract or promise of the co., but even if it were it could not be upheld, because it was not shown to have been given in

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a resolution passed by P. & his brother as directors, debentures were issued to pltf. in discharge of the debt due to him from P. At this date P. was the only creditor of the co. The co. was wound up within three months of its formation:—*Held*: the debentures were not void on the ground of pltf. not being a creditor of the co. inasmuch as the co. had agreed to indemnify P. against pltf.'s debt; nor on the ground that they were issued in P.'s interest, there being no conflict between his interest & the interest of the co.; nor on the ground of fraudulent preference.—*SELIGMAN v. PRINCE & Co.*, [1895] 2 Ch. 617; 64 L. J. Ch. 745; 73 L. T. 124; 44 W. R. 6; 11 T. L. R. 473; 2 Mans. 586; 12 R. 592, C. A.

6734. — As collateral security—Debt partly secured by chairman's acceptance.]—*Re STENO-TYPER, LTD., HASTINGS BROTHERS v. STENO-TYPER, LTD.*, No. 6729, *ante*.

6735. — To secure sum for benefit of creditors.]—A co. executed a document which purported to be a debenture, marked "B," in favour of H., charging by way of floating charge, but subject to another document purporting to be a debenture marked "A," in favour of other parties, executed on the same date, Sept. 20, all the assets of the co. to secure a sum of £70,000 to be applied for the benefit of all the co.'s creditors. The document provided, *inter alia*, as follows: "In consideration of H. undertaking the trusts created by the conditions indorsed hereon," the co. "will on demand pay to H., or other the registered holder for the time being hereof, the sum of £70,000." The co. agreed to pay interest thereon at the rate of 6 per cent *per annum* during the continuance of the security & charged with such payment "its undertaking & all its property present & future including its uncalled capital. This debenture is issued subject to & with the benefit of the conditions indorsed hereon, which are to be deemed part of it." Two days after the date of the above document pltf. signed judgment against the co. for £15,184 odd under R. S. C., Ord. 14. The purported debentures were duly registered as charges in the Cos. Registration Office on Oct. 8, & a week later the sheriff levied execution on the judgment signed under the Order. Notice of a claim was given under the "debenture" & interpleader proceedings followed. The master held that the document charging the assets with the payment of £70,000 & interest was an "assignment" of the whole of the co.'s property within 1908 Act, s. 210 (3), & was therefore void:—*Held*: the master's decision was right & the appeal must be dismissed.—*LONDON JOINT CITY & MIDLAND BANK, LTD. v. DICKINSON (H.), LTD., JOHNSTONE, CLAIMANT*, [1922] W. N. 13, D. C.

6736. Mortgage to bankers to secure overdraft.]—A co. in difficulties but not in the immediate prospect of a winding up, deposited the deeds of some freehold property with their bankers, to secure their current account, then largely overdrawn. They afterwards continued to draw upon their account & to pay in moneys for a period of two months until the bank stopped payment. The co. resolved upon a voluntary winding up rather more than six months after the transaction. The arts. of assocn. provided that the co. might, with the sanction of a general

meeting, borrow money not exceeding in amount one-half of the nominal capital, upon mtge.:—*Held*: (1) the mtge. was valid; (2) the express power did not negative the general power, the rule being that a co. may mtge. its property unless expressly prohibited by its arts. from so doing; (3) such security did not operate as a fraudulent preference, & the bank were entitled to the full benefit of it.—*Re PATENT FILE CO., Ex p. BIRMINGHAM BANKING CO.* (1870), 6 Ch. App. 83; 40 L. J. Ch. 190; 23 L. T. 484; 19 W. R. 193, L. J.

Annotations:—As to (1) & (2) *Consd. Re Clough, Bradford Commercial Banking Co. v. Cure* (1885), 31 Ch. D. 324. *Refd. R. v. Reed* (1880), 5 Q. B. D. 483; *General Auction Estate & Monetary Co. v. Smith*, [1891] 3 Ch. 432. *Generally, Mentd. Re General Provident Assce., Ex p. National Bank* (1872), L. R. 14 Eq. 507.

6737. Debt due to directors—Mortgage of company's property as security—Directors knowing of company's insolvency.]—A board of directors knowing the co. to be insolvent made a call & ordered the seal of the co. to be affixed to a mtge. whereby that call & all other property of the co. were assigned to a trustee by way of security for some of themselves, who were personally liable as sureties for debts of the co. The co. was afterwards ordered to be wound up, & was unable to pay its debts in full:—*Held*: this transaction amounted to a fraudulent preference, & the directors who had received anything for their own benefit under the mtge. were liable to refund.—*GASLIGHT IMPROVEMENT CO. v. TERRELL* (1870), L. R. 10 Eq. 168; 39 L. J. Ch. 725; 23 L. T. 386.

Annotation:—*Refd. Re Wincham Shipbuilding, Boiler & Salt Co., Poole, Jackson & Whyte's Cases* (1878), 26 W. R. 588.

6738. Power to receive payment of calls in advance—Payment in & appropriation of amounts unpaid on directors' shares.]—Under a power in the arts. of assocn. to receive payment of calls in advance, the directors of a co. paid into the bank the amount remaining uncalled on their shares, & on the same day appropriated the money in payment of their fees, for which there were at the time, as they knew, no available assets:—*Held*: the effect of the transaction was that there had been no *bonâ fide* payment in anticipation of calls, & the directors, who were bound to exercise the powers given to them for the benefit of the co. generally, & not with a view to their own private interests only, were not relieved from liability upon their shares.—*Re EUROPEAN CENTRAL RY. CO., SYKES' CASE* (1872), L. R. 13 Eq. 255; 41 L. J. Ch. 251; 26 L. T. 92.

Annotations:—*N.F. Re Wood's Ships' Woodite Protection Co.* (1890), 62 L. T. 760. *Refd. Re Wincham Shipbuilding, Boiler & Salt Co., Poole, Jackson & Whyte's Case* (1878), 9 Ch. D. 322; *Re Land Development Assocn., Kent's Case* (1888), 39 Ch. D. 259; *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95.

6739. Guarantee & repayment of loan by director—Assignment of security to director within week of winding up.]—A board of three directors deputed C. one of their number, to negotiate with bankers for a loan to the co. C. had an interview with the director of the bank who agreed to make the advance if C. would give his personal guarantee for the repayment. The evidence was that at this interview it was understood that, if required, the co. would give a charge on its uncalled capital as surety for the loan, C. reported his interview to the other two directors who agreed

consideration of a money advance made in the *bonâ fide* belief that such advance would enable the debtors to continue business & pay their debts in full.—*RIVER STAFF CO. v. SILL* (1886), 12 O. R. 557.—CAN.

*g. Mortgage within thirty days of winding up—Although in compliance with demand by mortgagee.]—*A mtge. of land made by an incorporated co. in favour of a creditor within thirty days prior to the beginning of winding-up

proceedings was attacked by the liquidator as being void under Winding-up Act, R. S. C., c. 129, ss. 68–71:—*Held*: notwithstanding the fact that the mtge. was given upon demand of the mtgee., the transaction must be

to indemnify him from loss, & C. thereupon gave the bank his personal guarantee & obtained the loan for the co. About nine months after this, the co. was shown, by a report, to be in difficulties. Within three days the bank wrote requiring C. to repay the loan, & ten days later the directors sent to the bank a duly executed charge on the co.'s unpaid capital, although the bank had not asked for it. Within a week of this a winding-up petition was presented, & about a month after, a liquidation under the supervision of the ct. was order. C. having repaid the loan to the bankers, they assigned to him the co.'s charge on its unpaid capital. On application by certain creditors to set aside the charge:—*Held*: the charge constituted a fraudulent preference & must be set aside.—*Re LONDON, WINDSOR & GREENWICH HOTELS* (1889), 1 Meg. 242.

6740. — Guarantee of overdraft—Agreement by company to give debenture on request—Request within three months of winding up.—The permanent director & principal shareholder of a co. guaranteed the overdraft at the co.'s bank, & in consideration thereof it was agreed that the co. would, whenever called upon by him to do so, give him a debenture charged on the co.'s property. About a year afterwards the director called upon the co. to give him a debenture in accordance with the agreement, which the co. did, & about sixteen days afterwards a resolution was passed for winding up the co.:—*Held*: the debenture was invalid as a fraudulent preference, the *onus* of showing that the delay was *bonâ fide* not having been discharged.—*Re JACKSON & BASSFORD, LTD.*, [1906] 2 Ch. 467; 75 L. J. Ch. 697; 95 L. T. 292; 22 T. L. R. 708; 13 Mans. 306.

Annotations:—*Reid. Re Gregory, Love, Francis v. Gregory, Love*, [1916] 1 Ch. 203. *Mentd. Re Columbian Fireproofing Co.*, [1910] 1 Ch. 758.

6741. — Set off against amount unpaid on shares.—U., a director of a co., held shares not fully paid up, & his directors' fees were unpaid. The co. was admittedly in embarrassed circumstances. On July 21, 1891, on which day the co.'s balance at its bankers was £2 0s. 11d., U. gave to the co. a cheque for £70, the amount remaining unpaid on his shares, & received at the same time from the co. a cheque for a like amount on account of his fees, signed by himself & M., another director. Within three months a winding-up petition was presented, on which a winding-up order was made. The liquidator took out a summons for an order on U. & M. to pay the £70 to him on the ground that its payment was a fraudulent preference:—*Held*: the payment was a fraudulent preference, & U. & M. must pay the amount.—*Re WASHINGTON DIAMOND MINING CO.*, [1893] 3 Ch. 95; 62 L. J. Ch. 895; 69 L. T. 27; 41 W. R. 681; 9 T. L. R. 509; 37 Sol. Jo. 559; 2 R. 523, C. A.

Annotations:—*Mentd. Re Auriferous Properties*, [1898] 1 Ch. 691; *Lister v. Hooson*, [1908] 1 K. B. 174.

6742. Agreement to set off in futuro debt due to shareholder against amount unpaid on shares.—A co. owed a debt to E. Before any portion of it had become payable, it was assigned by E. to K. a shareholder. Under the arts. of assocn. the directors had power to accept money from shareholders on their shares in anticipation of calls. K. gave notice to the co. of E.'s assignment, & requested the directors to credit him with payment of his shares in full by writing off from E.'s debt so much as would be equal to the amount remaining

unpaid on his shares. No call had been made on these shares. On receipt of K.'s request, the board, by resolution, agreed to the request, but no writing off ever was made in the co.'s books. At the date of the request the co. was, to the knowledge of K., in difficulties, & within a month of the resolution a winding-up order was made. No registered contract was ever filed:—*Held*: if this transaction had amounted to payment it would, under the circumstances, have constituted a fraudulent preference.—*Re LAND DEVELOPMENT ASSOCN., KENT'S CASE* (1888), 39 Ch. D. 259; 57 L. J. Ch. 977; 59 L. T. 449; 36 W. R. 818; 4 T. L. R. 691; 1 Meg. 69, C. A.

Annotations:—*Consd. Re Jones, Lloyd* (1889), 41 Ch. D. 159. *Reid. Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95.

6743. Payment to company's bankers — In ordinary course of business.—Three directors, who had not paid or been called upon to pay anything on their shares, made themselves liable on their personal guarantee for money advanced to the co. by a bank. The co. being in difficulties, & the bank having recovered judgment against the guarantors, a resolution was passed by the board of directors that in order to reduce the debt due to the bank the directors be recommended to pay in advance the amount of their shares. The three directors subsequently paid a sum equal to the amount of their shares, which was carried to the credit of the co. at the bank. Two days afterwards a petition was presented on which an order for winding up was made:—*Held*: the three directors were guilty of no breach of trust or duty to the co. in paying up their shares in order to relieve themselves of their personal liability to the bank; & the payment was a valid payment on account of the shares; & the shares must be treated as paid-up shares.—*Re WINCHAM SHIPBUILDING, BOILER & SALT CO., POOLE, JACKSON & WHYTE'S CASE* (1878), 9 Ch. D. 322; 48 L. J. Ch. 48; 38 L. T. 659; 26 W. R. 823, C. A.

Annotations:—*Consd. Re Exchange Banking Co., Ramwell's Case* (1881), 50 L. J. Ch. 827; *Re Wood's Ships' Woodlute Protection Co.* (1890), 62 L. T. 760. *Reid. Re Liverpool & London Guarantee & Accident Insee., Gallagher's Case* (1882), 46 L. T. 54; *Re Pyle Works* (1890), 44 Ch. D. 534; *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95. *Mentd. Re Blackpool Motor Car Co., Hamilton v. Blackpool Motor Car Co.*, [1901] 1 Ch. 77.

6744. Payment in good faith & for valuable consideration—With money paid in advance of calls.—*Re EXCHANGE BANKING CO., LTD., RAMWELL'S CASE*, No. 2815, *ante*.

6745. Payment under moral obligation—Hardship on creditor.—The preferential payment of a creditor of a co. within the three months prior to the point which, in the case of a co. is, by 1862 Act, s. 164, equivalent to an act of bkpcy. by an individual trader is an undue or fraudulent preference if the payment is made, not merely to discharge a legal obligation, but because the directors think that it would be a hardship on the creditor & against their conscience to leave him to his right to prove in the winding up.—*Re BLACKBURN (W.) & CO., BUCKLEY'S CASE*, [1899] 2 Ch. 725; 68 L. J. Ch. 764; 81 L. T. 520; 48 W. R. 186; 7 Mans. 47.

6746. Payment by company to surety.—A surety being a person who can prove in respect of his contingent liability is a creditor within Bkpcy. Act, 1883 (c. 52), s. 48, & consequently a transaction which, if between a co. & one of its ordinary creditors, would, under 1862 Act, s. 164,

avoided, the mtge. being a conveyance for consideration respecting real property, by which creditors were injured or obstructed, made by a co. unable

to meet its engagements; & it was not material whether the mtgeo. was or was not ignorant of such inability; but the transaction, being made within

the thirty days, was avoidable & should therefore be set aside.—*KIRBY v. RATHBUN CO.* (1900), 32 O. R. 9; 20 C. L. T. 333.—CAN.

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& 1883 Act, s. 48, be void as a fraudulent preference, is also void for the same reason when between the co. & its surety.—*Re BLACKPOOL MOTOR CAR CO., LTD., HAMILTON v. BLACKPOOL MOTOR CAR CO., LTD.*, [1901] 1 Ch. 77; 70 L. J. Ch. 61; 49 W. R. 124; 45 Sol. Jo. 60; 8 Mans. 193.

Annotation:—Mentd. *Re Lake, Ex p. Dyer*, [1901] 1 K. B. 710.

SUB-SECT. 16.—ASSIGNMENTS FOR BENEFIT OF CREDITORS.

6747. Deeds of Arrangement Act, 1887 (c. 57)—Whether applicable to companies.]—The above Act does not apply to arrangements made by limited cos.

An agreement was made between the co. & some of its creditors, whose names were to be given in a schedule to the agreement, for the payment by instalments, through a trustee, of the debts due to them. A list of these creditors was given to the trustee; several of them signed the schedule, & nearly all assented to it. The agreement was not registered under the above Act. If all the instalments had been paid the trustee would have received £936, & the debts of the creditors mentioned in the list amounted to £933 10s. The co. paid £216 to the trustee & then made default. The debenture-holders of the co. claimed the whole, & the other creditors of the co. claimed a share of £216. The co. was not in liquidation:—*Held*: the Act of 1887 did not apply to limited cos.; the agreement was not void for want of registration; that its operation was not confined to the particular creditors who had assented to it; and that all the creditors of the co. were entitled to take advantage of it.—*Re RILEYS, LTD., HARPER v. RILEYS*, [1903] 2 Ch. 590; 72 L. J. Ch. 678; 89 L. T. 529; 51 W. R. 681; 10 Mans. 314.

Annotation:—Refd. *Re Allix, Ex p. Trustee*, [1914] 2 K. B. 77.

6748. Agreement by company for composition with creditors—What creditors may take benefit of agreement.]—*Re RILEYS, LTD., HARPER v. RILEYS*, No. 6747, *ante*.

SUB-SECT. 17.—ENFORCEMENT OF ORDERS.

6749. English order—Whether enforceable in Scotland & Ireland.]—Security for costs will not be required of pltf. in an action in any division of the High Ct. who is resident in Scotland or Ireland, inasmuch as the judgment can be enforced in Scotland or Ireland, but that an order made on a claim in a winding up is not a judgment enforceable in Scotland or Ireland under the Judgments Extension Act, 1868 (c. 54), & therefore a claimant in a winding up resident in Scotland must give security for costs. On appeal claimant adduced evidence that he had a large amount of property in England available for costs, & the order for security was discharged, the ct. declining to give any opinion on the question as, whether

an order in a winding up can be enforced in Scotland or Ireland under 1868 Act, or whether, having regard to 1862 Act, s. 122, claimant in a winding up who resides in Scotland or Ireland ought to be ordered to give security.—*Re HOWE MACHINE CO., FONTAINE'S CASE* (1889), 41 Ch. D. 118; 61 L. T. 170, C. A.

Annotation:—Expld. *Re Queensland Mercantile Agency Co.* (1891), 61 L. J. Ch. 48. If 1862 Act, s. 122, had been present to my mind in *Re Howe Machine Co., Fontaine's Case*, I should have decided that case differently (NORTH, J.).

6750. ———.]—Motion to stay execution pending appeal refused on the ground that, having regard to 1862 Act, s. 122, there was no difficulty in enforcing in Scotland an order made in England in the winding up of a co., & there being no other special circumstances in the case.—*Re QUEENSLAND MERCANTILE AGENCY CO.* (1891), 61 L. J. Ch. 48.

— **Order against contributories.]—**See Sub-sect. 10, E. (g) ii., *ante*.

— **Jurisdiction of county court.]—**See Nos. 5315, 5316, *ante*.

— **Foreign order—Order against contributories.]—**See Nos. 6311–6313, *ante*.

— **Order restraining further proceedings in action in foreign court.]—**See No. 6709, *ante*.

SUB-SECT. 18.—APPEALS.

A. To What Court.

6751. From registrar in chambers—To judge.]—An appeal from an order of the registrar in chambers in the winding up of a co. does not lie direct to the Ct. of Appeal. The proper course to obtain a reversal of such an order is to move before the judge to discharge it.—*Re PRETORIA PIETERSBURG RY. CO., LTD.*, [1904] 2 Ch. 170; 73 L. J. Ch. 551; 91 L. T. 274; 53 W. R. 41; 20 T. L. R. 591; 11 Mans. 318, C. A.

6752. ———.]—*Re BRYNDU & PORT TALBOT COLLIERIES, LTD.* (1904), 48 Sol. Jo. 589.

B. Who may Appeal.

Liquidator—Without leave.]—See No. 6025, *ante*.

Stranger to company—Neither creditor nor contributory.]—See No. 5658, *ante*.

6753. Person not party to winding-up proceedings—Although bound by order made in winding up.]—A person who is bound by an order made in the winding up of a co., but is not a party to the proceeding, cannot appeal without leave from such order.—*Re SECURITIES INSURANCE CO.*, [1894] 2 Ch. 410; 63 L. J. Ch. 777; 70 L. T. 609; 42 W. R. 465; 38 Sol. Jo. 437; 1 Mans. 289; 7 R. 217, C. A.

6754. Person undertaking not to appeal—Undertaking not embodied in order.]—A claim under a winding up having been refused by the Master of the Rolls, counsel for the liquidator asked counsel for claimant whether he intended to carry the case further, & on being informed that he did not, said that he should not ask for costs. An order was drawn up dismissing the claim without costs & not containing any undertaking not to

PART III. SECT. 36, SUB-SECT. 16.

h. Competence to make — Railway company.]—*ROYAL BANK OF CANADA v. EASTERN TRUST CO.*, [1923] 1 D. L. R. 498.—CAN.

PART III. SECT. 36, SUB-SECT. 18.—B.

k. Person aggrieved—Whether liquidator per se.]—A liquidator per se

has no substantial interest in the subject-matter of an application by him to the ct. for directions, & therefore is not a person "feeling aggrieved" within the meaning of the Order in Council of June 9, 1860.—*Re AUSTRALIAN DEPOSIT & MORTGAGE BANK (IN LIQUIDATION)* (1901), 27 V. L. R. 139.—AUS.

l. Shareholder — Winding-up order

*irregular.]—*Where a winding-up order under the Ontario Winding-up Act is made in violation of the statute, or is obtained by fraud or misrepresentation, or is otherwise open to attack, any shareholder prejudicially affected may obtain redress, either by direct application to the county ct. judge if the order has been made by him *ex parte*, or, if made by him after notice, then by way of appeal to the ct. of appeal.—

appeal:—*Held*: as no undertaking not to appeal was embodied in the order, an appeal would lie.—*Re HULL & COUNTY BANK, TROTTER'S CLAIM* (1879), 13 Ch. D. 261; 41 L. T. 537; 28 W. R. 125, C. A.

Annotation:—*Folld. Harvey v. Croydon Union R. S. A.* (1883), 53 L. J. Ch. 335 (see 53 L. J. Ch. 707).

C. In respect of What Orders.

See, now, 1908 Act, s. 181.

6755. Order made by judge in chambers—On certificate that judge does not wish to hear case re-argued in court.]—*Re HUMBER IRONWORKS & SHIP-BUILDING CO., WARRANT FINANCE CO.'S CASE* (No. 2), No. 6505, *ante*.

6756. Order giving carriage of winding up.]—*Re CUNNINGHAM (R. N.) & CO., LTD.*, No. 5690, *ante*.

Order appointing liquidator.]—See Nos. 5910-5912, 5919, *ante*.

Order removing liquidator.]—See No. 6028, *ante*.

Orders as to costs.]—See No. 5362, *ante*.

— **Order directing liquidator to pay costs personally.]—**See No. 6005, *ante*.

Order on liquidator to pay workman—Commuted sum under Workmen's Compensation Act, 1906 (c. 58).]—See No. 7009, *post*.

Order for examination of person in regard to property.]—See Sub-sect. 10, B. (k), *ante*.

DEACON v. KEMP MANURE SPREADER CO. (1907), 15 O. L. R. 149; 9 O. W. R. 965; 10 O. W. R. 577.—CAN.

*m. Creditor—Refusal by liquidator to appeal.]—*If the official liquidator declines to appeal, a creditor cannot obtain leave to do so in his own name; nor to use the name of the official liquidator for the purpose, even upon an understanding to indemnify him against costs.—*Re ETNA INSURANCE CO., Ex p. NATIONAL PROVINCIAL BANK OF ENGLAND* (1873), 1 R. 7 Eq. 362.—IR.

PART III. SECT. 36, SUB-SECT. 18.—
C.

*n. "Final orders"—Order determining rights of debenture-holders under security.]—*A liquidator having applied to the ct. under Cos. Act, s. 189, for directions as to the rights of debenture-holders under their security, the ct. directed the debenture-holders & depositors to be communicated with for the purpose of being represented at the hearing of the application. This was done & the contention of the depositors was overruled. A petition for leave to appeal to the Privy Council was then presented by the depositors:—*Held*: the decision was a final order from which the depositors could appeal.—*Re ANGLO-AUSTRALIAN INVESTMENT FINANCE & LAND CO., LTD.* (No. 2) (1893), 14 N. S. W. Eq. 110.—AUS.

*o. — Order for sale of assets.]—*An order in a winding-up proceeding for the sale of assets is a "final order" as nothing further remains to be done under it & therefore is the subject of appeal.—*Re JONES (D. A.) CO.* (1892), 19 A. R. 63.—CAN.

*p. — Order rescinding dissolution of company—Dissolution order made by same judge.]—**Re EQUITABLE SAVINGS, LOAN & BUILDING ASSOCN.* (1903), 6 O. L. R. 26; 23 C. L. T. 182; 2 O. W. R. 366.—CAN.

*q. Winding-up order—On ground of no notice to creditors, contributories or shareholders.]—*It is a substantial objection to a winding-up order appointing a liquidator to the estate of an insolvent co. under 45 Vict. c. 23, that such order has been made without notice to the creditors, contributories, shareholders or members of the co. as required by sect. 24 of the Act, & an order so made was set aside, & the

petition therefor referred back to the judge to be dealt with anew.—*SHOOLBRED v. UNION FIRE INSURANCE CO.* (1887), 14 S. C. R. 624.—CAN.

*r. — Where amount involved exceeds \$2,000.]—*In a case under Winding-up Act, s. 76, an appeal may be taken to the Supreme Ct. of Canada by leave of a judge thereof if the amount involved exceeds \$2,000.—*CUSHING SULPHITE-FIBRE CO. v. CUSHING* (1906), 37 S. C. R. 427.—CAN.

*s. — Refusal.]—*An appeal lies from the refusal of a winding-up order under the Winding-up Act.—*MARSDEN v. MINNEKAHDA LAND CO., LTD.*, [1918] 2 W. W. R. 471; 40 D. L. R. 76.—CAN.

*t. Order appointing interim liquidator.]—*An order was made in the chancery division of the high ct. directing the winding up under 45 Vict. c. 23, of a fire insurance co. incorporated by the Legislature of O., & against which proceedings had previously been taken under R. S. O. 1877, c. 160, & the Joint-Stock Cos. Winding-up Act. This order appointed the receiver in the former proceedings interim liquidator, etc., & further referred it to the master to appoint a liquidator, etc., & to settle the list of contributories; & further provided that certain accounts & inquiries which had been made under the previous proceedings, should be incorporated with & used in the winding-up proceedings under the Dominion statute, in so far as they could properly be made applicable:—*Held*: this was an order from which an appeal would lie under 1882 Act, s. 78.—*Re UNION FIRE INSURANCE CO.* (1886), 13 A. R. 268.—CAN.

*a. Order made ultra vires—By local judge.]—*A local judge of the Supreme Court has no jurisdiction to make a winding-up order. An order made *ultra vires* should be moved against, not appealed from.—*Re KOOTENAY BREWING CO.* (1898), 7 B. C. R. 131.—CAN.

*b. Order staying proceedings by liquidator against contributory—Less than \$500 involved—Not involving future rights.]—*An order of a judge made under Winding-up Act, 1906, s. 131, staying proceedings in an action by the liquidator of a co. being wound up against a contributory, does not

D. Time for Appeal.

(a) In General.

To what appeals time limit applicable—Application to discharge order in chambers—In regard to rectification of list of contributories.]—See Nos. 6261-6263, *ante*.

6757. — Appeal from order made by arrangement in debenture-holder's action & in winding up.]—An action was brought by a debenture-holder of a co. on behalf of himself & the other debenture-holders to enforce their securities. After this an order was made for winding up the co. An arrangement was proposed for making over the undertaking to the Secretary of State for India on certain terms, & an order was made in the winding up & in the action sanctioning the arrangement & declaring that no moneys payable by the Secretary of State to the stockholders & debenture-holders of the co. under the arrangement should be treated as assets of the co. An unsecured creditor of the co. who did not know of this order at the time when it was made, applied after a lapse of more than 21 days from his receiving a copy of the order, but within the time for appealing from a final order in an action, for leave to appeal against it:—*Held*: as appct. had no such interest that he could have been a party to

involve future rights within the meaning of sect. 131 of the Act, neither could it be said that the amount involved in an appeal by a shareholder from such an order exceeded five hundred dollars, & therefore, as it was conceded that the order was not one that was likely to affect other cases of a similar nature in the winding-up proceedings, leave should not be given, under sect. 101 of the Act, to appeal from it.—*Re LONDON FENCE CO.* (No. 2) (1911), 21 Man. L. R. 100.—CAN.

*c. Order reducing remuneration of employee of official liquidator.]—*Companies Act, 1882, s. 169, is not applicable to an order of the liquidating judge reducing the remuneration of an employee of the official liquidators sanctioned by the predecessor of the judge, & consequently no appeal from such order can be entertained.—*GHANSHAM DAS v. HINDUSTAN BANK, LTD.* (1919), 1 L. R. 1 Lah. 73.—IND.

*d. Interlocutor ordering winding up pronounced in vacation.]—*On a petition for the compulsory winding up an interlocutor ordering winding up was made in vacation. The co. reclaimed when petitioners objected to the competency of the reclaiming note arguing that a winding-up order pronounced by the Lord Ordinary in vacation was equivalent to an order by one of the Divisions & therefore final so far as the Ct. of Session was concerned:—*Held*: it was competent to reclaim against an interlocutor pronounced by the Lord Ordinary on the Bills in vacation, granting an order for the compulsory winding up of a co.—*EDINBURGH MAGISTRATES v. UNION BILL POSTING CO., LTD.*, [1913] S. C. 105.—SCOT.

PART III. SECT. 36, SUB-SECT. 18.—
D. (a).

*e. From winding-up order—Promptly.]—**WATSON v. COMMERCIAL BANK OF AUSTRALIA* (1879), 5 V. L. R. 36.—AUS.

*f. Notice of appeal within three weeks.]—*No appeal against an order made in the matter of the winding up of a co. under the Indian Cos. Act, 1882 shall be heard by an Appellate Ct. unless notice of the same is given within three weeks after any order complained of has been made.—

Sect. 36.—Winding up by court: Sub-sect. 18,

the action the order must, as regarded him, be treated as an order made only in the winding up, R. S. C. Ord. 58, r. 9, applied, & he was out of time.—*Re MADRAS IRRIGATION & CANAL CO., WOOD v. MADRAS IRRIGATION & CANAL CO.* (1883), 23 Ch. D. 248; 40 L. T. 228, C. A.

6758. — Appeal from order on original petition.]—The restriction of appeals in 1862 Act, s. 124, to those in which notice has been given within three weeks after the making of the order appealed from, does not apply to appeals from any order made on the original petition for winding up.—*Re UNIVERSAL BANK* (1866), 1 Ch. App. 428; 14 L. T. 691; 12 Jur. N. S. 477, L. C.

Annotation:—N.F. Re National Funds Assec. (1876), 4 Ch. D. 305.

6759. — — — — —.]—(1) An appeal must be entered with the proper officer of the Ct. of Appeal before the day mentioned in the notice of appeal for the hearing, or if that day happens to be in a vacation when the office is closed, then before the next day of the sitting of the ct., otherwise resp. will be entitled to have the appeal motion dismissed as an abandoned motion, although the notice of appeal was given in time. (2) The time within which an appeal from an order on a petition to wind up a co. under 1862 Act must be brought, is 21 days.—*Re NATIONAL FUNDS ASSURANCE CO.* (1876), 4 Ch. D. 305; 46 L. J. Ch. 183; 35 L. T. 689; 25 W. R. 151, 158, C. A.

Annotations:—As to (1) Folld. Re Mansel, Rhodes v. Jenkins (1878), 7 Ch. D. 711. *Apld. Donovan v. Brown* (1879), 4 Ex. D. 148. *Expld. Lawson v. Financial News*, [1918] 1 Ch. 1. *Generally, Meantd. Re St. Nazaire Co.* (1879), 12 Ch. D. 88.

6760. — Re-hearings by Court of Appeal of its own orders.]—1862 Act, s. 124, which restricts the time within which notice of re-hearings or appeals must be given, refers to re-hearings by way of appeal, & not to re-hearings by the Ct. of Appeal of orders made by itself.—*Re BLAKELY ORDNANCE CO., LTD., BRETT'S CASE* (No. 1) (1873), 29 L. T. 255, L. C. & L. JJ.

6761. — Appeal from order for payment over to liquidator—Of proceeds of sale of distress.]—A co. gave, in 1875, a mtge. to its bankers for its current account, by covenant to surrender its copyhold works, & by the mtge. deed the co. became tenant to the bankers at the rent of £5,000. No surrender of the copyholds was made. On July 16, 1877, the bankers sent an auctioneer to distrain for £10,000 being two years' rent. The auctioneer on the same day saw the managing director of the co., gave him formal notice of distraint, & by arrangement with him employed two workmen of the co. to keep possession of the chattels distrained. On July 18, the co. requested the bankers not to proceed to an immediate sale, to which the bankers assented, & the two men remained in possession. On July 19, a petition was presented for winding up the co.; & on July 28, a winding-up order was made. By arrangement with the liquidator, the men went out of possession in Oct., & in Nov. the bulk of the chattels was sold by the liquidator without prejudice to the rights of the bankers, & realised less than £5,000:—*Held*: the order was not an interlocutory order; & the proper notice of appeal

was a fourteen days' notice; but a four days' notice having been given, the ct. allowed it to be amended. The Ct. of Appeal has full discretion, under R. S. C. 1875, Ord. 58, r. 3, to allow a notice of appeal to be amended as to dates or otherwise, & special circumstances are not required to justify such amendment.—*Re STOCKTON IRON FURNACE CO.* (1879), as reported in 10 Ch. D. 335; 48 L. J. Ch. 417, C. A.

Annotations:—Refd. Shubbrook v. Tufnell (1882), 30 W. R. 740; *Re Lewis, Lewis v. Williams* (1886), 31 Ch. D. 623; *Re Gardner, Long v. Gardner* (1894), 71 L. T. 412. *Meantd. Re Bridgwater Engineering Co.* (1879), 12 Ch. D. 181; *Re Bowes, Ex p. Jackson* (1880), 14 Ch. D. 725; *Re Kitchen, Ex p. Punnett* (1880), 16 Ch. D. 226; *Re Betts, Ex p. Harrison* (1881), 18 Ch. D. 127; *Re Betts, Ex p. Tempest* (1881), 44 L. T. 616; *Re Knight, Ex p. Voisey* (1882), 21 Ch. D. 442; *Re Willis, Ex p. Kennedy* (1888), 21 Q. B. D. 384; *Green v. Marsh*, [1892] 2 Q. B. 330; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.* (1896), 75 L. T. 508.

(b) Computation of Time.

See, now, 1908 Act, s. 181.

6762. When time begins to run—Whether from time of pronouncing order—Or of drawing up same.]—The time at which an order is "made" is that of the order being pronounced & of its date, & not that of its being drawn up. An appeal therefore in a winding-up case was held to be too late when brought beyond three weeks from the former, though not from the latter period.—*Re RISCA COAL & IRON CO., Ex p. HOOKEY* (1862), 4 De G. F. & J. 456; 31 L. J. Ch. 429; 6 L. T. 567; 8 Jur. N. S. 900; 10 W. R. 701; 45 E. R. 1261, L. C.

Annotation:—Folld. Re Greaves, Ex p. Whitton (1880), 13 Ch. D. 881.

6763. — — — — — Or when appellant first had notice of same—Appeal from order in chambers.]—*Re HARRY (J. H.) & CO., LTD.* (1906), 121 L. T. Jo. 63.

*(c) Extension of Time.**i. In General.*

See, now, 1908 Act, s. 181.

6764. Jurisdiction of court—Under 1862 Act, s. 124—To extend time after prescribed time has elapsed.]—*BANNER v. JOHNSTON*, No. 6379, *ante*.

6765. Objection to extension of time—Power reserved to respondent to take objection at hearing of appeal.]—Time for appealing in a winding-up case extended on an *ex p.* application; the benefit of the objection on the point of form being reserved to resp. at the hearing of the appeal.—*Re HULL FORGE CO.* (1867), 15 W. R. 388, L. J.

ii. When Ordered.

6766. General rule.]—Special or peculiar circumstances must be shown to induce the Ct. of Appeal to exercise its power under 1862 Act, s. 124, of extending the time for appeal limited by that sect.—*Re BASTOW & CO., LTD., Ex p. BASTOW & CO.* (1867), 37 L. J. Ch. 51, L. J.

6767. Conflicting decision of court of co-ordinate jurisdiction.]—The mere fact that, since an order from which it is desired to appeal was made, a different decision has been arrived at in a similar case by a ct. of co-ordinate jurisdiction, does not afford sufficient ground for extending the 21 days limited by 1862 Act, s. 124, for appealing from

PROSANNA KUMAR GUHA v. BANI KANTA BHATTACHARJEE (1903), 1 L. R. 30 Calc. 758.—*IND.*

g. To what orders time limit applicable—Orders pronounced in winding up by permanent Lord Ordinary.]—*MACARTHUR v. MACKAY* (LIQUIDATOR

OF MOTOR BROUGHAM CAB CO., LTD.) (1914), 51 Sc. L. R. 466.—*SCOT.*

PART III. SECT. 36, SUB-SECT. 18.—
D. (c) ii.

h. Failure to appeal due to diffi-

culties—Intention to appeal formed.] Upon an application under the Winding-up Act, R. S. C. 1906, c. 144, for an extension of the time within which to appeal, such time having expired, it is necessary to show that the intention to appeal was formed within the time

orders made under that Act.—*Re HULL FORGE Co., LTD., Ex p. MITCHELL* (1867), 36 L. J. Ch. 337; 15 W. R. 474, L. JJ.

Annotations:—Mentd. Re Thurso New Gas Co. (1889), 42 Ch. D. 486; *Westbury v. Twigg* (1891), 61 L. J. Q. B. 32.

6768. — Only recently come to notice of applicant.]—*Re VALE OF NEATH & SOUTH WALES BREWERY Co., Ex p.* — (1850), 15 L. T. O. S. 64.

6769. Order conforming to existing practice—Subsequent decision invalidating practice.]—After an order made in chambers in the winding up of a co. admitting the claim of a creditor for his principal debt & interest to the date of the order, this being in accordance with the practice existing at the time, it was laid down in another case that the period up to which interest on interest-bearing debts ought to be allowed was the date of the winding-up order, & not the date of the order allowing the claim:—*Held*: this was sufficient reason for enlarging the time for appealing against the order.—*Re CONTRACT CORPN., EBBW VALE Co.'s CASE* (1869), 5 Ch. App. 112; 39 L. J. Ch. 363; 18 W. R. 222, L. C.

Annotation:—Mentd. Re International Contract Co., Hughe's Claim (1872), 41 L. J. Ch. 373.

6770. Followed decision reversed on appeal.]—In the winding up of a co. Jessel, M.R., following a reported decision of his own, ordered a certain fund, claimed by a creditor as against the liquidator, to be paid to the liquidator. The creditor allowed the time for appealing to expire. Afterwards the decision which had been followed was overruled by the Ct. of Appeal. The creditor then applied for leave to appeal against the order of the Master of the Rolls:—*Held*: as the fund in question was still within the control of the ct. leave to appeal should be given.—*Re NORMANTON IRON & STEEL Co., LTD.* (1881), 50 L. J. Ch. 223; 29 W. R. 300, C. A.

6771. Delay & acquiescence—Application by personal representative of original party.]—In Nov., 1871, A., having by an order of ct. been fixed on the list of contributories of a co., gave notice of appeal, but withdrew such notice in Apr., 1872, & took no further steps to dispute his liability, & died in Dec. 1874. An application was then made on behalf of his administratrix for leave to enrol the order with the view of presenting an appeal to the House of Lords:—*Held*: under the circumstances, the delay & acquiescence of A. disentitled her to the order.—*Re UNITED PORTS & GENERAL INSURANCE Co., BROWNE'S CASE* (1875), L. R. 20 Eq. 639; 44 L. J. Ch. 745; 33 L. T. 46.

Delay to enable liquidator to consult shareholders & creditors.]—*See* No. 6212, *ante*.

6772. Mistake—As to further liability for calls.]—*Ex p. HOLROYD*, No. 6275, *ante*.

6773. — As to time for giving notice of appeal.]—A contributory, on Mar. 29, being 21 days from the pronouncing of a refusal to remove his name from the list, gave fourteen days' notice of appeal. On Apr. 1, conceiving that he ought to have given only a four days' notice, he withdrew his notice of appeal, & on the following day gave a four days' notice of appeal. On the hearing of the appeal, the objection was taken that it was too late:—*Held*: the time ought to be extended.—*Re AMBROSE LAKE TIN & COPPER Co., TAYLOR'S CASE* (1878), 8 Ch. D. 643; *sub nom. Re AMBROSE LAKE TIN & COPPER Co., LTD., CLARKE'S CASE*,

TAYLOR'S CASE, 47 L. J. Ch. 696; 38 L. T. 587; 26 W. R. 601, C. A.

6774. — No misconduct by respondent.]—*Re NEW CALLAO*, No. 6779, *post*.

— As to validity of resolution for voluntary winding up.]—*See* No. 7353, *post*.

6775. Ignorance of order—Appellant not party to order.]—By the rules of a mutual marine insurance assocn., which was not registered under Cos. Act, it was provided that all persons who effected an insurance with the assocn. should be members. No ship was to be insured for more than three-fourths of its value, the person insuring paid a deposit of 25s. per cent. on the amount of the insurance, & in case of the total loss of a vessel, the members were to pay the loser the amount for which he had insured it ratably, according to the amounts assured to them respectively. The assocn. consisted of more than twenty members. A vessel insured by R. was lost, & the amount of the loss was referred to arbn. R. assigned his claim to his bankers, who obtained judgment in R.'s name on the award, & not obtaining payment, presented a petition to wind up the assocn., the petition stating that the assocn. consisted of more than seven members, but not stating that it consisted of more than twenty. The petition was served at the abandoned office of the assocn., which had ceased to carry on a business, & the proper advertisements were issued. On May 28, 1880, a winding-up order was made, no one appearing to oppose. In Nov., 1881, another member of the assocn. heard, for the first time, of the winding-up order, & within a week applied for leave to appeal against it:—*Held*: as applt. was not a party to the order, & applied for leave to appeal as soon as he knew of it, he ought to have leave to appeal notwithstanding the lapse of time.—*Re PADSTOW TOTAL LOSS & COLLISION ASSURANCE ASSOCN.* (1882), 20 Ch. D. 137; 45 L. T. 774; 30 W. R. 326; *sub nom. Re PADSTOW TOTAL LOSS & COLLISION ASSURANCE ASSOCN., Ex p. BRYANT*, 51 L. J. Ch. 344, C. A.

Annotations:—Mentd. Jennings v. Hammond (1882), 9 Q. B. D. 225; *Shaw v. Benson* (1883), 11 Q. B. D. 563; *Re Bowling & Welby's Contract*, [1895] 1 Ch. 663; *Re Ilfracombe Permanent Mutual Benefit Bldg. Soc.*, [1901] 1 Ch. 102; *Marrs v. Thompson* (1902), 86 L. T. 759.

6776. Joint & several order against directors—Appeal by some—Without knowledge of other directors.]—In a winding up of a co. several directors were ordered jointly & severally to replace certain sums paid to three of them for shares in the co. sold by them to the co., liberty being given to the three who had not received any of the money to apply as to the liability of those who had. On the last day for appealing from this order, the three who had received the money appealed, but without the knowledge of the others:—*Held*: leave to appeal ought to be given to the others.—*Re CLAYTON MILLS MANUFACTURING Co.* (1887), 37 Ch. D. 28; 57 L. J. Ch. 325; 58 L. T. 317; 3 T. L. R. 798, C. A.

E. Notice of Appeal.

6777. Sufficiency of.]—A person against whom an order in a winding up had been made for payment of money to the official liquidator served on the official liquidator a notice: "Take notice that it is the intention of J. to prosecute an appeal from the order made in this matter by His Honour the

limited or that there was difficulty in communicating with clients & obtaining instructions.—*Re WINDING-UP ACT, B. C. SECURITIES v. MUTUAL LIFE ASSURANCE Co.* (1918), 1 W. W. R. 733; 43 D. L. R. 184.—CAN.

PART III. SECT. 36, SUB-SECT. 18.—E.

k. Service of—On liquidator—Whether necessary—Appeal from compulsory winding-up order.]—Service on

the liquidator of a notice of appeal on behalf of the co. from a compulsory winding-up order is not necessary.—*Re ORO FINO MINES, LTD.* (1900), 7 B. C. R. 388.—CAN.

Sect. 36.—Winding up by court: Sub-sect. 18, E., F., G. & H.; sub-sect. 19, A., B., C. & D. (a).]

Vice-Warden of the Stannaries on May 29, 1878, whereby the said J. was ordered," etc. :—*Held* : this notice was sufficient, & the appeal was ordered to be set down.—*Re WEST JEWELL TIN MINING Co., LITTLE'S CASE* (1878), 8 Ch. D. 806, C. A.

Annotations:—*Consd. Re Blyth & Young* (1880), 13 Ch. D. 416. *Expld. Collins v. Paddington Vestry* (1880), 5 Q. B. D. 368. *Distd. Re New Callao* (1882), 22 Ch. D. 484. *Refd. Kettlewell v. Watson* (1883), 48 L. T. 840; *R. v. Lincolnshire Appeal Tribunal, Ex p. Stubbs*, [1917] 1 K. B. 1.

6778. — Notice not signed by solicitor prosecuting appeal.]—Service of notice of an appeal motion not signed by the solrs. prosecuting the appeal is invalid, & unless the irregularity be waived by the other side, will not prevent the enrolment of the original order.—*Re LIMEHOUSE WORKS Co.* (1874), 9 Ch. App. 266; 43 L. J. Ch. 483; 30 L. T. 4; 22 W. R. 288, L. J. J.

6779. — Informal letter mentioning intention to appeal.]—A petition for winding up a co. having been dismissed petitioner's solrs. wrote a letter to the co.'s solr. urging him to get the order drawn up, adding, "as we are advised & intend to give notice of appeal." No formal notice of appeal was given till more than 21 days had elapsed from the dismissal of the petition, when petitioner gave a supplemental notice of appeal :—*Held* : (1) the letter could not be treated as an informal notice of appeal, & therefore the appeal was too late; (2) there was no such mistake or accident as would justify the ct. in extending the time for appeal. Mistake by applt. may be a ground for extending the time for appeal, without misconduct by resp.—*Re NEW CALLAO* (1882), 22 Ch. D. 484; 52 L. J. Ch. 283; 48 L. T. 251; 31 W. R. 185, C. A.

Annotation:—*As to (2) Refd. Re Manchester Economic Bldg. Soc.* (1883), 24 Ch. D. 488.

F. Entry of Appeal.

6780. Within what time.]—*Re NATIONAL FUNDS ASSURANCE Co., No. 6759, ante.*

G. Hearing of Appeal.

6781. Whether before judge or in chambers—Appeal from official receiver acting as liquidator.]—*Re NATIONAL WHOLEMEAL BREAD & BISCUIT Co., No. 6514, ante.*

6782. Whether appeal treated as final or interlocutory—Appeal from compulsory winding-up order.]—*Re NAVAL, MILITARY, & CIVIL SERVICE*

PART III. SECT. 36, SUB-SECT. 18.—G.

1. New Evidence—Admissibility.]—New evidence may be introduced at the hearing of an appeal from an order or decision in a proceeding under Winding-up Act, but such evidence will not be allowed in unless it be clearly shown that due diligence was exercised in endeavouring to obtain it for submission at the trial.—*Re DOMINION TRUST Co. & ALLEN* (1918), 24 B. C. R. 450.—CAN.

PART III. SECT. 36, SUB-SECT. 18.—H.

m. Security for costs—Effect of failure to furnish—Time within which to be found.]—An appeal under 41 Vict. c. 5, s. 27, cannot be entertained when security has not been given within eight days from the rendering of the final order or judgment appealed from.—*Re UNION FIRE INSURANCE Co.* (1882), 7 A. R. 783.—CAN.

n. — Petition to set aside winding-up order—Petitioner man of straw—Nominee of persons out of jurisdiction.]—S., a contributory of the co., petitioning to set aside a winding-up order, was required to give security

for the costs of the co. & a creditor opposing the petition, where it appeared that S., although he had a nominal interest as the holder of stock, upon which nothing was paid, was not in such a position that anything could be made out of him upon execution, & was petitioning merely in the interest of other persons who lived out of the jurisdiction, & who had indemnified him as to the costs.—*Re RAINY LAKE LUMBER Co.* (1886), 11 P. R. 314.—CAN.

o. — Furnished out of time—Waiver of objection—By application for increase.]—A resp. by applying to increase the amount of security for costs waives his right to object that the security was not originally furnished in time.—*Re ORO FINO MINES, LTD.* (1900), 7 B. C. R. 388.—CAN.

tion.]—*Re FLORIDA MINING Co., LTD.* (1902), 8 B. C. R. 388.—CAN.

q. — Amount.]—The amount of the security for costs of an appeal to be given by an insolvent co. is limited to \$200 by the Supreme Ct. Act, 1904, notwithstanding Cos. Act, 1897.—*STAR MINING & MILLING Co. v. BYRON N. WHITE Co.* (1906), 12 B. C. R. 355.—CAN.

CO-OPERATIVE SOCIETY OF SOUTH AFRICA (No. 2) (1903), 47 Sol. Jo. 618.

6783. — Appeal from order for payment over to liquidator—Of proceeds of sale of distress.]—*Re STOCKTON IRON FURNACE Co., No. 6761, ante.*

—.]—*Compare No. 1040, ante.*

H. Costs of Appeal.

Of liquidator.]—*See Sub-sect. 8, E. (d), ante.*

6784. Of creditors & contributories—Supporting successful party in court below.]—Where an appeal is brought against the decision of the ct. of first instance upon a winding-up petition, & by the order of the ct. below, those contributories or creditors who have supported the successful party have been allowed one set of costs between them in accordance with the settled practice, if applt. does not seek to disturb that part of the order, his proper course is not to serve such contributories or creditors with notice of the appeal, but to inform them by letter of the pendency of the appeal & of his intention not to ask for a reversal or modification of the order of the ct. below so far as it deals with their costs, & then, if they think fit to appear upon the appeal & the appeal is dismissed, the rule awarding them one set of costs between them will continue to apply upon the appeal. If, on the other hand, applt. desires to appeal against the whole order & serves such contributories or creditors with notice of appeal, they will be entitled, in the event of the appeal being dismissed, to their separate costs of appeal.—*Re IBO INVESTMENT Co., [1903] 2 Ch. 373; 72 L. J. Ch. 661; 88 L. T. 752; 51 W. R. 593; 47 Sol. Jo. 581; 10 Mans. 309, C. A.*

6785. What costs allowed—Costs of shorthand notes of evidence in court below.]—*Re DUCHESS OF WESTMINSTER SILVER LEAD ORE Co., No. 6264, ante.*

6786. Security for costs—Appeal in name of company against winding-up order—No one responsible for costs.]—*Re DIAMOND FUEL Co., No. 5377, ante.*

6787. — — — —.]—Where a limited co. alone appeals from a winding-up order without joining any one personally responsible for costs, it will generally be ordered to give security for costs.—*Re PHOTOGRAPHIC ARTISTS' CO-OPERATIVE SUPPLY ASSOCN.* (1883), 23 Ch. D. 370; 52 L. J. Ch. 654; 48 L. T. 454; 31 W. R. 509, C. A.

Annotation:—*Refd. Re Consolidated South Rand Mines Deep, [1909] W. N. 66.*

See, generally, PRACTICE & PROCEDURE.

r. — — — Appellant resident out of jurisdiction.]—*BAILEY COBALT MINES, LTD. v. BENSON* (1918), 43 O. L. R. 322.—CAN.

s. — Ground for refusing—Clog on right to appeal.]—An application for security for costs of appeal against a winding-up order obtained by a shareholder, whose shares in the co. were only partly paid up, was refused, on the ground that the effect of the application, if granted, would be to impose an additional condition on the appeal, which would be contrary to what was intended in the ct. where the case was heard, & where leave to appeal was given.—*Re COMPANIES ACTS, 1862 TO 1867 & GWELO (MATARELELAND) EXPLORATION Co.* (1898), 32 L. L. T. 33.—

t. Of petitioner—As respondent to appeal—Payable out of assets.]—The ct. having dismissed an appeal from a winding-up order brought by the co. & certain contributories, the resp. petr. applied for an order that his costs of the appeal should be paid by two directors who had opposed the petr. & supported the appeal :—*Held* : his costs were payable out of the assets.—*Re YUE HING Co., LTD.* (1916), 11 Hong Kong L. R. 82.—HONG KONG

SUB-SECT. 19.—MISCELLANEOUS PRACTICE AND PROCEDURE.

A. Applications to Court.

6788. Who may make—Bankrupt contributory.]—R., a contributory, became bkpt. After this he took out a summons asking that the official liquidator might be directed to take proceedings against a director to recover sums of money alleged to have been improperly received by him. An order was made that on R.'s depositing £100 the liquidator should take the opinion of counsel on the case alleged against the director, & on obtaining his opinion should apply to the judge for directions. Two contributories & creditors who had liberty to attend proceedings appealed from this order:—*Held*: R., having become bkpt., was a stranger to the co.—there was no jurisdiction to make any order on his application, & the order must therefore be discharged without any regard to the question whether it was right or wrong on the merits.—*Re CAPE BRETON CO.* (1881), 19 Ch. D. 77; 51 L. J. Ch. 202; 45 L. T. 395, C. A.
Annotation:—*Reid*. *Re Securities Insce.* (1894), 42 W. R. 465.

6789. Nature of—Leave to sue in formâ pauperis.]—Order *ex p.* for a person carrying in a claim under a winding up to sue *in formâ pauperis*.—*Re IRISH LANDS IMPROVEMENT SOCIETY, Ex p. FRY* (1860), 1 Drew. & Sm. 318; 3 L. T. 462; 9 W. R. 51; 62 E. R. 401.

6790. Hearing of—Right of applicant to be heard by judge in person.]—*Re AGRICULTURIST CATTLE INSURANCE CO., Ex p. LOWE, Re SAME CO., Ex p. FINDLATER*, No. 5926, *ante*.

Applications for particular purposes.]—See specific sects., *ante*.

B. Attendance of Parties.

6791. Who may attend—Contributories—Interests fully represented by liquidator.]—Contributories, notwithstanding they appear at their own expense, have no *locus standi*, but are sufficiently represented by the official liquidator.—*Re UNIVERSAL BANKING CO., BARTLETT'S CASE* (1868), 19 L. T. 628; *sub nom. Re UNIVERSAL BANKING CO., LTD., BARTLETT'S CASE, MACRETH'S CASE*, 17 W. R. 131.

6792. ——— Creditor's representative.]—*Semble*: the appearance of the creditor's representative in addition to the official manager is unnecessary & the contributory will not have to pay his costs.—*Re PHOENIX LIFE ASSURANCE CO., Ex p. HATTON* (1862), 31 L. J. Ch. 340; 6 L. T. 123; 8 Jur. N. S. 380; 10 W. R. 313.

Annotations:—*Mentd. Re British Provident Life & Fire Assce., Orpen's Case* (1863), 2 New Rep. 225; *Re Discoverers Finance Corpn., Lindlar's Case*, [1910] 1 Ch. 312.

6793. ——— Interests fully represented by liquidator.]—As a general rule, where the creditors & contributories have common & equal interests,

the creditors' representative ought not to appear upon applications to the ct., but should leave the case in the hands of the official manager.

Where, therefore, claims against the estate were being urged, the official manager was more interested in resisting them than the creditors' representative, & the costs of the latter, who attended the proceedings, were disallowed by the Ct. of Appeal. But, *secus*, where any question arises between creditors & contributories; & *Semble*: where the interest of the creditors is greater than that of the contributories.—*Re ERA LIFE, ETC. ASSURANCE CO.* (1863), 1 De G. J. & Sm. 172; 1 New Rep. 343; 8 L. T. 126; 9 Jur. N. S. 163; 11 W. R. 320; 46 E. R. 67, L. J.

Annotation:—*Mentd. Re British Provident Life & Fire Assce. Soc., Stanley's Case* (1864), 4 De G. J. & Sm. 407.

6794. ———.]—An order having been made giving the creditors' representative liberty to attend all proceedings, & ordering his costs to be paid out of the estate, was discharged by the Ct. of Appeal without any application for that purpose; his costs to be in future allowed him only in those cases in which his presence, in addition to that of the official liquidator, was shown to the ct. to be desirable.—*Re INTERNATIONAL LIFE ASSURANCE SOCIETY, McIVER'S CLAIM* (1870), 5 Ch. App. 424; 23 L. T. 38; 18 W. R. 794; L. J.

— **On applications for particular purposes.]**—See specific sects., *ante*.

C. Discovery and Evidence.

6795. Affidavit of documents—When ordered—No action in progress.]—Where proceedings were taken under 1862 Act:—*Held*: the ct. had jurisdiction to make an order for an affidavit of documents under R. S. C. Ord. 31, rr. 11, 12, though no action was in progress between the parties.—*Re NATIONAL FUNDS ASSURANCE CO.* (1876), 24 W. R. 774, C. A.

On applications for particular purposes.]—See specific sects., *ante*.

D. Inspection of Books and Papers.

(a) In General.

See, now, 1908 Act, s. 221.

6796. Right to inspect—Under 1862 Act, s. 156.]—*SOMERSET v. LAND SECURITIES CO.*, [1897] W. N. 29.

— **In voluntary winding up.]**—*See* No. 1209, *ante*, No. 7143, *post*.

6797. ——— Includes right to take copies—Without paying for same.]—*Re ARAUCO CO.*, [1899] W. N. 134.

— **Generally.]**—*See* Sect. 12, sub-sect. 4, A. (b), *ante*.

6798. What books may be inspected—Registry of shares—Allotment & agenda books.]—*LANCA-*

PART III. SECT. 36, SUB-SECT. 19.—A.

a. *Who may make.*—It is preferable to have the proceedings under an order for winding up a co. under 45 Vict. c. 23 (D), conducted by solrs. who are totally unconnected with the co.—*Re JOSEPH HALL MANUFACTURING CO.* (1884), 10 P. R. 485.—CAN.

b. *How made—By summons.*—All applications made to the ct. in its winding-up jurisdiction must be made by summons.—*Re NELSON SAWMILL CO.* (1898), 6 B. C. R. 156.—CAN.

c. ———.]—Where an application is authorised under a statute to be made to the ct., & no specific method is

provided, & no Rule of Ct. or of practice or procedure is applicable, such application must be deemed to be a "proceeding," & as such, should be commenced in the manner authorised by the Rules of Ct.—*Re COMPANIES WINDING UP ORDINANCE, Re STROME MILLING & GRAIN CO., LTD.*, [1922] 3 W. W. R. 41; 68 D. L. R. 149.—CAN.

PART III. SECT. 36, SUB-SECT. 19.—C.

d. *Affidavit—Cross-examination—Production of documents.*—A deponent who makes an affidavit in connection with proceedings under Manitoba

Winding-up Act is subject to cross-examination thereon & may be compelled to attend & submit to such cross-examination & also to examination for the purposes of his depositions being used on the hearing of a petition for a winding-up order & to produce upon such examination all books & documents in his possession as an officer of the co.—*Re MANITOBA COMMISSION CO.* (1911), 21 Man. L. R. 795.—CAN.

e. *In support of petition—Examination of directors.*—*Re BAYNES CARRIAGE CO.* (1912), 23 O. W. R. 10; 4 O. W. N. 30; 27 O. L. R. 144; 7 D. L. R. 257.—CAN.

Sect. 36.—Winding up by court: Sub-sect. 19, D. (a)

SHIRE COTTONSPINNING CO. v. GREATORIX, No. 6801, *post*.

6799. — Books in possession of third party.

(1) The power given by 1862 Act, s. 156, of ordering inspection of the books & papers of a co. which is in course of winding up is *prima facie* to be exercised only for the purposes of the winding up, & for the benefit of those who are interested in the winding up, & will not in general be exercised for the purpose of enabling individual shareholders to establish claims for their personal benefit against the directors or promoters. The sect. only applies to books & papers in the possession of the co., & does not enable the ct. to decide any question of right against third parties who have the books in their possession & claim to be entitled to such possession.

(2) *Seem*: 1862 Act, s. 155, does not preclude a liquidator from handing over to a purchasing co., under an order directing the sale to be carried into effect, the books of the selling co., although no express direction with reference to them be given by the ct.—*Re NORTH BRAZILIAN SUGAR FACTORIES* (1887), 37 Ch. D. 83; 57 L. J. Ch. 110; 58 L. T. 4; *sub nom. Re NORTH BRAZILIAN SUGAR FACTORIES, LTD. Ex p. KNIGHT*, 4 T. L. R. 61, C. A. *Annotations*:—*As to* (1) *Refd.* *Re London & Lancashire Paper Mills Co.* (1888), 57 L. J. Ch. 766. *Generally, Mentd.* *Re Great Kruger Gold Mining Co.* (1892), 8 T. L. R. 674.

6800. — Register of mortgages.—*SOMERSET v. LAND SECURITIES CO.*, [1897] W. N. 29.

(b) When Ordered.

6801. General rule—Granting of order purely discretionary.—In an action by a co. against an alleged shareholder for calls under a winding-up order, the ct. will uphold the order of a judge at chambers giving liberty to deft. after plea, to inspect the registry of shares, the allotment & agenda books in the possession of the co. The granting such an order is purely in the discretion of the judge at chambers, & the ct. will not review his exercise of such discretion unless they clearly see that the order was wrong.—*LANCASHIRE COTTONSPINNING CO. v. GREATORIX* (1866), 14 L. T. 290.

6802. ——*Re NORTH BRAZILIAN SUGAR FACTORIES*, No. 6799, *ante*.

6803. On behalf of creditors—By whom claims filed.—Certain creditors of a co. ordered to be wound up had filed their claims in the master's office. The master, upon their application, gave them leave to inspect certain documents relating to the co. which were in the possession of the official manager. Some of the contributories moved that the master's order should be discharged or varied, but the motion was refused.—*Re ROYAL BANK OF AUSTRALIA* (1851), 17 L. T. O. S. 88.

6804. On behalf of shareholders—Company largely indebted—Complicated transactions.—In the case of a co. winding up, where the debts are large, & the transactions of the co. have been complicated, the ct. will allow an inspection of the accounts by a proper person on behalf of the shareholders without any special fact being stated as a reason for the order.—*Re BIRMINGHAM BANKING CO.*, *Ex p. BRINSLEY*, *Re JOINT-STOCK DISCOUNT CO.*, *Ex p. BUCHAN* (1866), 36 L. J. Ch. 150; 15 L. T. 261; 15 W. R. 99.

Annotations:—*Refd.* *Re Glamorganshire Banking Co.*, *Morgan's Case* (1884), 28 Ch. D. 620; *Re North Brazilian Sugar Factories Co.* (1887), 57 L. J. Ch. 110.

6805. — Alleged promotion of company for purchase & sale of worthless property.—*Re*

HOOVER HILL GOLD MINING CO. (1883), 27 Sol. Jo. 434.

6806. On amalgamation—Both companies in liquidation.—The N. co. transferred its business to the O. co., & all the books of the former co. were handed over to the latter, but no provision was made for the liquidation of the debts of the former co. Afterwards an order was made to wind up the N. co. Subsequently to this an order was made to wind up the O. co. Upon motion by the official liquidator of the N. co. that the books of that co. should be delivered up to him by the official liquidator of the O. co., it was ordered that those books should be produced at all reasonable times to the official liquidator of the N. co. at chambers.—*Re NATIONAL FINANCIAL CO.* (1867), 15 W. R. 499.

Annotation:—*Refd.* *Re North Brazilian Sugar Factories Co.* (1887), 57 L. J. Ch. 110.

6807. To prove company's insolvency.—*Re EUROPEAN LIFE ASSURANCE SOCIETY*, No. 5335, *ante*.

6808. In action against liquidator personally.—In an action on a promissory note, made by deft. as security for the repayment of moneys due to pltf. from a limited co., deft. objected to produce documents relating to the matters in question in the action, being the banker's pass-book & directors' minute-book of the co., on the ground that they were in his custody only as liquidator in the voluntary winding up of the co. The co. had been dissolved before the application for discovery of documents was made:—*Held*: pltf. was entitled to inspection of the documents, as there was no interest which could be affected by their production other than the interest of the parties to the action.—*LONDON & YORKSHIRE BANK v. COOPER* (1885), 15 Q. B. D. 473; 51 L. J. Q. B. 495, C. A.; *affg. S. C. sub nom. LONDON & YORKSHIRE BANK v. WING*, 1 T. L. R. 496, D. C. *Annotation*:—*Distd.* *Gowan v. Briggs* (No. 2) (1895), 39 Sol. Jo. 330.

On examination of persons in regard to property.—*See* Sub-sect. 10, B. (i), *ante*.

E. Service of Proceedings.

6809. Sufficiency of—Service on solicitor & brother of contributory—At last place of residence—Order for substituted service unnecessary.—Where service of an order *nisi* had been made upon the solr. & a brother of a contributory, & also at the last place of his residence in England:—*Held*: the service was sufficient, without an order for substituted service.—*Re PARAGON MINING CO.* (1861), 5 L. T. 578; 8 Jur. N. S. 11; 10 W. R. 76.

6810. Service on liquidator—Company having no place of business or registered office.—Where a co., which was being wound up, had no place of business & no registered office, but a petition had been served upon the liquidator of it at his office:—*Held*: service must be made upon the secretary.—*Re PETROLEUM CO.* (1866), 15 L. T. 169; 15 W. R. 29.

6811. Out of jurisdiction—Jurisdiction of court to order.—The ct. has no jurisdiction to give leave to serve notices of orders & other proceedings in the winding up of a co. on persons residing out of the jurisdiction.—*Re ANGLO-AFRICAN S.S. CO.* (1886), 32 Ch. D. 348; 55 L. J. Ch. 579; 54 L. T. 807; 34 W. R. 554, C. A.

Annotations:—*Distd.* *Re Nathan, Newman* (1887), 35 Ch. D. 1. *Refd.* *Re Cliff, Edwards v. Brown*, [1895] 2 Ch. 21.

6812. — Court of Appeal—Company being wound up by Chancery Court of Lancaster.—Under Ct. of Ch. of Lancaster Act, 1854 (c. 82),

s. 8, the Ct. of Appeal has jurisdiction to give leave to serve notices of orders & other proceedings in the winding up of a co., which is being wound up by the Ct. of Ch. of the County Palatine of Lancaster, on persons residing in England outside the county of Lancaster.—*Re STATE BANKING CORPN.* (1907), 51 Sol. Jo. 265, C. A.

Of petition.]—*See* Sub-sect. 3, E. (c), *ante*.

Of notice of call in winding up.]—*See* Nos. 2055–2060, *ante*.

F. Arrests and Commitments.

6813. For contempt—Advertisement inserted by chairman of company—Accusing petitioners for winding up of dishonest motives—Undertaking not to repeat advertisement.]—*Re* GENERAL EXCHANGE BANK, LTD., No. 5429, *ante*.

6814. — Publication in newspaper of charges of fraud against directors—Before hearing of petition—Payment of costs of motion to commit.]—A petition for winding up a co. containing charges of fraud against the directors was published *in extenso* in a newspaper, before the hearing of the petition:—*Held*: the publishers of the newspaper had committed a contempt of ct.; & they were ordered to pay the costs of a motion to commit.—*Re* CHELTENHAM & SWANSEA RAILWAY CARRIAGE & WAGON CO. (1869), L. R. 8 Eq. 580; 38 L. J. Ch. 330; 20 L. T. 169; 34 J. P. 3; 17 W. R. 463.

Annotations:—*Consd.* *Robson v. Dodds* (1869), 20 L. T. 941; *Bowden v. Russell* (1877), 46 L. J. Ch. 414. *Refd.* *Re Crown Bank, Re O'Malley* (1890), 63 L. T. 304.

6815. — Issue of fraudulent circular to obtain resolution for voluntary winding up—Intention to mislead court—Order for committal.]—When a petition is pending for the winding up of a co., it is a contempt of ct. to issue a circular to the shareholders of the co. containing misrepresentations with the intent to obtain a resolution of the co. for the voluntary winding up thereof, & thereby mislead the ct. as to the real view of the shareholders & prevent a compulsory winding-up order from being made.—*Re* SEPTIMUS PARSONAGE & CO., [1901] 2 Ch. 424; 70 L. J. Ch. 706; 84 L. T. 866; 49 W. R. 700; 17 T. L. R. 617.

6816. — Motion for committal—Onus of proof.]—*LACHARME v. QUARTZ MARIPOSA GOLD MINING CO.* (1862), 1 New Rep. 29.

G. Disposal of Books and Papers.

See, now, 1908 Act, s. 222.

Delivery of documents to liquidator.]—*See* Sub-sect. 10, A., *ante*.

6817. Effect of 1862 Act, s. 155—On power of liquidator of selling company to hand over books to purchasing company.]—*Re* NORTH BRAZILIAN SUGAR FACTORIES, No. 6799, *ante*.

H. Prosecutions.

See, now, 1908 Act, s. 217.

6818. Under 1862 Act, s. 167—Leave to prosecute—When granted—Principles on which discretion of court exercised.]—The discretion conferred on the ct. by the above sect. with reference to directing the liquidator of a co. to prosecute its officers or members is unshackled by any obliga-

tion of hearing evidence as to the propriety of a prosecution.

An application under the sect. is properly made *ex p.*—*Re* DENHAM (CHARLES) & CO. (1884), 53 L. J. Ch. 1113; 51 L. T. 570; 32 W. R. 920.

6819. — — — — —.]—In determining whether the ct. should under 1862 Act, s. 167, direct a criminal prosecution at the expense of the assets of a co. in course of winding up, the ct. must consider, first, whether a *prima facie* case for conviction is made out; & if it is satisfied on this head, it must not allow a prosecution to be instituted for the personal profit or to satisfy the vengeance of those desiring a prosecution, but must inquire whether, if the persons at whose expense the prosecution would be instituted were not a class but a single person—an upright & honest man desirous as a good citizen to do his duty to the State—he would think it his duty to prosecute at his own expense. If that question be answered in the affirmative, a prosecution ought to be directed at the expense of the assets, notwithstanding the dissent of members of the class, at any rate if a substantial majority of the class desire a prosecution.—*Re* LONDON & GLOBE FINANCE CORPN., LTD., [1903] 1 Ch. 728; 72 L. J. Ch. 368; 88 L. T. 194; 51 W. R. 651; 19 T. L. R. 314; 10 Mans. 198.

Annotation:—*Mentd.* *R. v. Newton & Bennett* (1913), 109 L. T. 747.

6820. — — — — — Lack of funds.]—*Re* EUPION FUEL & GAS CO., [1875] W. N. 10.

Annotation:—*Consd.* *Re* Northern Counties Bank (1883), 31 W. R. 546.

6821. — — — — —.]—A co. was being wound up subject to the supervision of the ct., & the liquidator was advised by counsel that a prosecution of certain officers & members of the co. would probably result in a conviction, & he presented a petition for a direction under 1862 Act, s. 167, that he should institute a prosecution. The assets were sufficient to pay about 5s. in the pound, & two-thirds of the creditors opposed the application. The petition was supported by the liquidator's affidavit that he was advised & believed that a prosecution would probably result in a conviction:—*Held*: (1) it did not sufficiently "appear" within sect. 167 that an offence had been committed; (2) inasmuch as two-thirds of the creditors opposed the application, & the costs of a prosecution would, if authorised under sect. 167, be paid for out of their moneys, the application ought, on this ground also, to be refused.—*Re* NORTHERN COUNTIES BANK, LTD. (1883), 31 W. R. 546.

Annotation:—*As to* (2) *Distd.* *Re* Denham (1884), 53 L. J. Ch. 1113.

6822. — — — — — Mode of application—Ex parte.]—*Re* DENHAM (CHARLES) & CO., No. 6818, *ante*.

Under Larceny Act, 1861 (c. 96).]—*See* Nos. 3357, 3373, *ante*.

I. Costs.

6823. Of applicant—Motion to vacate enrolment of order—After omission to enter caveat against enrolment.]—Where a party omitting to enter a caveat against the enrolment of an order, was not misled by anything done or said, either by the officers of the ct. or by his opponents, a motion to vacate the enrolment was refused with costs,

PART III. SECT. 36, SUB-SECT. 19.—I.

1. Of sheriff—Seizure before winding-up order—Possession money.]—Where a sheriff has made a seizure under execution of goods of a co. before the making of a winding-up order under the Dominion Winding-up Act

against the co. he is entitled to his costs, including possession money, up to the date of the winding-up order, as a preferred claim; but is not entitled to possession money under the seizure for any time after the winding-up order; though the winding-up order be made by a judge of another province;

the sheriff's fees are taxable under the law of the province where the seizure was made.—*Re* PENNY LUMBER CO., [1921] 3 W. W. R. 352; 65 D. L. R. 779.—CAN.

g. Review of taxation—Practice.]—A judge of the Supreme Ct. [B. C.]

Sect. 36.—Winding up by court: Sub-sect. 19, I.; sub-sect. 20. Sect. 37: Sub-sects. 1, 2 & 3, A

notwithstanding that there had been several intimations that he intended to appeal. The order refusing the application gave costs to all parties whom appct. had, by serving them with notice of his motion, brought before the ct.—*Re GREAT NORTHERN COPPER MINING CO. OF SOUTH AUSTRALIA, LTD., Ex p. THE CO.* (1869), 20 L. T. 347, L. JJ.

Of liquidator.]—See Sub-sect. 8, E., ante.

Of contributories & creditors—On applications for particular purposes.]—See specific sects., ante.

6824. Of parties appearing on service of notice of motion.]—*Re GREAT NORTHERN COPPER MINING CO. OF SOUTH AUSTRALIA, LTD., Ex p. THE CO., No. 6823, ante.*

6825. Of summons to stay execution pending appeal—From order on contributory—Whether costs of appeal.]—Where a contributory of a co. was ordered to pay a certain sum of money to the liquidator, the contributory took out a summons to stay execution pending an appeal, & stay of execution was ordered upon the terms of his paying the money & £50 for costs into ct., no order being made as to the costs of the summons to stay. The appeal was dismissed with costs, but no reference was made as to the costs of the summons to stay, & the taxing master disallowed the costs of that summons. On summons to review the taxation:—*Held*: the contributory was ordered to pay the £50 into ct. to satisfy such costs as the ct. should think he ought to pay, & the costs of the summons to stay, being caused by the appeal, must be paid out of the £50 in ct., & the ct. had jurisdiction at any time to make such order.—*Re BRIGHTON LIVERY STABLES CO.* (1885), 52 L. T. 745.

6826. Of representative case for opinion of court.]—In a representative case for the opinion of the ct. in the winding up of a co., the costs of the parties will be allowed out of the estate between party & party only, & not as between solr. & client.—*Re MUTUAL SOCIETY, GRIMWADE v. MUTUAL SOCIETY* (1881), 18 Ch. D. 530; 50 L. J. Ch. 400; 30 W. R. 242.

Of order dismissing petition to discharge winding-up order.]—See No. 5493, ante.

has no power to review a taxation made in the winding up of a co., & where the registrar is proceeding upon a wrong principle, the proper course is to apply for an adjournment, & request the registrar to refer the matter to a judge of the ct. for directions.—*Re FEDERAL MORTGAGE CORPN. & STEWART*, [1917] 2 W. W. R. 52; 24 B. C. R. 12.—CAN.

PART III. SECT. 36, SUB-SECT. 20.

h. Effect of dissolution—On right of company to apply to court.]—A co. claiming that it is absolutely defunct cannot make an application to the ct., & its receiver has no *locus standi* to be heard on that ground.—*BRAND v. GREEN* (1898), 12 Man. L. R. 337.—CAN.

k. — Shareholder's right to recover fund—After payment of all obligations.]—A shareholder is a creditor of a co. registered under the Alberta Cos. Ordinance, after payment of all its other obligations & may bring a representative action to recover a fund in the hands of the manager after dissolution; such money does not pass to the Crown as *bona vacantia*, but remains a trust fund for payment of creditors.—*EMBREE v. MILLAR*, [1917] 1 W. W. R. 1200; 33 D. L. R. 331.—CAN.

l. — On lease held by company—Assigned before dissolution.]—*LEASE CATILE CO., LTD. v. DRABBEL*, [1923] 1 D. L. R. 546.—CAN.

m. — Nominal reversion undisposed of—Vesting order.]—*Re QUEENSTOWN DRY DOCKS SHIPBUILDING & ENGINEERING CO.*, [1918] 1 I. R. 356.—IR.

n. Injunction to restrain—Whether court may grant—After liquidator's return to Registrar-General.]—After a liquidator of a co. has made his return to the Registrar-General, the ct. has no jurisdiction to grant an injunction restraining the dissolution of the co.

The co. is dead after the return is made.—*BIRCH (JOHN) & CO., LTD. v. PATENT CORK ASPHALT CO., LTD.* (1894), 20 V. L. R. 471; (1895), 21 V. L. R. 268.—AUS.

o. How effected.]—Nothing but a direct proceeding by the A.-G. against a co., or winding-up proceedings, can put an end to its existence, & even then, there would be rights not destroyed.—*INTERNATIONAL MINING SYNDICATE v. STEWART* (1914), 48 N. S. R. 172.—CAN.

p. Application by shareholder—Evi-

Of particular applications.]—See specific sects. ante.

SUB-SECT. 20.—DISSOLUTION OF COMPANY.

See, now, 1908 Act, s. 172.

6827. Order to dissolve company—Lessee of quarry—Necessity for notice of application to dissolve.]—*Re HAYTOR GRANITE CO., No. 6410, ante.*

6828. Effect of dissolution—On right of trustees of company to sue.]—Pltfs. claimed as trustees of a dissolved co., & were proved to have been partners in the co.:—*Held*: they were entitled to sustain a suit, as representing the co., against a deft. who had been in the habit of transacting business with the co., & had dealt with the trustees in that character, & by his answer to the suit made no positive suggestion that pltfs. did not sufficiently represent the co.—*GORDON v. PYM* (1843), 3 Hare, 223; 67 E. R. 364.

6829. — On claim by creditor against directors—No allegations of fraud.]—After an order has been made under 1862 Act, s. 111, dissolving a co., an action by a creditor claiming that the directors should be held liable for a misfeasance, but not alleging fraud, nor impeaching the order of dissolution, is barred by the order.—*COXON v. GORST*, [1891] 2 Ch. 73; 60 L. J. Ch. 502; 64 L. T. 444; 39 W. R. 600; 7 T. L. R. 460. *Annotation:—Reid. Whiteley Exerciser v. Gamago* (1898), 79 L. T. 20.

6830. — On property held by company as trustee—Vesting order—Copyright.]—*Re BARAUD'S COPYRIGHT* (1921), 151 L. T. Jo. 112.

After voluntary winding up.]—See Sect. 37, sub-sect. 14, post.

Of corporation.]—See CORPORATIONS, Vol. XIII., pp. 434–437.

SECT. 37.—VOLUNTARY WINDING UP.

SUB-SECT. 1.—COMPANIES WHICH MAY WIND UP VOLUNTARILY.

6831. Company registered under 1856 Act.]—A co. registered under 1856 Act, but not under 1862 Act, may be wound up voluntarily, under a

*dence of fraud.]—*Where a co. has been struck off the roll by the registrar of cos., the mere fact that before the machinery of the registrar's office was set in motion a shareholder wrote asking that the co. be struck off & stating that the writer held all the stock of the co., & that there were no liabilities that he knew of except to himself, does not support the contention that the dissolution of the co. was brought about fraudulently by such shareholder.—*SECORD v. KEITH*, [1918] 3 W. W. R. 764.—CAN.

q. Application to declare dissolution void—Lapse of 10 years.]—A co. in liquidation sold its property to a new co., & was dissolved. Ten years afterwards the new co. discovered that they had not obtained a formal conveyance of property included in the transfer, and they petitioned the ct. to declare the dissolution void, & to empower the liquidator to grant a conveyance. The Cos. (Consolidation) Act, 1908, s. 223 (1), authorises such a declaration within two years of the date of the dissolution.

The ct., in the exercise of its *nobile officium*, granted the prayer of the petition.—*COLLINS BROTHERS & CO., LTD., PETITIONERS*, [1916] S. C. 620.—SCOT.

resolution passed after the latter Act came into operation.

The words "unregistered co.," in 1862 Act, mean a co. not registered under any Act, & not a co. unregistered under that Act.—*Re TORQUAY BATH CO.* (1863), 32 Beav. 581; 2 New Rep. 98; 8 L. T. 527; 9 Jur. N. S. 633; 11 W. R. 653; 55 E. R. 228.

6832. —.]—A co. registered under 1856 Act is to be deemed a co. registered under 1862 Act, s. 176, for the purpose of a voluntary winding up, & it need not be re-registered under the more recent statute.

The words "unregistered co." in 1862 Act, refer to cos. not registered either under that Act or under any of the previous Joint-Stock Cos. Acts mentioned therein.—*Re LONDON INDIA-RUBBER CO.* (1866), 1 Ch. App. 329; 35 L. J. Ch. 592; 14 L. T. 316; 12 Jur. N. S. 402; 14 W. R. 506, L. C. & L. JJ.

SUB-SECT. 2.—IN WHAT EVENTS VOLUNTARY WINDING UP MAY TAKE PLACE

6833. Whether company can contract not to wind itself up voluntarily.—A co. formed to purchase & work a patented invention having gone into voluntary liquidation, it was contended by the patentee, who was a shareholder, that the arts. of assocn. of the co. contained an implied contract by the co. not to wind itself up voluntarily during the term of the letters patent:—*Held*: even if the statutory power of a co. of winding itself up voluntarily could be excluded by a contract contained in its arts., the ct. would not be justified in holding that there was such a contract in a case where the contract was not expressed in plain terms. *Semble*: such a contract would not be valid.—*ELLIS v. DADSON* (1891), 60 L. J. Ch. 353; 7 T. L. R. 318.

6834. Whether court will interfere to restrain—In absence of fraud.—*BRITISH WATER GAS SYNDICATE, LTD. v. NOTTS & DERBY WATER GAS CO., LTD.* (1889), 6 T. L. R. 44; 1 Meg. 427.

SUB-SECT. 3.—MEETINGS AND RESOLUTIONS FOR WINDING UP.

A. Meetings.

Meetings generally, see Part III., Sect. 30, *ante*.

Convention—Who may summon meeting—Secretary.—See Nos. 3735, 3743, *ante*.

6835. — Contents of notice.]—Notice was given of an extraordinary meeting of shareholders in a co., "for the purpose of considering, & if so determined on, of passing, a resolution to wind up the co. voluntarily." The meeting passed a resolution "that it had been proved to the satisfaction of the co. that the co. could not, by reason of its liabilities, continue its business; & that it was advisable to wind up the same." No meeting was ever called to confirm this resolution:—*Held*: this resolution was invalid as an extraordinary resolution under 1862 Act, s. 129, the notice not showing that it was intended to propose a resolution that the co. was unable, by reason of its liabilities, to continue its business, nor containing

anything to show that it was proposed to pass such a resolution for winding up the co. as would not require confirmation by a subsequent meeting.

An order to wind up compulsorily was made, with liberty to adopt such of the proceedings taken in the voluntarily winding up as the judge in chambers should think fit.—*Re BRIDPORT OLD BREWERY CO.* (1867), 2 Ch. App. 191; 15 W. R. 291; *sub nom. Re BRIDPORT OLD BREWERY CO., LTD.*, *Ex p. COLLIS*, 15 L. T. 643, L. JJ.

Annotations:—*Fold.* *Re Silkstone Fall Colliery Co.* (1875), 1 Ch. D. 38. *Refd.* *Re Overend, Gurney, Ex p. Oakes & Peek* (1867), 36 L. J. Ch. 413; *Re London & Mediterranean Bank, Wright's Case* (1868), L. R. 12 Eq. 331; *Re London Flour Co.* (1868), 19 L. T. 136; *Stone v. City & County Bank, Collins v. Same* (1877), 3 C. P. D. 282; *Re Allison, Johnson & Foster, Ex p. Burkinshaw* (1904), 91 L. T. 66; *MacConnell v. Prill*, [1916] 2 Ch. 56.

6836. —.]—In order to render an extraordinary resolution for the voluntary winding up of a co. valid under 1862 Act, s. 129 (3), it is necessary that the notice of the meeting should express that it is intended to propose a resolution that the co. is unable, by reason of its liabilities, to continue its business.—*Re SILKSTONE FALL COLLIERY CO.* (1875), 1 Ch. D. 38; 34 L. T. 46, C. A.

Annotation:—*Refd.* *MacConnell v. Prill*, [1916] 2 Ch. 57.

6837. —.]—(1) The notice to the shareholders convening the meeting at which an extraordinary resolution was passed to wind up a bank voluntarily & appoint a liquidator, in which was embodied an agreement by the directors with B. & Co., a London banking firm, to transfer to the latter all the assets of the bank upon their undertaking the debts & liabilities of the bank, not including any claims of shareholders to have money repaid to them on the ground of fraud, was in the words of clause 3 of 1862 Act, s. 129:—*Held*: the notice was sufficient & the resolution binding on all the shareholders of the bank, whether they were present & voted for it or not.

(2) By the arts. of assocn. of the bank every shareholder was required to pay calls to the person & at the time & place appointed by the directors; & twenty-one day's notice was to be given of the time & place appointed. By a resolution of the directors before a voluntary winding up, they made a call payable by instalments at certain dates, but no place or person at which or to whom the call was to be paid was mentioned, & no notice of the call was given by the directors; after the winding up the liquidator gave notice to the shareholders that a call had been made, & requested them to pay it to certain persons at a specified place and time:—*Held*: the liquidator had power to enforce the call made by the directors.—*STONE v. CITY & COUNTY BANK, COLLINS v. SAME* (1877), 3 C. P. D. 282; 47 L. J. Q. B. 681; 38 L. T. 9, C. A.

Annotations:—*Refd.* *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317; *Re Scottish Petroleum Co., Machagan's Case* (1882), 46 L. T. 880; *Re Pyle Works* (1890), 44 Ch. D. 534; *Thomson v. Henderson's Transvaal Estates*, [1908] 1 Ch. 765; *MacConnell v. Prill*, [1916] 2 Ch. 57.

— How far omission of contents from notice may be waived.]—See No. 3756, *ante*.

Constitution—Whether one member constitutes meeting.—See No. 3780, *ante*.

6838. Proceedings—Irregularity—Convention of further meeting.—Where a resolution for a voluntary winding up has been *de facto* adopted, but there is so much informality with regard

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r. Convention—Contents of notice—Waiver of omission—Effect of invalid resolution.—A notice calling a meeting

of shareholders "to consider the financial position of the co." is not a notice specifying an intention to propose a resolution that the co. be wound up voluntarily & a resolution to that

effect passed at a meeting called by such a notice is invalid.—*SOUTH CANTERBURY BUILDING SOCIETY (LIQUIDATORS) v. STUMBLES* (1894), 12 N. Z. L. R. 58.—N.Z.

Sect. 37.—Voluntary winding up: Sub-sect. 3, A.**B.; sub-sect. 4, A. (a) & (b).]**

to its adoption as would probably render it legally inoperative, it is the proper course for contributories aware of the circumstances to procure another meeting to be called for their consideration, & not at once to present a petition for winding up.—*Re LONDON FLOUR CO., LTD.* (1868), 19 L. T. 136; 16 W. R. 552, C. A.

6839. ——— **When court will interfere—At instance of dissentient member.]**—Where resolutions for winding up a co. voluntarily were passed by the shareholders, there being only one dissentient shareholder, the ct. refused to entertain a petition presented by such shareholder for a compulsory winding-up order, on the ground that the meetings at which the resolutions were passed were not in all respects regular.—*Re UNION HILL SILVER CO., LTD.* (1870), 22 L. T. 400.

6840. ——— **———.]**—The notices convening the meeting at which a special resolution to wind up voluntarily was passed by the shareholders of a co. were issued under the authority of a resolution passed at a meeting of the board of directors at which a quorum was not present. Six months afterwards the shareholders sought to have the special resolution declared invalid:—*Held*: the doctrine upon which the ct. had acted was not to interfere for the purpose of forcing cos. to conduct their business according to the strictest rules, where the irregularity complained of could be set right at any moment; & therefore, in the present case, the ct. would not interfere, especially as no application to the ct. had been made until six months had elapsed after the passing of the resolution.—*SOUTHERN COUNTIES DEPOSIT BANK, LTD. v. RIDER & KIRKWOOD* (1895), 73 L. T. 374; *sub nom.* *SOUTHERN COUNTIES DEPOSIT BANK, LTD. v. KIRKWOOD*, 11 T. L. R. 563, C. A.

Annotations:—**Consd.** *Re Haycraft Gold Reduction & Mining Co.*, [1900] 2 Ch. 230. **Appld.** *Boschoek Proprietary Co. v. Fuke*, [1906] 1 Ch. 148. **Refd.** *Transport v. Schonberg* (1905), 21 T. L. R. 305.

PART III. SECT. 37, SUB-SECT. 3.—B.

s. Validity—Sufficiency of notice convening meeting.]—Cos. Act, 1862, s. 129, enacts that a co. may be wound up voluntarily "whenever the co. has passed a special resolution requiring the co. to be wound up voluntarily." Sect. 51 enacts that a special resolution can only be passed at a general meeting, of which "notice specifying the intention to propose such resolution" has been given. A notice was given of a meeting of a co. "for the purpose of considering the present position of the co., & to consider & resolve whether under existing circumstances, the co. should be wound up, & if so resolved upon, to decide in what manner this should be done." At the meeting a resolution was carried to wind up the co. voluntarily:—*Held*: the notice was sufficient.—*SDEUARD v. GARDNER* (1876), 3 R. (Ct. of Sess.) 577; 13 Sc. L. R. 363.—**SCOT.**

t. ———.]—*WILSON v. M'GENN & Co.* (1876), 3 R. (Ct. of Sess.) 474; 13 Sc. L. R. 303.—**SCOT.**

a. ——— Non-compliance with articles of association.]—A resolution was passed at two successive meetings for placing a co. in liquidation. It was admitted that at the first meeting there was a quorum as required by Art. 40, but no quorum as required by Art. 112:—*Held*: the requirement of a quorum different from that required for a general meeting, in the event of a meeting being called to deal with a specific matter, was not *ultra vires*, &

the resolution purporting to wind up the co. was not validly passed.—*GRAND LODGE N. S. W. MASONIC HALL CO. v. SLY* (1913), 13 S. R. N. S. W. 512.—**AUS.**

b. ——— Mere irregularity does not affect.]—Where no regular meeting of directors was held to convene the extraordinary meeting of the co. to consider a resolution for winding up, but it was shown that the requisite number of shareholders had joined in the requisition pursuant to Cos. Ordinance, s. 118, among them being all the directors, all of whom subsequently signed an endorsement directing the secretary—himself a director—to call the meeting:—*Held*: that the want of a regular meeting of the directors was a mere irregularity, & did not invalidate the meeting of shareholders subsequently held, in pursuance of notice given by the secretary, at which the winding-up resolution was passed.—*RED DEER MILL & ELEVATOR CO. v. HALL* (1908), 1 Alta. L. R. 530.—**CAN.**

c. ——— Statutory majority essential.]—*COWAN v. SCOTTISH PUBLISHING CO.* (1892), 19 R. (Ct. of Sess.) 437; 29 Sc. L. R. 375.—**SCOT.**

d. ——— Right of trustees for deceased member to question.]—*HOWLING'S TRUSTEES v. SMITH* (1905), 7 F. (Ct. of Sess.) 390; 42 Sc. L. R. 321; 12 S. L. T. 628.—**SCOT.**

e. Proof—Sufficiency of.]—Cos. Act, 1890, s. 118, requires that notice of any extraordinary resolution passed

B. Resolutions.

Resolutions generally, see Part IV., Sect. 30, sub-sect. 3, D. (f), *ante*.

Validity—Sufficiency of notice convening meeting.]—See Nos. 6835–6837, *ante*.

— **Several resolutions passed at same meeting—Some resolutions invalid or ultra vires.]**—See Nos. 3727, 3852, 3853, *ante*.

— **Failure to pass some.]**—See No. 3778, *ante*.

6841. Effect—Expression of wishes of majority of members.]—*BANK OF GIBRALTAR & MALTA*, No. 7307, *post*.

Proof.]—See Nos. 3794–3797, 3860, *ante*.

Resolution passed by fraud—Compulsory winding up pending—Contempt of court.]—See No. 6815, *ante*.

SUB-SECT. 4.—LIQUIDATORS AND COMMITTEE OF INSPECTION.**A. Appointment of Liquidator.****(a) In General.**

6842. Whether notice of resolution for appointment necessary.]—The deed of settlement of a Joint Stock Company, completely registered under 1844 Act, contained a clause, "that no other business shall be transacted at a special general meeting than the business for which it shall have been expressly called." The co. was afterwards registered under 1856 Act. After Joint-Stock Cos. Act, 1857 (c. 14), at a general meeting it was resolved that the co. should be wound up voluntarily, & liquidators were appointed. The meeting was held in pursuance of a notice, which, however, did not state the intention of the co. to appoint liquidators at that meeting. In an action to recover calls made by the liquidators so appointed:—*Held*: the above clause applied to a meeting held for the purpose of appointing liquidators, & no notice of the intention to appoint

by the winding up of a co. voluntarily shall be given by advertisement in the *Govt. Gazette*:—*Held*: a record in writing of such resolution signed by the chairman of the meeting at which it was passed, a copy of which was sent to the Registrar General & recorded by him, & was also published in the *Govt. Gazette*, was *prima facie* evidence that all that took place at that meeting was done lawfully, & therefore, if a quorum was requisite at such meeting, that there was such a quorum present. By reason of the presumption against fraud in the carrying out of duties to be performed under an Act of Parliament, a certified copy of a printed copy of such a resolution sent to the Registrar General by the co., is *prima facie* evidence of a valid resolution.—*MCLEAN BROTHERS & RIGG, LTD. v. GRICE* (1906), 4 C. L. R. 835.—**AUS.**

f. ——— As disclosed by minute.]—The minute of a meeting of a co. bore that it had been resolved to wind up the co. voluntarily, & to appoint liquidators for that purpose, & that each of them so appointed may act separately & exercise every power which, by Cos. Act, 1862, is conferred on liquidators. The meeting thereupon proceeded to elect four persons as liquidators:—*Held*: the above minute being statutory proved itself, & no parol or other evidence could be admitted to explain or contradict the terms of the liquidators' appointment.—*CITY OF GLASGOW BANK (LIQUIDATORS)* (1880), 7 R. (Ct. of Sess.) 1190; 17 Sc. L. R. 483, 800.—**SCOT.**

liquidators having been given, their appointment was invalid.—**ANGLO CALIFORNIAN GOLD MINING Co. v. LEWIS** (1860), 6 H. & N. 174; 30 L. J. Ex. 50; 3 L. T. 588; 6 Jur. N. S. 1376; 9 W. R. 126; 158 E. R. 72.

6843. —.—.]—Where, under 1856 Act, Table B., art. 28, notice has been given of a general meeting for the voluntary winding up of the co., the appointment of an official liquidator is not good, unless it is stated in the notice that such appointment is the purpose of the meeting.—*Re STEARIC ACID Co., LTD.* (1863), 2 New Rep. 544; 32 L. J. Ch. 784; 8 L. T. 759; 9 Jur. N. S. 1066; 11 W. R. 980.

Annotation :—**N.F.** *Re Welsh Flannel & Tweed Co.* (1875), L. R. 20 Eq. 360.

6844. —.—.]—*Semble* : liquidators may be appointed, at a meeting convoked for the purpose of winding up, without special notice, because a co. cannot be wound up without liquidators.—*Re OVEREND, GURNEY & Co., OAKES v. TURQUAND & HARDING, PEEK v. SAME* (1867), L. R. 2 H. L. 325; 36 L. J. Ch. 949; 16 L. T. 808; 15 W. R. 1201, H. L.; *affg. S. C. sub nom. Re OVEREND, GURNEY & Co., Ex p. OAKES & PEEK* (1867), L. R. 3 Eq. 576.

Annotations :—**Folld.** *Re Welsh Flannel & Tweed Co.* (1875), L. R. 20 Eq. 360. **Consd.** *Re Trench & Tubeless Tyre Co., Bethell v. Trench & Tubeless Tyre Co.* (1899), 69 L. J. Ch. 97. **Mentd.** *Re Cleveland Iron Co., Ex p. Stevenson* (1867), 16 W. R. 95; *Henderson v. Lacon* (1867), L. R. 5 Eq. 249; *Re Overend, Gurney, Ex p. Musgrave* (1867), 37 L. J. Ch. 161; *Re Universal Banking Corp., Gunn's Case* (1867), 3 Ch. App. 40; *Downes v. Ship* (1868), L. R. 3 H. L. 343; *Kent v. Freehold Land & Brickmaking Co.* (1868), 3 Ch. App. 493; *Ogilvie v. Currie* (1868), 37 L. J. Ch. 541; *Re Oriental Commercial Bank, Alabaster's Case* (1868), L. R. 7 Eq. 273; *Re Overend, Gurney, Barrow's Case* (1868), 3 Ch. App. 784; *Re Aberaman Ironworks, Peek's Case* (1869), 4 Ch. App. 532; *Re Estates Investment Co., Pawle's Case* (1869), 4 Ch. App. 497; *Re London & County General Agency Assocn., Hare's Case* (1869), 4 Ch. App. 508; *Re London & Northern Insee. Corp., Stace & Worth's Case* (1869), 4 Ch. App. 682; *Overend, Gurney v. Gurney* (1869), 4 Ch. App. 701; *Reese River Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64; *Re Warren's Blacking Co., Pentelow's Case* (1869), 4 Ch. App. 178; *Re General Provincial Life Assoc., Ex p. Daintree* (1870), 18 W. R. 396; *Re Imperial Land Co. of Marsilles, Ex p. Jeaffreson* (1870), L. R. 11 Eq. 109; *Waterhouse v. Jamieson* (1870), L. R. 2 Sc. & Div. 29; *Re Contract Corp., Hudson's Case* (1871), L. R. 12 Eq. 1; *Re Empire Assoc. Corp., Challis's Case, Somerville's Case* (1871), 6 Ch. App. 266; *Re London & Mediterranean Bank, Wright's Case* (1871), 7 Ch. App. 55; *McEuen v. West London Wharves & Warehouses Co.* (1871), 6 Ch. App. 655; *Re Hercules Insee., Pugh & Sharman's Case* (1872), L. R. 13 Eq. 566; *Paraguassu Steam Tramroad Co., Black's Case* (1872), 8 Ch. App. 254; *Re Blakely Ordnance Co., Brett's Case, Re Oriental Commercial Bank, Morris' Case* (1873), 8 Ch. App. 800; *Re Nassau Phosphate Co.* (1876), 2 Ch. D. 610; *Collins v. City & County Bank, Stone v. City & County Bank* (1877), 38 L. T. 9; *Stone v. City & County Bank, Collins v. The Same* (1877), 3 C. P. D. 282; *Twycross v. Grant* (1877), 46 L. J. Q. B. 636; *Cree v. Somervail* (1879), 4 App. Cas. 648; *Tennent v. City of Glasgow Bank* (1879), 4 App. Cas. 615; *Re Hull & County Bank, Burgess's Case* (1880), 15 Ch. D. 507; *Re Scottish Petroleum Co., MacLagan's Case* (1882), 51 L. J. Ch. 841; *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413; *Re Ystalyfera Co.* (1886), 2 T. L. R. 900; *Re London & Leeds Bank, Ex p. Carling, Carling v. London & Leeds Bank* (1887), 56 L. J. Ch. 321; *Re British Burmah Land Co.* (1888), 4 T. L. R. 631; *Re London Celluloid Co., Bayley & Hanbury's Cases* (1888), 36 W. R. 673; *Re Lennox Publishing Co., Ex p. Storey* (1890), 62 L. T. 791; *Cocksedge v. Metropolitan Coal Consumers Assocn.* (1891), 64 L. T. 826; *Re National Debenture & Assets Corp., [1891] 2 Ch. 505; Westmoreland Green & Blue Slate Co. v. Feilden* (1891), 7 T. L. R. 585; *Boaler v. Broadhurst* (1892), 8 T. L. R. 398; *Re Laxon* (2), [1892] 3 Ch. 555; *East Broken Hill Consols v. Mallaby-Deeley* (1895), 11 T. L. R. 465; *Hemp, Yarn & Cordage Co., Hindley's Case, [1896] 2 Ch. 121; Re Kent Coalfields Syndicate, [1898] 1 Q. B. 754; Ladies' Dress Assocn. v. Pulbrook* (1899), 68 L. J. Q. B. 871; *Re*

Yolland, Husson & Birkett, Leicester v. Yolland, Husson & Birkett (1907), 77 L. J. Ch. 43; *Moosa Goolam Ariff v. Ebrahim Goolam Ariff* (1912), 28 T. L. R. 505; *First National Reinsurance v. Greenfield, [1921] 2 K. B. 260; Abram S.S. Co. v. Westville Shipping Co., [1923] A. C. 773.*

6845. —.— **Winding-up resolution passed.**—After a winding-up resolution has been passed, liquidators may be appointed at a meeting without special notice of the intention to propose their appointment.—*Re WELSH FLANNEL & TWEED Co.* (1875), L. R. 20 Eq. 360; 44 L. J. Ch. 391; 32 L. T. 361; 23 W. R. 558.

Annotation :—**Mentd.** *Re Guardian Assoc., [1917] 1 Ch. 431.*

6846. —.—.]—As soon as a resolution for the voluntary winding up of a co. is passed, a liquidator may be appointed without special notice; &, in the case of a voluntary winding up by special resolution, where the notice of the confirmatory meeting includes notice of a resolution for the confirmation of the appointment of a named person as liquidator, & that resolution is dropped, a resolution for the appointment of another person may be proposed & carried without further notice.—*Re TRENCH TUBELESS TYRE Co., BETHELL v. TRENCH TUBELESS TYRE Co., [1900] 1 Ch. 408; 69 L. J. Ch. 213; 82 L. T. 247; 48 W. R. 310; 16 T. L. R. 207; 44 Sol. Jo. 260; 8 Mans. 85, C. A.*

6847. Time of appointment—Not before effective resolution for winding up.—A resolution appointing a liquidator is operative only when there is an effective resolution to wind up.—*Re INDIAN ZOEDONE Co.* (1884), 26 Ch. D. 70; 53 L. J. Ch. 468; 50 L. T. 547; 32 W. R. 481, C. A.

6848. —.— **At first meeting for passing resolution to wind up—Confirmation at second meeting.**—(1) Three petitions having been presented, summonses to appoint provisional liquidators were adjourned in order to give time to the co. to hold a meeting, at which it was resolved to wind up voluntarily, & two liquidators were appointed. At a subsequent meeting these resolutions were confirmed :—*Held* : the appointment was valid.

(2) *Semble* : the secretary of a co. is a proper person to act as liquidator.—*Re LONDON & AUSTRALIAN AGENCY CORPN., LTD.* (1873), 29 L. T. 417; 22 W. R. 45.

Annotation :—*As to* (1) **Mentd.** *Re Building Societies' Trust* (1890), 44 Ch. D. 110.

6849. —.— **Dispute as to whether confirmatory meeting held.**—*RALEIGH PRINTING & PUBLISHING Co. v. ARTHUR* (1896), 40 Sol. Jo. 781, 813.

(b) Who may be Appointed.

6850. Secretary.—*Re LONDON & AUSTRALIAN AGENCY CORPN., LTD., No. 6848, ante.*

6851. Liquidation of another company—Conflicting interests.—The ct. will not allow one person to act as liquidator of two cos. the interests of which are conflicting.—*Re CITY & COUNTY INVESTMENT Co., LTD.* (1877), 25 W. R. 342.

Person with intimate business connection with directors—Investigation required.—*See No. 6889, post.*

Receiver for debenture-holders.—*See No. 6891, post.*

Sect. 37.—Voluntary winding up: Sub-sect. 4, A. (c), B. & C.]

(c) *Appointment of More than One Liquidator.*

6852. Powers of joint liquidators—Acceptance by one of bill of exchange—Validity.]—A co. was being voluntarily wound up, & four liquidators were appointed; but no determination was come to at the time of their appointment by the co. as to the exercise of their powers. The liquidators, however, shortly afterwards met, & resolved that one of them should exercise their statutory powers on behalf of all. One of them, accordingly, accepted a bill of exchange on behalf of the co.:—*Held*: such acceptance was invalid.—*Re LONDON & MEDITERRANEAN BANK, LTD., Ex p. LONDON & SOUTH-WESTERN BANK* (1867), 36 L. J. Ch. 807; 16 L. T. 691.

Annotation:—Folld. Re London & Mediterranean Bank, Ex p. Birmingham Banking Co. (1868), 3 Ch. App. 651.

6853. ———.]—The four liquidators of a co. resolved that one of them should have power to accept bills:—*Held*: this, as a general authority, would not be sufficient under 1862 Act, which requires the signature of two liquidators, but the four liquidators might authorise any one to sign any particular bill.

Bills accepted by one liquidator, in pursuance of this resolution, were invalid against the co. but the holders of the bill were allowed to claim as creditors for money advanced.—*Re LONDON & MEDITERRANEAN BANK, Ex p. BIRMINGHAM BANKING CO.* (1868), 3 Ch. App. 651; 37 L. J. Ch. 905; 19 L. T. 193; 16 W. R. 1003, L. J.J.

Annotation:—Consd. Re London & Mediterranean Bank, Ex p. Agra & Masterman's Bank (1871), 6 Ch. App. 206.

6854. ———.]—A resolution to wind up a banking co. voluntarily was confirmed on Nov. 22, & advertised in the London Gazette on Nov. 26. On Nov. 24, one of the directors, who had been appointed one of the liquidators, accepted as director, a bill of exchange on the bank. This bill was afterwards indorsed for value to a person who had no notice that the bank was in liquidation:—*Held*: the bill was not a bill of the co., & therefore the holder could not prove against the co. for the amount.—*Re LONDON & MEDITERRANEAN BANK, BOLOGNESI'S CASE* (1870) 5 Ch. App. 567; 40 L. J. Ch. 26; 18 W. R. 876, L. J.

Annotation:—Distd. Re Oriental Bank Corpn., Ex p. Guillemin (1884), 28 Ch. D. 634.

6855. ———.]—The four liquidators of a co. passed a resolution that one of them should have power to accept bills of exchange. They afterwards resolved that bills to the amount of £7,500, which had been accepted to the credit of C., should be renewed. Fresh bills were

accordingly drawn & accepted by one liquidator:—*Held*: the acceptances were invalid. *Qu.*: whether, under any circumstances, liquidators can authorise one of their number to sign a bill in their name.—*Re LONDON & MEDITERRANEAN BANK, Ex p. AGRA & MASTERMAN'S BANK* (1871), 6 Ch. App. 206; 24 L. T. 376; 19 W. R. 486, L. J.J.

6856. ———.]—User by one of company's seal—*Death of one liquidator—Power of surviving liquidator.]—*Where two liquidators are appointed for the purpose of carrying into effect a resolution to wind up a co. voluntarily, one of them cannot (unless directions to the contrary are given by the resolutions) use the seal of the co. even for the purpose of carrying into effect an agreement made by both liquidators, & the validity of which is undisputed. A co. resolved to wind up voluntarily, & appointed two liquidators, who entered into a valid agreement for the sale of the assets of the co. Part of such assets consisted of a debt secured by a legal mtge., & a proper legal assignment of the mtge. security was prepared; but one of the liquidators died before the seal of the co. was affixed to it:—*Held*: the surviving liquidator had no power to affix the seal of the co., & a new liquidator must be appointed in order that the assignment might be executed.—*Re METROPOLITAN BANK & JONES* (1876), 2 Ch. D. 366; 45 L. J. Ch. 525; 24 W. R. 815.

B. Position of Liquidator.

6857. Not trustee—Agent of company.]—The voluntary liquidator of a co. is not a trustee of the assets of the co. for the creditors or contributories & is not under liability as a trustee dealing with his *cestuis que trust*. He is the agent of the co., & in the absence of misfeasance or wilful misconduct on his part, an action will not lie against him for damages resulting from his delay in distributing the co.'s assets.—*KNOWLES v. SCOTT*, [1891] 1 Ch. 717; 60 L. J. Ch. 284; 64 L. T. 135; 39 W. R. 523; 7 T. L. R. 306.

Annotations:—Distd. Pulford v. Devenish, [1903] 2 Ch. 625. *Refd. Argylls v. Coxeter* (1913), 29 T. L. R. 355.

6858. Same as trustee in bankruptcy—Officer of court.]—*Re TEMPLE FIRE & ACCIDENT ASSURANCE CO.* (1910), 129 L. T. Jo. 115.

C. Powers and Duties of Liquidator.

In regard to transfers of shares.]—*See Sect. 23, sub-sect. 14, B., ante.*

6859. In regard to calls—Article providing for sanction by majority—Whether applicable to liquidator.]—*Re COED MADOG SLATE CO.*, [1877] W. N. 190.

PART III. SECT. 37, SUB-SECT. 4.—A. (c).

h. Powers of joint liquidators—Exercise by two out of three—Validity.]—Companies Act, 1890, s. 119 (r. 1) gives validity to exercise of powers of liquidators under Act by any two of their number.—*MERCANTILE BANK OF AUSTRALIA, LTD. v. DINWOODIE* (1902), 28 V. L. R. 491.—AUS.

k. What constitutes a joint appointment—Powers of several liquidators not jointly appointed.]—An appointment of four liquidators in a voluntary winding-up, was not under the statutes a joint appointment, & did not fall by the resignation of one of them; it was within the statutory power of such liquidators to bring this action; & the co. & the liquidators had a good title to sue for the loss alleged.—*WESTON BANK (LIQUIDATORS) v. DOUGLAS* (1860), 22 Dunl. (Ct. of Sess.) 447; 32 Sc. Jur. 212.—SCOT.

PART III. SECT. 37, SUB-SECT. 4.—C.

l. In regard to calls—For what purposes calls may be made.]—The purposes for which a liquidator may call up the uncalled capital of a co. are for the payment of all or any sums the ct. or liquidator may deem necessary to satisfy the debts & liabilities of the co., & the costs, charges, & expenses of winding it up, & for the adjustment of the rights of the contributories amongst themselves. An injunction will be granted to restrain a liquidator in a voluntary winding up from calling up the uncalled capital for the purpose of reducing its amount by the device of a sale to a reconstructed co., & a subsequent release of the contributories.—*TERRY v. CARLTON & WEST END BREWERIES, LTD.* (1896), 22 V. L. R. 33.—AUS.

m. Power to sell assets.]—The liquidator of a co. which was being voluntarily wound up under Ontario

Winding-up Act, sold the assets *en bloc*, without the sanction of the contributories, & obtained from the county ct. an order approving the sale & making provision for disposition of the purchase moneys:—*Held*: the order was made without authority.—*Re JONES (D. A.) CO.* (1892), 19 A. R. 63.—CAN.

n. Litigation by liquidator—Duty to proceed against directors for fraud.]—The co. being in process of voluntary winding up under the Manitoba Winding-up Act, R. S. M. 1902, c. 175, the liquidator applied, under s. 23, for a direction as to whether or not he should take proceedings against former directors of the co. to cancel shares which they had issued to themselves as fully paid up, but without payment of any kind, & to recover dividends which they had afterwards paid to themselves:—*Held*: no order could be made under s. 23, but the judge

6860. Made before winding up—Enforcement.]—STONE *v.* CITY & COUNTY BANK, COLLINS *v.* SAME, No. 6837, *ante*.

6861. Power to sell assets—On terms that deficiency should be made good by calls.]—The A. co., being unable to realise its assets & pay its debts passed resolutions for voluntary winding up & appointed liquidators who were authorised to enter into an agreement with the U. co. for the transfer of its assets & liabilities to the U. co. One of the terms of such agreement was that, in the event of the assets not being sufficient to pay the debts, the liquidators were, so far as they legally could, to make such calls as should be necessary to raise the deficiency:—*Held*: there was power under 1862 Act, ss. 95, 133, to sell on the terms of the agreement, & the debt, whether existing at the date of the commencement of the winding up or not, was sufficient to support a petition for compulsory winding up by the ct.—*Re* BANK OF SOUTH AUSTRALIA (2), [1895] 1 Ch. 578; 64 L. J. Ch. 397; 72 L. T. 273; 43 W. R. 359; 39 Sol. Jo. 214; 2 Mans. 129; 12 R. 166; *sub nom.* *Re* BANK OF SOUTH AUSTRALIA, LTD., *Ex p.* UNION BANK OF AUSTRALIA, LTD., 11 T. L. R. 265, C. A.

6862. For shares fully or partly paid up.]—It is not competent for a co. by its arts. of assocn. to confer upon the liquidator in the event of the winding up of the co., whether voluntarily or otherwise, a power of selling the assets for shares fully or partly paid-up of another co., irrespective of the powers conferred upon him by the co. Acts & as an additional power thereto, nor is it competent by such arts. upon any such sale to deprive dissentient members of the benefits given to them by 1862 Act, s. 161.—*PAYNE v. CORK CO., LTD.*, [1900] 1 Ch. 308; 82 L. T. 44; 48 W. R. 325; 16 T. L. R. 135; *sub nom.* *PAYNE v. CORK CO.*, 69 L. J. Ch. 156; 7 Mans. 225.

Annotations:—Consd. *Re* Doughty *v.* Lomagunda Reefs (1903), 88 L. T. 337. *Refd.* *Manners v. St. David's Gold & Copper Mines*, [1904] 2 Ch. 593; *Bisgood v. Henderson's Transvaal Estates*, [1908] 1 Ch. 743; *Llewellyn v. Kasintoe Rubber Estates*, [1914] 2 Ch. 670.

6863. Power to compromise—Without sanction of extraordinary meeting.]—A compromise by the liquidator of a co. in voluntary liquidation of a claim by the co. against a third party, is, if not set aside, binding on the co., although entered into by the liquidator without obtaining the sanction of an extraordinary resolution of the co. under 1862 Act, s. 160.—*CYCLEMAKERS' CO-OPERATIVE SUPPLY CO. v. SIMS*, [1903] 1 K. B. 477; 72 L. J. K. B. 160; 88 L. T. 360; 19 T. L. R. 153; 47 Sol. Jo. 224.

6864. Power to inspect books—Personally or by authorised agent.]—*Re* GOLD COAST FINANCE SYNDICATE, LTD., [1904] W. N. 73.

6865. Duty to stamp & file contracts for allotment of fully-paid shares.]—It is the duty of the liquidator of a co. which is being wound up voluntarily to stamp & file any unfiled contract constituting the title of an allottee to any shares which were allotted for a consideration other than cash, & to pay for such stamping & filing out of the assets of the co.—*Re* X. Co., LTD., [1907], 2 Ch. 92; 76 L. J. Ch. 529; 97 L. T. 50; 14 Mans. 227.

expressed the opinion that it was the liquidator's duty, in the circumstances, to take the suggested proceedings, & that, if he refused, the ct. would have jurisdiction, under s. 19, sub-sect. (f), to compel him so to do.—*Re* GREAT PRAIRIE INVESTMENT CO. (1908), 8 W. L. R. 6; 17 Man. L. R. 554. CAN.

o. — *Application for inquiry into conduct of co-liquidator—Jurisdiction of court.]—*Where two liquidators have been appointed in the voluntary winding up of a co., the ct. has jurisdiction to entertain an application made by one of the liquidators petitioning for an inquiry into the conduct of his co-liquidator.—*Re* MIRANDA COAL &

6866. Power to assign lease—Necessity for consent of landlord.]—*Re* FARROW'S BANK, LTD., No. 5946, *ante*.

6867. ———.]—A co. were assignees of a lease containing a covenant by the lessee not to assign the demised premises without the lessor's previous licence & consent in writing not to be unreasonably withheld in case of a respectable & responsible person being offered as tenant. The co. went into voluntary liquidation, in which the liquidator without the licence or consent of the lessor assigned the lease without offering a responsible person as tenant:—*Held*: this constituted a breach of the covenant not to assign.—*COHEN v. POPULAR RESTAURANTS, LTD.*, [1917] 1 K. B. 480; 86 L. J. K. B. 617; 116 L. T. 477; 33 T. L. R. 107.

Annotation:—Consd. *Re* Farrow's Bank, [1921] 2 Ch. 164.

———— **In what circumstances covenant broken.]—***See* LANDLORD & TENANT.

6868. Litigation by liquidator—Power to serve bankruptcy notice—Form of notice.]—A liquidator appointed in the voluntary winding up of a co. served upon a judgment debtor of the co. a bkpcy. notice headed "*Ex parte* N., liquidator of the M. Bank, Ltd." In the body of the notice the debtor was required to pay to N., "the liquidator of the bank" the sum "claimed by him" as the amount due on the judgment, or to secure or compound for the same sum, "to his satisfaction," etc. The debtor was not in any way misled by the terms of the notice:—*Held*: (1) the form of the notice must comply strictly with the provisions of 1862 Act, s. 95, a substantial compliance not being sufficient, & therefore, the notice not being in the name of the co. was bad; (2) the liquidator appointed in the voluntary winding up of a co. may serve a bkpcy. notice, under Bkpcy. Act, 1883 (c. 52), upon a judgment debtor of the co.—*Re* WINTERBOTTOM, *Ex p.* WINTERBOTTOM (1886), 18 Q. B. D. 446; 56 L. J. Q. B. 238; 56 L. T. 168; 4 Morr. 5, D. C.

Annotations:—As to (1) *Refd.* *Re* Bassett, *Ex p.* Lewis (1895), 2 Mans. 177; *Re* De Murrieta, *Ex p.* South American & Mexican Co. (1896), 12 T. L. R. 238. *Generally, Mentd.* *Re* Bates, *Ex p.* Lindsey (1887), 4 Morr. 192; *Re* Arkell, *Ex p.* Arkell (1889), 6 Morr. 182; *Re* Judgment Debtor, [1908] 2 K. B. 474; *Re* A Debtor, [1911] 2 K. B. 718.

6869. ——— Power to prove in bankruptcy proceedings—Mode of proof.]—The liquidator of a co. in voluntary liquidation, in his proof in bkpcy. of a debt due to the co., described himself as "the liquidator" of the co., & in the form the proxy at the foot of & on the same sheet of paper said "I appoint A. & B. jointly & severally my proxy" & signed both in his own name & with no other description:—*Held*: the description of the official liquidator was sufficient, & the proxy was good.—*Re* POOLEY, *Ex p.* TAYLOR (1877), 36 L. T. 679; 25 W. R. 641, C. A.

6870. ——— Undertaking to set apart out of assets sufficient sum to meet costs—Distribution of assets pending appeal from judgment in company's favour—Liability of liquidators on reversal of judgment.]—Defts. took out a summons for an order that pltf. co., which was in voluntary liquidation, should give security to the amount of £200 for the costs of the action. One of the

IRON CO., LTD. (1893), 11 N. Z. L. R. 640.—N.Z.

p. **Power to borrow—For the purposes of winding up—Effect.]—**A liquidator of a co. being voluntarily wound up has power to borrow for the purposes of winding up, including the working of steamers & docks, on the

Sect. 37.—Voluntary winding up: Sub-sect. 4, C., D., E. & F. (a).]

liquidators made an affidavit that they would set apart a sum sufficient to meet any possible claim for debts.' costs in the action. The master made an order that the co. should give security unless the liquidators within four days gave an undertaking in the terms of the affidavit, in which case there was to be no order. The liquidators gave an undertaking to set apart out of the assets of the co. a sum sufficient to meet the costs, if any, which pl'tfs. might be liable to pay to debts. in the action. Pl'tfs. succeeded at the trial, but the judgment in their favour was reversed by the Ct. of Appeal, & entered for debts. with costs. Debts.' taxed costs, including the costs of the action & of the appeal, amounted to £790:—*Held*: upon the true construction of the undertaking & of the summons & order for security, the liquidators were only liable personally to the extent of £200.—*HAWKINS HILL CONSOLIDATED GOLD MINING CO. v. WANT, JOHNSON & CO.* (1893), 62 L. J. Q. B. 505; 69 L. T. 297; 9 T. L. R. 558; 4 R. 577, C. A.

6871. As regards unclaimed or undistributed assets—Duty to pay assets into Companies Liquidation Account—Application of Companies (Winding up) Act, 1890 (c. 63), s. 15.]—The Board of Trade can enforce the provisions of the above sect. against liquidators, not only in a winding up by order of the ct., but also in a voluntary winding up, whether continued under the supervision of the ct. or not.

Motions by the Board of Trade against liquidators of cos. in voluntary liquidation for payment of undistributed assets into the Cos. Liquidation Account, granted.—*Re STOCK & SHARE AUCTION & BANKING CO., Re SPIRAL WOOD CUTTING CO., Re HULL LAND & PROPERTY INVESTMENT CO.*, [1894] 1 Ch. 736; 63 L. J. Ch. 245; 70 L. T. 235; 42 W. R. 300; 10 T. L. R. 270; 38 Sol. Jo. 254; 1 Mans. 125; 8 R. 172.

Annotation:—Refd. Re New Terras Tin Mining Co., [1894] 2 Ch. 344.

6872. ——— What are undistributed assets.]—In Dec. 1895, a limited co., being unable to pay the interest on its debentures, went into voluntary liquidation. On Apr. 15, 1896, the ct. sanctioned a scheme under the Joint-Stock Cos. Arrangement Act, 1870 (c. 104), which provided that the uncalled capital of the co. should be called up by the voluntary liquidators, & that they should thereout, by Sept. 1897, pay sums amounting to a dividend of 12s. 6d. in the pound to the debenture-holders, the balance being payable in 1902, & the interest being kept down in the meantime. Any surplus from calls, after payment of the first dividend, might be applied, according to the liquidators' discretion, for management & other expenses. The scheme also gave the liquidators power to borrow for the purpose of protecting & developing the assets. On the debenture-holders being paid off the winding up was to be stayed, & the co. was to resume business. By a trust deed executed in pursuance of the scheme the liquidators covenanted to apply the proceeds of the call in accordance with the scheme. In May & Sept. 1897, the liquidators filed with the Registrar of Joint-Stock Cos. the statements of account required by 1890 (Winding-up) Act, s. 15, but they refused to pay into the Cos. Liquidation Account the surplus

of calls shown by the accounts to be still in their hands or under their control, although directed to do so by the Board of Trade. On a motion by the Board for an order to comply with its direction:—*Held*: the money was not "undistributed assets" within 1890 (Winding-up) Act, s. 15 (3), & the liquidators could not be called on to pay it into the Cos. Liquidation Account.—*Re LAND MORTGAGE BANK OF FLORIDA*, [1898] 1 Ch. 444; 67 L. J. Ch. 183; 78 L. T. 156; 46 W. R. 333; 14 T. L. R. 203; 42 Sol. Jo. 253; 5 Mans. 178.

6873. ———.]—The balance of a fund set apart for the payment of bondholders in a co. in liquidation, the bonds not becoming payable until 1950, not having been claimed for over 10 years in answer to advertisements, the ct. refused to make an order that the unclaimed balance should be handed over to the liquidator on behalf of the shareholders.—*ELKINS v. CAPITAL GUARANTEE SOCIETY* (1900), 16 T. L. R. 423, C. A.

D. Remuneration of Liquidator.

6874. What is—Liquidator acting without remuneration from company—Gift from shareholders on conclusion of liquidation.]—Applt. had been secretary & liquidator of a co. without any remuneration for his services, & on the termination of his employment he received a gift of money from the shareholders:—*Held*: the payment was not a profit of an office, but rather a testimonial for past services.—*COWAN v. SEYMOUR*, [1920] 1 K. B. 500; 89 L. J. K. B. 459; 122 L. T. 465; 36 T. L. R. 155; 64 Sol. Jo. 259; 7 Tax Cas. 372, C. A.

6875. Whether liquidator entitled to—Irregular winding up—Quantum meruit.]—A co., which had resolved on voluntary winding up by a resolution, which was subsequently set aside by the ct. as invalid, appointed applt. to be liquidator. On a compulsory winding up of the co. applt. sought to prove as a creditor for work done & expenses incurred by him while purporting to act as liquidator, & before he knew of the invalidity of his appointment:—*Held*: neither under 1862 Act, s. 67, nor on a *quantum meruit* was he entitled to be paid anything for services rendered as liquidator; but in so far as any work then done by him had been useful to the co. for business purposes unconnected with the voluntary liquidation, or had been used by the official receiver & liquidator in the compulsory winding up with full knowledge of the facts, he was entitled to claim reasonable remuneration.—*Re ALLISON, JOHNSON & FOSTER, LTD., Ex p. BIRKENSHAW*, [1904] 2 K. B. 327; 91 L. T. 66; 53 W. R. 285; 20 T. L. R. 493; *sub nom. Re ALLISON, JOHNSON & FOSTER, LTD., Ex p. CARLILL, BIRKINSHAW & FERGUSON*, 73 L. J. K. B. 763, D. C.

6876. How amount fixed—Necessity for approval of court.]—A co. which was being wound up under a compulsory winding-up order was liable for the costs & expenses of the voluntary winding up of other cos., the undertakings of which it had purchased. In assessing the amount payable as remuneration to the voluntary liquidator:—*Held*: (1) the ct. would not sanction an alleged practice of accountants to charge for all letters written, irrespective of their character, as having taken half an hour of the principal's time (charged for at a certain rate) in the preparation; (2) there

credit of the assets of the co. without security.—*Re INDIAN COMPANIES ACT*, 1882, *Re GANGES STEAM TUG CO., LTD., Ex p. DELHI & LONDON BANK*,

LTD. (1890), 1 L. R. 18 Calc. 31.—*IND.*

q. Delegation.]—The duties imposed upon liquidators by Companies Act,

s. 177, cannot be delegated by them to others.—*KESAVALOO NAIDU v. MURUGAPPA MUDALI* (1906), 1 L. R. 30 Mad. 22.—*IND.*

was nothing to bind the ct. to apply the scale adopted by the Chancery judges & sanctioned by the Lord Chancellor in 1868, which only applied to official liquidators; (3) each case as to the remuneration of a voluntary liquidator must be considered with regard to its own particular circumstances.—*Re AMALGAMATED SYNDICATES, LTD.*, [1901] 2 Ch. 181; 70 L. J. Ch. 726; 84 L. T. 864; 17 T. L. R. 486.

Annotation:—*As to (3) Rejd. Re Allison, Johnson & Foster, Ex p. Birkenshaw*, [1904] 2 K. B. 327.

— *Under scheme of arrangement.*—*See* No. 6872, *ante*.

6877. — *Subject to taxation.*—*Re WATER-PROOF MATERIALS CO., LTD.* (1893), 37 Sol. Jo. 231.

6878. — *On a summons to fix the remuneration of voluntary liquidators the registrar adopted as his guide the scale of remuneration applicable to trustees in bkpcy., there being no evidence of any special difficulty in the winding up:—Held: the decision of the registrar was right.*—*Re CARTON, LTD.* (1923), 128 L. T. 629; 39 T. L. R. 194.

E. Costs.

6879. Whether personally liable—Costs of solicitor employed in liquidation.—A liquidator appointed under a resolution to wind up voluntarily is not personally responsible to the solr. employed by him in the affairs of the liquidation for any of the costs of such liquidation.—*Re TRUEMAN'S ESTATE, HOOKE v. PIPER* (1872), L. R. 14 Eq. 278; 41 L. J. Ch. 585; 20 W. R. 700.

Annotations:—*Folld. Re Anglo-Moravian Hungarian Junction Ry., Ex p. Watkin* (1875), 1 Ch. D. 130. *Rejd. Re Sanitary Burial Assocn.*, [1900] 2 Ch. 289.

6880. Of appeal—Without leave—Appeal unsuccessful.—*Re CITY & COUNTY INVESTMENT CO., No. 7132, post.*

Of appearance on petition for compulsory winding up.—*See* No. 7240, *post.*

See, also, Sub-sect. 12, B., post.

PART III. SECT. 37, SUB-SECT. 4.—F. (a).

6881 i. Jurisdiction of court to remove.—If the ct. thinks it is for the substantial & real interests of the persons interested in the winding up of a co. under the Cos. Statute 1864, that a liquidator should be removed, it has power under s. 124 to remove him & appoint another in his place, as for "due cause shown," although he has been guilty of no impropriety whatever. The fact that another person will act as liquidator gratuitously is sufficient reason for removing a liquidator who is receiving a commission.—*Re ROYAL STANDARD INVESTMENT CO., LTD.* (1889), 15 V. L. R. 822.—AUS.

6881 ii. — *Liquidators appointed by the co. under Companies Act, s. 177, can be removed only by the ct. under s. 185.*—*KESAVALOO NAIDU v. MURUGAPPA MUDALI* (1906), 1 L. R. 30 Mad. 22.—IND.

6882 i. When removal ordered—General rule.—The liquidator in a voluntary liquidation of a co. under the Companies Statute, 1864, may be removed under Cos. Act, 1890 (No. 1074), s. 127, for "due cause," i.e. what is best for the persons interested in the liquidation, including personal unfitness of the liquidator, either from his character or from his connection with other parties, such as directors, debtors, or others against whom he might have to proceed, or from circumstances with which he is mixed up.—*Re FEDERAL BANK OF AUSTRALIA, LTD.* (1894), 20 V. L. R. 199.—AUS.

6882 ii. — *GAUNT'S EXE- J.—VOL. X.*

CUTORS v. LA MANCHA SYNDICATE, LTD. (LIQUIDATORS) (1907), 44 Sc. L. R. 316.—SCOT.

6882 iii. — *In a voluntary winding up the ct. will not remove a liquidator for not taking proceedings to recover debts due to the co. where, on the materials before it, it is unable to say whether it is or is not in the interests of the creditors that such proceedings should be taken. Under Companies Act, 1882, s. 201, the power of the ct. to remove a liquidator in a voluntary winding up is not restricted to cases where the application is made by a contributory; but where such an application is made by a creditor he should show that the other creditors are parties to the application, or very conclusively that such removal is for the benefit of all the creditors. *Semble*: a liquidator in such case might be removed who refused to take such proceedings on being indemnified in respect of the costs incurred in so doing.*—*Re WHITE CLIFFS DREDGING CO., LTD.* (1893), 11 N. Z. L. R. 711.—N.Z.

6882 iv. — *On a petition by shareholders for the removal by ct. of a liquidator appointed on the voluntary liquidation of a co.:—Held: (1) although other matters than personal unfitness of the liquidator may amount to due cause, such matters must be proved, & must show a case of substantial advantage to the co. or liquidation by the removal of the liquidator; (2) there is nothing in the Cos. Act, 1882, which gives to individual shareholders the right of inspection of the accounts & informa-*

F. Removal and Appointment of New Liquidator.

(a) Removal of Liquidator.

See, now, 1908 Act, s. 186 (ix).

6881. Jurisdiction of court to remove.—The ct. has full power to remove a liquidator or liquidators either under a voluntary resolution to wind up, or a compulsory order to wind up under the supervision of the ct.—*Re UNITED MERTHYR COLLIERIES CO., LTD.* (1867), 16 L. T. 170.

6882. When removal ordered—General rule.—The ct. has jurisdiction under 1862 Act, s. 141, to remove liquidators appointed at a meeting of a co. at which resolutions for a voluntary liquidation have been passed where no personal unfitness is suggested against them, if it is of opinion that it is for the general benefit of the co. that they should be removed; but will be cautious in exercising that jurisdiction where the shareholders are alone interested in the question, & they almost unanimously support liquidators whom they have appointed. The ct. will not hear individual creditors of a co. in opposition to an application by a creditor which is opposed on behalf of the co. itself.—*Re BRITISH NATION LIFE ASSURANCE ASSOCN.* (1872), L. R. 14 Eq. 492; *sub nom. Re BRITISH NATION ASSURANCE ASSOCN., Ex p. HENDERSON*, 20 W. R. 651.

Annotation:—*Rejd. Re Sir John Moore Gold Mining Co.* (1879), 12 Ch. D. 325.

6883. — *The power to remove a liquidator for due cause shown is not merely discretionary; some unfitness in the liquidator must be shown. The fact that the liquidator's interest conflicts with his duty, as where a serious claim is made against him & directors, & he offers opposition & takes a strong view in favour of the directors, is sufficient cause for his removal.*—*Re SIR JOHN MOORE GOLD MINING CO.* (1879), 12 Ch. D. 325; 28 W. R. 203, C. A.

Annotations:—*Expld. Re Adam Eyton, Ex p. Charlesworth* (1887), 36 Ch. D. 299. *Rejd. Re Oxford Building &*

*tion from the liquidator without an order of ct.; & the refusal by a liquidator of an application for such inspection & information, made by shareholders who had assumed a hostile attitude, was no ground for his removal. *Qu.*: whether an allegation of misrepresentation in the prospectus to which the liquidator as a promoter was alleged to be a party, & whereby, it was alleged, petitioners were induced to take shares, would, if proved, be a ground for the removal of the liquidator, such misrepresentation affording a ground of action against the promoters to petitioners only, & not to the co. in liquidation.*

It was no ground for removing the liquidator that he was employing as his solr. a solr. with whom an invalid agreement had been entered into by the co. on its formation.—*Re MERCANTILE FINANCE & AGENCY CO., LTD.* (1895), 13 N. Z. L. R. 472.—N.Z.

r. Interest opposed to duty—Proof of misconduct unnecessary.—Where liquidators of a co. appointed under a voluntary winding up have claims adverse to the co. so that their duty conflicts with their interest, the ct. will remove them after continuing the winding up under its supervision.

The words "due cause shown" in the Cos. Statute, 1864, s. 124, do not necessitate any misconduct on the part of the liquidator to be shown to warrant his removal.—*Re FEDERAL HAT CO., LTD.* (1887), 13 V. L. R. 88.—AUS.

s. Application for removal—Who may apply—Contributory in default.—

Sect. 37.—Voluntary winding up: Sub-sect. 4, F. (a), (b), & G.; sub-sect. 5, A. & B.]

Investment Co. (1883), 49 L. T. 495; *Re Rubber & Produce Investment Trust* (1915), 84 L. J. Ch. 534.

Interest opposed to duty.]—*Re DEVONSHIRE SILKSTONE COAL CO.*, [1878] W. N. 71.

6885. ———.]—*Re SIR JOHN MOORE GOLD MINING CO.*, No. 6883, *ante*.

6886. ——— Liquidator of unsound mind.]—A co. registered under the Cos. Acts, which was formerly engaged in working a mine within & subject to the jurisdiction of the Stannaries, was wound up voluntarily, & the mine was sold & disposed of. The liquidator subsequently became of unsound mind, & it was desirable that some person should forthwith be appointed liquidator of the co. in his place. An application was accordingly made to the High Ct. for that purpose. The case not being expressly provided for by 1862 Act, ss. 140, 141, the question arose as to whether the ct. had jurisdiction to remove a lunatic liquidator. Another question was, whether the application was properly made to the High Ct., or whether it should have been made to the Stannaries Ct.:—*Held*: under the circumstances, the High Ct. had jurisdiction to make the order asked for, notwithstanding that there might be a concurrent jurisdiction in the Stannaries Ct.; & an order was made removing the liquidator, & directing the usual reference to chambers to appoint a new liquidator.—*Re NORTH MOLTON MINING CO., LTD.* (1886), 54 L. T. 602; 34 W. R. 527.

6887. ——— Employment of solicitor other than company's solicitor.]—*Re COOPERS, LTD.* (1897), 14 T. L. R. 144, C. A.

6888. ——— Animus against persons connected with company.]—*Re URMSTON GRANGE S.S. CO., LTD.* (1901), 17 T. L. R. 553; 45 Sol. Jo. 555, C. A.

6889. ——— Liquidator with intimate business connection with directors.]—Where it appeared that the liquidator in the voluntary winding up of a co. had an intimate business connection with several of the directors of the co., who were also directors of other cos. between which & the co. in question there had been dealings requiring investigation, the ct., being of opinion that he was not in a position to take an independent course in making the necessary investigations, made an order removing him from the office of liquidator, & appointed another liquidator in his place.—*Re CHARTERLAND GOLDFIELDS, LTD.* (1909), 26 T. L. R. 132.

Annotation:—Distd. *Re Amalgamated Properties of Rhodesia* (1914), 30 T. L. R. 405.

6890. ——— Office vacated before application for removal.]—On an application by a shareholder in a limited co., under 1908 Act, s. 186 (ix), for the removal of the liquidator on the alleged ground that he was not in an independent position so as to be able to make the strict investigation which the affairs of the co. were said to require, the ct. refused the application on the ground that the directors impeached were no longer directors & that appct. had no support from the other shareholders.—*Re AMALGAMATED PROPERTIES OF RHODESIA, LTD.* (1914), 30 T. L. R. 405.

6891. ——— Joint liquidator receiver in debenture-holder's action.]—It is undesirable that the

receiver for debenture-holders should be appointed one of two joint liquidators of a co.

The creditors of a private co., at meetings held previous to the liquidation of the co., desired that the co. should go into voluntary liquidation, & that K. & M. should be appointed joint liquidators. H. had already been appointed receiver & manager for the debenture-holders in a debenture-holders' action. The co. passed a resolution for voluntary winding up, & appointed K. & H. to be joint liquidators. Subsequently the statutory meeting of the creditors was held, & the creditors applied to the ct. that H. might be removed from his office of liquidator & M. appointed in his place to act jointly with K.:—*Held*: the application of the creditors must be granted.—*Re KARAMELLI & BARNETT, LTD.*, [1917] 1 Ch. 203; 86 L. J. Ch. 207; [1917] H. B. R. 102; *sub nom. Re KARIMELLI & BARNET, LTD.*, 115 L. T. 753.

6892. Application for removal—Who may apply.]—Every application to the ct. in a voluntary winding up must be under 1862 Act, s. 138. Consequently no person other than the liquidator or a contributory or creditor of a co. has any *locus standi* to apply under 1862 Act, s. 141, for the removal of a liquidator & the appointment of a new liquidator in his place.—*Re NEW DE KAAP, LTD.*, [1908] 1 Ch. 589; 77 L. J. Ch. 374; 98 L. T. 665; 15 Mans. 149.

6893. Issue of summons for removal—Right of applicant to circularise members—Containing charges against liquidator.]—Where a summons to remove a liquidator in a voluntary winding up is taken out on behalf of appct. & all other shareholders, the ct. will not, on the ground of contempt, restrain appct. from issuing a circular to the shareholders asking their support to the summons, though it contains charges against the liquidator, made *ex parte*, to justify the application.—*Re NEW GOLD COAST EXPLORATION CO.*, [1901] 1 Ch. 860; 70 L. J. Ch. 355; 17 T. L. R. 312; 8 Mans. 296.

6894. Effect of removal—& of other liquidators not being appointed—On order of committal—For default in obeying order for payment of costs.]—*R. v. LONDON (LORD MAYOR)*, *Ex p. BOALER*, No. 6909, *post*.

(b) Appointment of New Liquidator.

See, now, 1908 Act, s. 186 (ix).

6895. When court may appoint—"On due cause shown"—Appointment of additional liquidator—At instance of existing liquidator.]—Sects. 138 & 141 of 1862 Act, enable the ct. having jurisdiction to wind up cos. to appoint a liquidator in a voluntary winding up, not only where there is no liquidator acting or in the place of a liquidator who is by the ct. removed from his office, but also in any other case where due cause is shown for appointing a liquidator, *e.g.* when an additional liquidator is required, & the appointment may be made on the application of the existing liquidator.—*Re SUNLIGHT INCANDESCENT GAS LAMP CO.*, [1900] 2 Ch. 728; 69 L. J. Ch. 873; 83 L. T. 406.

6896. ——— Retirement of existing liquidator.]—The ct. has jurisdiction under 1862 Act, s. 141, to appoint a new liquidator of a co. in voluntary liquidation not only on the removal but also on the retirement of an existing liquidator.—*Re*

The fact that a contributory of a co. is in default in payment of his calls, is not a bar to his petitioning for the removal of a liquidator of the co. on a winding up if he is not disputing his liability.—*Re ROYAL STANDARD IN-*

VESTMENT CO., LTD. (1889), 15 V. L. R. 822.—AUS.

t. ——— Procedure.]—Where contributories of a co. in voluntary liquidation complain of the conduct of

liquidators in the winding up, & desire an inquiry under the Indian Act, 1882, s. 214, the proper procedure is by summons in chambers.—*Re JEHANGIR KARANI & CO.* (1894), 1 L. R. 19 Bom. 88.—IND.

SHEPPEY PORTLAND CEMENT CO., LTD. (1892), 68 L. T. 83; 9 T. L. R. 119; 3 R. 191.

— **Where in best interests of all concerned.**—*Re* **BARON CIGARETTE MACHINE CO., LTD.** (1912), 28 T. L. R. 394.

G. Committee of Inspection.

See cases infra.

SUB-SECT. 5.—COMMENCEMENT AND CONSEQUENCES OF WINDING UP.

A. Commencement of Winding up.

6898. Time of—Confirmation of resolution for winding up.—A voluntary winding up under 1862 Act, s. 132, commences at the time of the confirmation of the resolution passed for the winding up.—*Re* **CHINA S.S. CO., DAWES' CASE** (1868), L. R. 6 Eq. 232; 37 L. J. Ch. 901; 16 W. R. 995.

Annotations:—Apprvd. Re **Smith, Knight, Weston's Case** (1868), 4 Ch. App. 20. *Refd. Re* **Imperial Land Co. of Marseilles, Ex p. Colborne & Strawbridge** (1871), L. R. 11 Eq. 478.

6899. ———.—A voluntary winding up commences at the time of the passing of the resolution confirming the first resolution passed for such winding up.—*Re* **OTTOMAN CO., LTD., HORNBY'S CASE** (1868), 37 L. J. Ch. 929; 19 L. T. 237; 16 W. R. 1164.

Annotation:—Refd. Re **Imperial Land Co. of Marseilles, Ex p. Colborne & Strawbridge** (1871), L. R. 11 Eq. 478.

6900. ——— Convention of meeting to confirm resolution for winding up.—As the co. had passed a resolution for its voluntary winding up, & had convened a meeting for a future date to confirm it, it was held to be in liquidation for the purposes of this case.—**LAMB v. SAMBAS RUBBER & GUTTA PERCHA CO., LTD.**, [1908] 1 Ch. 845; 77 L. J. Ch. 386; 98 L. T. 633; 15 Mans. 189.

Annotation:—Mentd. Jones v. Pacaya Rubber & Produce Co., [1911] 1 K. B. 455.

B. Consequences of Winding up.

6901. General rule.—D. was a shareholder in a co. having power to subscribe for or take shares in, to enter into treaty, act or unite with, buy up or absorb, any other co. having the like objects, & to sell or transfer its business & property to any other co. or individuals. The co. agreed that it would amalgamate with another, & that, to facilitate the amalgamation, it should be wound up voluntarily, & the business & assets be merged in the amalgamated co. which was to be governed by arts. of its own. A resolution was also passed

that the shareholders in the original co. were to take shares in the amalgamated one, in exchange for those which they previously held. D. never in any way assented to the amalgamation or accepted the new shares:—*Held*: that he was not a partner or shareholder in the amalgamated co.

After a resolution has been come to by a co. for a voluntary winding up, it exists as a co. for the mere purpose of being beneficially wound up.—*Re* **LONDON, BOMBAY & MEDITERRANEAN BANK, LTD., DREW'S CASE** (1867), 36 L. J. Ch. 785; 16 L. T. 657; 15 W. R. 1057.

6902. ———.—*Re* **PINTO SILVER MINING CO.**, No. 7158, *post*.

On transfer of shares.—*See* Sect. 23, sub-sects. 1, 2, C. (c), 14; Sect. 13, sub-sect. 5, B. (g), *ante*.

On transfers of debentures.—*See* Sect. 34, sub-sect. 3, I., *ante*.

On right to inspect company's books.—*See* Nos. 1209, 1299, *ante*.

On secretary & other officers—Whether resolution equivalent to dismissal.—*See* Sect. 29, sub-sect. 1, B., *ante*.

6903. On contract—Entered into after liquidation—Required for beneficial winding up—Burden of proof.—Pltf. co. sued defts. for breach of contract. The contract was of a kind which it was the business of the co. to make, but it was entered into after the co. had commenced proceedings for a voluntary winding up. The contract & the breach of it were proved:—*Held*: it lay on defts. to show that the contract was not required for the beneficial winding up of the co., & in the absence of such evidence pltf. were entitled to succeed.—**HIRE PURCHASE FURNISHING CO. v. RICHENS** (1887), 20 Q. B. D. 387; 58 L. T. 460; 36 W. R. 365; 4 T. L. R. 184, C. A.

6904. ——— Whether non-requirement defence to action for goods sold & delivered.—In an action by a co. in voluntary liquidation for goods sold & delivered in pursuance of a contract entered into by deft. with the liquidator:—*Held*: the fact that the contract was not required for the beneficial winding up of the co. within 1862 Act, s. 131, did not constitute a defence to the action.—**BATEMAN & CO. v. BALL** (1887), 56 L. J. Q. B. 291.

Annotation:—Consd. Hire Purchase Furnishing Co. v. Richens (1887), 20 Q. B. D. 387.

— **Entered into before liquidation—Option to take shares.**—*See* No. 1470, *ante*.

6905. ——— Lease—Proviso for re-entry on liquidation.—**HORSEY ESTATE, LTD. v. STEIGER**, No. 7144, *post*.

PART III. SECT. 37, SUB-SECT. 4.—G.

a. Appointment of committee of inspection—Consent of liquidator.—A petition having been presented in terms of Cos. (Consolidation) Act, 1908, s. 188, for the appointment of a committee of inspection in the voluntary winding up of a co., the ct., on the production of a letter from the liquidator consenting to the application, granted the prayer of the petition.—**MARLOW, PETITIONER**, [1912] S. C. 625.—**SCOT**.

b. ——— Application by liquidator.—In the course of the voluntary winding up of a co. the creditors appointed in terms of Cos. (Consolidation) Act, 1908, s. 188, to apply to the ct. for appointment of a committee of inspection failed *per incuriam* to present the petition within the statutory fourteen days. On application, thereafter, by the liquidator, the ct., in the exercise of its *nobile officium*, granted the prayer of the petition.—

CLYDE MARINE INSURANCE CO. (LIQUIDATOR) (1921), 58 Sc. L. R. 324.—**SCOT**.

c. ——— When the court will sanction—If generally expedient—Consent of liquidator.—Cos. (Consolidation) Act, 1908, s. 188, makes provision for the appointment of a committee of inspection in a voluntary winding up, but the Act nowhere defines the duties or powers of such a committee in the winding up of a Scottish co. A creditor of a co. in voluntary liquidation acting on behalf of the creditors of the co. presented a petition for the appointment of (1) a liquidator to act jointly with the liquidator appointed by the ct., & (2) a committee of inspection. The petition was presented with the consent of the existing liquidator. The ct., in view of the expressed opinion of the petitioner & the liquidator that such a committee would serve a useful purpose, granted the prayer of the

petition.—**WEBB, PETITIONER**, [1922] S. C. 226; *sub nom. Re* **HALL & CO., LTD.**, *Ex p. WEBB*, 59 Sc. L. R. 151.—**SCOT**.

PART III. SECT. 37, SUB-SECT. 5.—B.

d. General rule—Act of bankruptcy.—The voluntary winding up of a co. is the same in effect as an assignment from an individual to a trustee for creditors, which has always been regarded by the cts. as an act of bkpcy., even before it was so made by statute.—*Re* **COLONIAL INVESTMENT CO. OF WINNIPEG** (1913), 26 W. L. R. 361.—**CAN**.

e. On contract—Entered into before liquidation—Contract to pay royalties on patent.—The voluntary winding up of a co. is not in itself a breach of a continuing contract, nor a termination of a contract, but the acts of the parties may create a position which has the result of bringing about a breach of the contract & also of

Sect. 37.—Voluntary winding up: Sub-sect. 5, B.; sub-sects. 6 & 7, A., B. & C.; sub-sect. 8.]

6906. —A proviso in a lease for re-entry if the lessees, being a co., should enter into liquidation either compulsory or voluntary, applies to the case of a solvent co., going into voluntary liquidation for the purpose of reconstruction or amalgamation only, & is "a condition for forfeiture on the bkpcy. of the lessee" within the Conveyancing & Law of Property Act, 1881 (c. 45), sect. 14, sub-sect. 6.—**FRYER v. EWART**, [1902] A. C. 187; 71 L. J. Ch. 433; 9 Mans. 281; *sub nom.* **WATNEY, COMBE, REID & Co. v. EWART**, 86 L. T. 242; 18 T. L. R. 426, H. L.; *affg.* S. C. *sub nom.* **EWART v. FRYER**, [1901] 1 Ch. 499, C. A.

Annotations:—Mentd. **Hurd v. Whaley** (1918), 118 L. T. 593; **Civil Service Co-op. Soc. v. McGrigor's Trustee**, [1923] 2 Ch. 347.

6907. — **Effect of occupation by liquidator.**—When a co. is being voluntarily wound up & the liquidator elects, for the benefit of the creditors, to occupy leasehold premises that are part of the estate, the landlord is entitled to have the covenants of the lease carried out, & to be paid in full out of the assets got in all claims due & owing for repairs under the covenants.—**Re LEVI & Co.**, [1919] 1 Ch. 416; 88 L. J. Ch. 233; 120 L. T. 531; 35 T. L. R. 334; [1918-19] B. & C. R. 154; *sub nom.* **Re LEVI & Co., LTD.**, 63 Sol. Jo. 373.

6908. On liability in tort—Nuisance by company—Injunction after winding up.—The fact that a co. which, by its works, caused a nuisance to pltf. has gone into liquidation & that the works have stopped before the trial, is not of itself sufficient to disentitle pltf. to an injunction.—**CHESTER (DEAN & CHAPTER) v. SMELTING CORPN., LTD.** (1901), 85 L. T. 67; 17 T. L. R. 743.

6909. On committal order—For default in obeying order for payment of costs to company.—B. preferred an information against a co. for not keeping a register of members. The charge was dismissed, & B. was ordered to pay costs, but made default, & in default of distress, on a judgment summons, upon proof of means, an order was made against him for committal:—**Held**: the fact that at the date of the hearing of the informa-

bringing the contract to an end, otherwise than as a basis for proving damages for breach.

The patentee of an invention granted a licence to a co. to use the process for a term of years in consideration of a royalty. During the term the licensee informed the licensor that it intended to cease operations, & it afterwards went into voluntary liquidation. The licensor then lodged a proof of debt for damages for breach of contract:—**Held**: the co.'s action amounted to a refusal to carry out the contract which the licensor had accepted & he was then entitled to sue for damages, such damages being the actual loss arising from the breach of contract, in calculating which the possibility of the process being beneficially used by the licensor during the balance of the term, should be taken into account.—**Re TRUGRAIN, ETC.**, [1921] V. L. R. 653.—**AUS.**

PART III. SECT. 37, SUB-SECT. 6.

6911i. Rights of—Interest on debts.—After the commencement of voluntary liquidation a creditor may still claim interest from that date, & uncalled capital is available as well as other assets.—**Re MURRAY RIVER STOCK STATION & COMMISSION AGENCY, LTD.** (1889), 24 V. L. R. 662; 25 V. L. R. 37.—**AUS.**

tion the co. was in voluntary liquidation, that before the date of the order for commitment the liquidators had been removed & no others were appointed, did not invalidate the order of committal.—**R. v. LONDON (LORD MAYOR), Ex p. BOALER**, [1893] 2 Q. B. 146; 63 L. J. M. C. 29; 57 J. P. 633; 42 W. R. 159; 9 T. L. R. 508; 5 R. 554.

SUB-SECT. 6.—CREDITORS.

6910. Remedies of—Creditor unable to get paid.—**Re CITY & COUNTY INVESTMENT Co., LTD.**, No. 7132, *post*.

6911. Rights of—Interest on debts.—Jud. Act, s. 10, applies the rule in bkpcy. as to interest on debts to the winding up of an insolvent co., although the winding up is voluntary.—**Re SALT (THOMAS) & Co., LTD.** (1908), 98 L. T. 558.

— **Under reconstruction.**—See Sub-sect. 13, *post*.

— **To prove.**—See Sub-sect. 8, *post*.

— **As regards distribution of assets.**—See Sub-sect. 9, C., *post*.

— **To levy execution & distress.**—See Sub-sect. 11, *post*.

SUB-SECT. 7.—PROPERTY AVAILABLE FOR DISTRIBUTION AMONGST CREDITORS AND CONTRIBUTORIES.

A. Examination of Persons in regard to Property.

6912. Who may apply for examination—Liquidator—Not entitled ex debito justitiæ.—A voluntary liquidator who applies to the ct. under 1862 Act, s. 138, for an order under sect. 115, to examine a person in respect of the affairs of the co. is not entitled as of right to the order, but must satisfy the ct. that it will be just & beneficial for the purposes of the winding up.—**Re METROPOLITAN BANK, HEIRON'S CASE** (1880), 15 Ch. D. 139; 49 L. J. Ch. 651; 43 L. T. 299, C. A.

Annotations:—Consd. **Re Great Kruger Gold Mining Co.**, *Ex p. Barnard*, [1892] 3 Ch. 307. **Refd.** **Re London & Lancashire Paper Mills Co.** (1888), 57 L. J. Ch. 766; **Re North Australian Territory Co.** (1890), 45 Ch. D. 87; **Re A Debtor, Ex p. Goldstein**, [1917] 1 K. B. 558.

Rate—Money deposited with company.—A person deposited money with a co. on current account at call at the rates of interest for the time being allowed by the co. The terms of the deposit were that the depositor could require payment on demand of the whole or any part of the money for the time being at his credit, & interest was calculated *de die in diem* on his daily balance. The depositor made demand in writing for the principal sum & interest, & gave notice that unless the amount was paid on that day he would charge interest on the amount due for the time being at 8 per cent per annum until repayment. Payment was not made on that day, & the next day the co. went into voluntary liquidation:—**Held**: (1) there was a breach of contract on the part of the co. in not paying the amount when demanded, & damages were recoverable for its wrongfully withholding the money; (2) the amount of damages recoverable was simple interest at 6 per cent, being the rate allowed by the ct. as being the value of money.—**Re COMMERCIAL PROPERTY & FINANCE Co., LTD. v. DICK** (1910), 30 N. Z. L. R. 147.—**N.Z.**

g. — Vendor to company—Having judicially established lien over assets.—A syndicate of nine persons owning land formed themselves into a

co. & sold the land to the co. on terms of deferred payment. Part of the consideration for the sale was the issue of partially contributing shares to the syndicate. W., one of the members of the syndicate, sold his shares in the co., & in a suit brought by him against the co., & other members of the syndicate, prayed for, & obtained, in default of appearance by defts., a decree declaring that he was entitled to a lien on the land for his share of the balance of the purchase-money. The co. went into voluntary liquidation, & the liquidators took out a summons under Companies Act, s. 189, to determine whether W. was entitled to a lien in priority to that of his covendors, the other members of the syndicate:—**Held**: the decree establishing W.'s lien did not entitle him to priority over his covendors.—**Re CITY AVENUE Co.** (1891), 12 N. S. W. L. R. 193, 241.—**AUS.**

PART III. SECT. 37, SUB-SECT. 7.—A.

h. Who may apply for examination—Liquidator—As to entry of names in share register.—The ct. has power, upon an *ex parte* application by a liquidator in the course of a voluntary winding up of a co., to order witnesses to be examined as to the trade dealings, estate, & effects of the co. Information as to the names appearing on the share register, & as to the manner in

6913. Contributory—On making out *prima facie* case—& without instituting proceedings.]

In a voluntary winding up a contributory is entitled under 1862 Act, s. 115, on making out a *prima facie* case & without instituting any proceedings, to summon before the ct. the liquidator to give information touching the affairs of the co.

In a voluntary winding up a contributory's petition for a supervision order was dismissed on demurrer. On an application by him under sect. 115 for a summons to examine the liquidator:—*Held*: the charges in the petition & the formal statutory affidavit verifying the statements in the petition could be read in support of the application.

A co. being voluntarily wound up, the ct. will not make a supervision order under any circumstances unless the resolution for winding up has been improperly obtained.—*Re* SIR JOHN MOORE GOLD MINING Co. (1877), 37 L. T. 242; 25 W. R. 900.

6914. — Party not under control of court.]—

The ct. will not make a general order for the examination of an officer of a co. under 1862 Act, ss. 115 & 138, on the application of a person not under the control of the ct.—*Re* PENYSYFLOG MINING Co. (1874), 30 L. T. 861.

Annotation:—*Consd.* *Re* Silkstone & Dodworth Coal & Iron Co. (1881), 45 L. T. 449.

6915. Petitioner for compulsory winding up—Alleging misfeasance against officers.]—*Re* GOLD Co., No. 6916, *post*.

6916. Who may be examined—Secretary—Being also voluntary liquidator.]—A co. being in voluntary liquidation, & a petition by a contributory of the co. for a compulsory winding up having been dismissed, an order was made, upon an application by petitioner, under 1862 Act, ss. 115, 138, that certain former officers of the co., including the secretary, who was the voluntary liquidator, should attend for the purpose of giving information as to the dealings of the co. The persons thus summoned appealed:—*Held*: the case was one in which the discretion of the judge of first instance ought not to be interfered with.

Witnesses summoned under sect. 115 have no *locus standi* to appeal from the order summoning them to be examined, the only difference between them & witnesses in an ordinary action being that while in an ordinary action a witness can be *subpœnaed* at the will of the suitor, under sect. 115 the *subpœna* can only issue by leave of the judge.—*Re* GOLD Co. (1879), 12 Ch. D. 77; 48 L. J. Ch. 650; 40 L. T. 865; 27 W. R. 757, C. A.; *affg.* S. C. *sub nom.* *Re* GOLD Co., LTD., *Ex p.* CARTER, 40 L. T. 773.

Annotations:—*Distd.* *Re* London & Lancashire Paper Mills Co. (1888), 57 L. J. Ch. 766. *Consd.* *Re* North Australian Territory Co. (1890), 45 Ch. D. 87; *Re* Great Kruger Gold Mining Co., *Ex p.* Barnard, [1892] 3 Ch. 307; *Re* Standard Gold Mining Co. (1895), 2 Mans. 463; *Re* Debtor, *Ex p.* Goldstein, [1917] 1 K. B. 558. *Refd.* *Re* Silkstone & Dodworth Coal & Iron Co., Whitworth's

which the names were so placed on the register, is information relating to the trade dealings of a co. within Act No. 1074, s. 109.

The ct. will not give power to the liquidator to summon such witnesses as the liquidator may deem fit, but only such persons as the ct. may deem capable of giving information.—*Re* BROKEN HILL & ARGENTON SMELTING Co., LTD. (1893), 19 V. L. R. 111.—AUS.

k. ———.]—Under Indian Companies Act, 1913, s. 215, a voluntary liquidator can apply to the ct. for examination of persons connected with the management of the co.—NOWROJI PUDUMJE v. LAXMAN

MORESHWAR (1919), I. L. R. 44 Bom. 459.—IND.

l. *Who may be examined—Secretary—Order to deliver up minute book.*—A petition presented under Companies Act, 1862, ss. 100, 138, by the liquidator of a co., which was being voluntarily wound up, to have the co.'s secretary ordained to deliver up his minute book is competent.—GLADSTONE v. McCALLUM (1896), 23 R. (Ct. of Sess.) 783; 33 Sc. L. R. 618; 4 S. L. T. 41.—SCOT.

m. *Power of court—To exclude witnesses—From hearing of evidence given by other witnesses.*—At the examination of witnesses in the

Case (1881), 19 Ch. D. 118. *Mentd.* *Re* Greys Brewery Co. (1883), 25 Ch. D. 400.

B. Misfeasance Proceedings.

See Nos. 6997–6999, *post*.

C. Contributories.

6917. Rights of—To see list of contributories rightly settled—Right to inspect company's books for such purpose—On payment of calls into court.]—*Re* LONDON BANK OF SCOTLAND, [1867] W. N. 114.

Annotation:—*Refd.* Brighton Arcade Co. v. Dowling (1868), L. R. 3 C. P. 175.

— *As regards distribution of assets.*—*See* Sub-sect. 9, D., *post*.

6918. Liability of—How established.]—*Re* CORNWALL BRICK, TILE, & TERRA COTTA Co. (1893), 37 Sol. Jo. 214.

—*See, also*, Nos. 1603, 6859, *ante*.

6919. Settlement of list of contributories—Whether liquidator bound to give notice—Whether want of notice defence to action for calls.]—In an action for calls against a contributory of a limited co. being voluntarily wound up, it is no defence that deft. had no notice that his name was placed upon the list of contributories.—BRIGHTON ARCADE Co. v. DOWLING (1868), L. R. 3 C. P. 175; 37 L. J. C. P. 125; 17 L. T. 543; 16 W. R. 427.

Annotations:—*Refd.* *Re* Whitehouse (1878), 9 Ch. D. 595; Groom v. Rathbone (1879), 41 L. T. 591; Hoby v. Birch (1890), 59 L. J. Q. B. 247. *Mentd.* *Re* International Life Assce. Soc., Gibbs & West's Case (1870), L. R. 10 Eq. 312; Sankoy Brook Coal Co. v. Marsh (1871), L. R. 6 Exch. 185; *Re* Paraguassu Steam Tramroad Co., Black's Case (1872), 8 Ch. App. 254; *Re* Pyle Works (1890), 44 Ch. D. 534; *Re* G. E. B., [1903] 2 K. B. 340.

6920. Orders against—Balance order—Whether “final judgment” within Bankruptcy Act, 1883 (c. 52), s. 4 (1).]—A “balance order” made in the voluntary winding up of a co. on a contributory, for the payment of calls which had been made upon him before the commencement of the winding up, is not a “final judgment” within above sub-sect., & therefore a bkpcy. notice cannot be issued in respect of such an order.—*Re* SANDERS, *Ex p.* WHINNEY (1884), 13 Q. B. D. 476; 1 Morr. 185, D. C.

Annotations:—*Fold.* *Re* Tennant, *Ex p.* Grimwade (1886), 3 Morr. 166. *Refd.* *Re* Faithfull, *Ex p.* Moore (1885), 14 Q. B. D. 627; *Re* Bkpcy. Notice, *Ex p.* Official Receiver, [1895] 1 Q. B. 609. *Mentd.* Pritchett & Young v. English & Colonial Syndicate (No. 2) (1899), 43 Sol. Jo. 602.

— — —.]—*Compare* No. 6304, *ante*.

Stay of application for.—*See* No.

7016, *post*.

6921. — Enforcement of—Absconding contributory—Writ of *ne exeat regno*.]—*Re* COTTON PLANTATION Co. OF NATAL, [1868] W. N. 79.

SUB-SECT. 8.—PROOF OF DEBTS.

6922. Debts provable—Claim for rent—Rent payable in advance.]—A joint-stock co. carried

winding up of a co. under Companies Act, 1908, ss. 210, 226, the ct. may order that witnesses not actually being examined do leave the ct., that the witnesses shall not directly or indirectly confer with one another regarding the evidence given or to be given by them, & that any notes taken by their counsel or solrs. for the purposes of the examination shall be handed to the registrar at the conclusion of the evidence.—*Re* WENDEL & Co., LTD., [1918] N. Z. L. R. 368.—N.Z.

PART III. SECT. 37, SUB-SECT. 8.

n. *Debts provable—Not claim by director for wrongful dismissal.*—A

Sect. 37.—Voluntary winding up: Sub-sects. 8 &

on business on certain property held from debts. under an agreement for a term of three years, which provided that two quarters' rent should be always due & payable in advance if required. The co. went into voluntary liquidation on Dec. 20, 1894. On Dec. 28, debts. served on the co. a demand for three quarters' rent—namely, one quarter due on Dec. 25, 1894, & two quarters in advance up to June 24, 1895. The amount not being paid, they put in a distress. The liquidator was in possession of the property, but intended to give up possession shortly:—*Held*: debts. could not distrain for the two quarters' rent in advance, but were entitled to be paid rent in full from the commencement of the liquidation during such time as the liquidator remained in beneficial occupation of the property & to prove for the balance of rent due under their agreement.—*SHACKELL & Co. v. CHORLTON & SONS*, [1895] 1 Ch. 378; 64 L. J. Ch. 353; 72 L. T. 188; 43 W. R. 394; 2 Mans. 233; 13 R. 301.

6923. — Claim by licensee of right to advertise in tramcars—Tramways taken over from company by municipal corporation.—By several leases the B. corpn. leased to the B. tramway co. the sole right of user of the tramways in B. belonging to the corpn. The co. granted a licence to C. for a term of years of the sole right to advertise in their tram cars. By the Bradford Corporation Act, 1901, the corpn. took over the leases of the co. on paying them compensation. The co. petitioned against the Bill, but withdrew their opposition on certain clauses being inserted in the Bill. The licensee claimed compensation in the winding up of the co.:—*Held*: under the circumstances, the Act afforded no defence to the licensee's claim, & he was therefore entitled to prove in the winding up.—*Re BRADFORD TRAMWAYS & OMNIBUS CO., LTD., COURTENAY'S CASE* (1904), 68 J. P. 362.

6924. — Claims by members of proprietary club—For damages for loss of club amenities—& for proportion of subscriptions.—*Re CURZON SYNDICATE, LTD.* (1920), 149 L. T. Jo. 232.

6925. Set-off—By contributories—Against calls.—*Re BANK OF HINDUSTAN, CHINA & JAPAN, Ex p. SMITH*, No. 7337, *post*.

6926. — — — — ——Where a limited co. is in voluntary liquidation, a contributory cannot set off a debt due to him from the co. against calls made against him either by the co. before or by the liquidator after the resolution to wind up.—*Re WHITEHOUSE & Co.* (1878), 9 Ch. D. 595; 47 L. J. Ch. 801; 39 L. T. 415; 27 W. R. 181.

Annotations:—Consd. Re Auriferous Properties, [1898] 1 Ch. 691. *Reid. Re General Works Co.*, Gill's Case (1879), 12 Ch. D. 755; *Re West of England & South Wales District Bank, Ex p. Cranwhite* (1879), 48 L. J. Ch. 463; *Re Anglo-French Co-op. Soc., Ex p. Pelly* (1882), 21 Ch. D. 492, n.; *Re Branksea Island Co., Ex p. Bentinck* (No. 1) (1888), 1 Meg. 12; *Re Pyle Works* (1890), 44 Ch. D. 534; *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95; *Monkwearmouth Flour Mill Co. v. Lightfoot* (1897), 13 T. L. R. 327; *Re G. E. B.*, [1903] 2 K. B. 340. *Mentd. Re West of England & South Wales District Bank, Ex p. Hatcher* (1879), 27 W. R. 907.

6927. — — — — ——Deft. in an action for calls, brought by the liquidator of a co. which is being voluntarily wound up under 1862 Act, is entitled to have leave to defend unconditionally under Ord. 14, r. 1, if he has a set-off exceeding

the amount of the claim due to him from the co.—*GROOM v. RATHBONE* (1879), 41 L. T. 591, D. C.

Annotation:—Reid. Hoby v. Birch (1890), 59 L. J. Q. B. 247.

6928. — — — — ——A person who has been duly settled on the list of contributories of a co., & on whom calls have been duly made, cannot, even in the case of a voluntary liquidation, in an action for calls by the liquidators of the co., counterclaim for a debt or damages due to him from the co. Deft., a newspaper proprietor, agreed to take fully paid-up shares in payment of advertisements inserted in his newspaper by the co., & duly performed his part of the contract, but the co. omitted to register the contract. The co. went into voluntary liquidation, & deft. was settled on the list of contributories as the holder of shares not paid for in cash. Calls were duly made, & deft. sought, in answer to an action by the liquidator for money due on calls, to counter-claim the price of the advertisements, or damages for neglect to register the agreement to give him fully paid shares:—*Held*: no such set-off or counter-claim could be pleaded.—*GOVERNMENT SECURITY INVESTMENT Co. v. DEMPSEY* (1880), 50 L. J. Q. B. 199.

6929. — — — — ——In an action by the liquidator of a co. in voluntary liquidation to recover an amount due in respect of calls upon shares in the co., deft. is not entitled to set off a debt due to him from the co.—*Hoby & Co. v. BIRCH* (1890), 59 L. J. Q. B. 247; 62 L. T. 404, D. C.

6930. — — — — ——A debenture-holder, who was also a holder of ordinary shares in a co., deposited debentures with a bank as a security, & executed a memorandum of deposit & a blank transfer, but no notice of the deposit or transfer was given to the co. On Nov. 3, 1890, a resolution was passed by the directors for a call payable on Nov. 20 at the same bank; under the arts. this call was deemed to have been made at the date when the resolution was passed. On Nov. 4 notice of the call was given to the bank. On Nov. 6 the bank gave the co. formal notice of the deposit, & this notice was entered on the register of debentures. On Nov. 12 a debenture-holder's action was brought; and on Nov. 13 resolutions for a voluntary winding up were passed & confirmed. On Dec. 5 a call was made in the winding up. The bank claimed as assignees to be paid in full the amount secured by the debentures; & the co. contended that they were entitled to set off against this claim the amount due by the assignor on his shares in respect of the call made on Nov. 3, & also that made in the winding up:—*Held*: the co. were entitled to set off the call made on Nov. 3, but not that made in the winding up.—*CHRISTIE v. TAUNTON, DELMARD, LANE & Co., Re TAUNTON, DELMARD, LANE & Co.*, [1893] 2 Ch. 175; 62 L. J. Ch. 385; 68 L. T. 638; 41 W. R. 475; 37 Sol. Jo. 304; 3 R. 404.

6931. — — — — ——The G. co. held shares in the A. co., & before either co. went into liquidation calls were made on the shares, & the A. co. became indebted to the G. co. for money lent.

The A. co. was ordered to be wound up by the ct. & the G. co., being insolvent, passed an extraordinary resolution for voluntary winding up:—*Held*: Jud. Act, s. 16, did not enable the liquidator

contributory & creditor of a co. in voluntary liquidation, alleging a claim of damages against the co. for wrongous dismissal from his position as managing director, presented a petition under Companies Act, 1862, s. 138, &

Companies Act, 1900, s. 25, praying for the determination of the ct. on the validity & extent of his claim:—*Held*: a claim of damages ought to be constituted before a ct. of ordinary jurisdiction & it was not "just & bene-

ficial" that it should be determined by the ct. under Companies Act, 1862, s. 138.—*CRAWFORD v. M'CULLOCH*, [1909] S. C. 1063; 46 Sc. L. R. 749; 1 S. L. T. 536.—*SCOT*.

of the G. co. to set off the debt against the calls.—*Re AURIFEROUS PROPERTIES, LTD.*, [1898] 1 Ch. 691; 67 L. J. Ch. 367; 79 L. T. 71; 47 W. R. 75; 14 T. L. R. 390; 42 Sol. Jo. 491; 5 Mans. 260.

Annotation:—*Reid. Re Auriferous Properties* (No. 2), [1898] 2 Ch. 428.

6932. ———. ———.]—Where a set-off is claimed or pleaded in defence to an action for a debt, the debt sued on is not thereby extinguished to the extent of the debt sought to be set off, but two separate & distinct debts remain until judgment.

When, therefore, a co., while a going concern, sues a shareholder for a call, & he sets up a defence of set-off & before judgment is obtained a winding up of the co. commences, the defence of set-off in the action does not prevent the application of the ordinary rule that the debt owing by the co. to the shareholder cannot be set off in proceedings in the winding up to obtain payment of the call.—*Re HIRAM MAXIM LAMP Co.*, [1903] 1 Ch. 70; 72 L. J. Ch. 18; 87 L. T. 729; 51 W. R. 74; 19 T. L. R. 26; 10 Mans. 329.

6933. ———. Of mutual debts & credits.]—The A. & B. cos. were both insolvent & in liquidation. The A. co. held shares in the B. co., on which calls had been made prior to either co. going into liquidation. The B. co. was indebted to the A. co. for money lent:—*Held*: in the winding up of the B. co. the liquidator of the A. co. was not entitled to take any dividend upon its debt owing from the B. co. until the A. co. had paid up all calls in the winding up of the B. co. on the shares held by it in the B. co.—*Re AURIFEROUS PROPERTIES, LTD.* (No. 2), [1898] 2 Ch. 428; 67 L. J. Ch. 574; 79 L. T. 71, 73; 47 W. R. 75, 77; 14 T. L. R. 536; 42 Sol. Jo. 689; 5 Mans. 260, 267.

Annotations:—*Reid. Re Goy, Farmer v. Goy*, [1900] 2 Ch. 149; *Re Brown & Gregory, Shephard v. Brown & Gregory, Andrews v. Brown & Gregory*, [1904] 1 Ch. 627; *Re Rhodesia Goldfields, Partridge v. Rhodesia Goldfields*, [1910] 1 Ch. 239. *Mentd. Re Peruvian Ry. Construction Co.*, [1915] 2 Ch. 144.

6934. ———. ———.]—A. co. had considerable mutual business dealings with B. co. in the course of which dealings it borrowed money from B. co. on two bills of sale charging certain machinery & providing for its insurance against fire. The machinery was insured in the name of B. co., the premiums being charged to A. co. The machinery was destroyed by fire, & B. co. received £1,600 insurance money. About a fortnight later A. co. was wound up voluntarily and was found to be insolvent. At the date of winding up £744 remained due on the bills of sale, so that B. co. had a surplus of £856 insurance money in hand for A. co. after deducting the secured debt. On the other hand A. co. owed B. co. £2,099 unsecured book debts:—*Held*: as the mutual dealings had resulted in cross money claims before the winding up, B. co. was entitled to set off the £856 surplus insurance money against the £2,099 book debts under the Bkpcy. Act, 1883, s. 38.—*Re THORNE (H. E.) & SON, LTD.*, [1914] 2 Ch. 438; 84 L. J. Ch. 161; 112 L. T. 30; 58 Sol. Jo. 755; [1915] H. B. R. 19.

6935. Preferential debts — “Wages” — Workman paid partly by salary & partly by commission.]—*Re EARLE'S SHIPBUILDING & ENGINEERING Co., BARCLAY & Co. v. EARLE'S SHIPBUILDING & ENGINEERING Co.*, [1901] W. N. 78.

Annotation:—*Reid. Re Klein, Ex p. Goodwin* (1906), 22 T. L. R. 664.

6936. ———. Crown debts.]—The bkpcy. rule that Crown debts have no claim to priority of payment, other than such priority as is given by statute,

obtains equally under 1908 Act, ss. 186 & 209, in the case of winding up an insolvent co.—*FOOD CONTROLLER v. CORK*, [1923] A. C. 647; 92 L. J. Ch. 587; 39 T. L. R. 699; 67 Sol. Jo. 788, H. L.

6937. Practice—Claim by creditor out of jurisdiction—Security for costs.]—Where a creditor residing out of the jurisdiction applies in a voluntary winding up for a declaration that he is entitled to prove in the winding up, the ct. has jurisdiction to require him to give security for costs. *Semble*: wherever a person out of the jurisdiction comes forward as an actor in a winding up, whether voluntary, or under supervision, or by the ct., the ordinary practice of the ct. as to ordering security for costs applies.—*Re PRETORIA PIETERSBURG RY. Co.* (No. 2), [1904] 2 Ch. 359; 73 L. J. Ch. 704; 91 L. T. 285; 53 W. R. 74; 48 Sol. Jo. 605.

SUB-SECT. 9.—DISTRIBUTION OF ASSETS.

A. In General.

6938. What are “surplus assets.”]—An investment made by a limited co. on capital account having fallen in value, the amount of depreciation was, in the half-yearly accounts, debited to revenue. When the co. afterwards went into liquidation, the investment had risen again in value, & the liquidator in his accounts credited to revenue as “appreciation” the amount which had previously been debited as depreciation:—*Held*: that the amount credited by the liquidator to revenue as “appreciation” must be treated as income, & not as capital, it being merely a restitution to profits of what had been previously taken from profits.

Earnings by a limited co. since the commencement of its liquidation are capital & not income.—*BISHOP v. SMYRNA & CASSABA RY. Co.* (No. 2), [1895] 2 Ch. 596; 64 L. J. Ch. 806; 73 L. T. 337; 2 Mans. 575; 13 R. 803.

6939. ———.]—The capital of a co. consisted of 5,000 shares of £1 each, called A shares, & 5,000 shares of 1s. each, called B shares. The arts. of assocn. provided that in the event of a winding up the surplus assets should be divided into two moieties, one of which should belong to & be distributed amongst the holders of the A shares, & the other amongst the holders of the B shares, & that the profits available for distribution should be divided in the same way. All the shares had been paid in full. The co. was in voluntary liquidation. The liquidator had paid the debts of the co. & the costs of winding up & had a balance in his hands. He took out this summons for the determination of the question how the balance ought to be divided between the two classes of shareholders:—*Held*: surplus assets in this case meant the surplus after payment of outside liabilities & repayment to the shareholders of capital paid up. *Semble*: in every case where surplus assets are directed to be divided between two classes of shares without reference to the nominal amounts of the shares or the amounts paid up, there is a presumption that surplus assets means a surplus after payment of outside liabilities & repayment of capital, & it needs clear & express words to give the phrase the meaning of surplus after payment of debts & costs only.—*Re RAMEL SYNDICATE, LTD.*, [1911] 1 Ch. 749; 80 L. J. Ch. 455; 104 L. T. 842; 18 Mans. 297.

6940. How distribution made—Shares held by company.]—A liquidator has, with the sanction

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of the ct. power to distribute shares forming part of the co.'s assets instead of selling them.—*Re ENGLISH & FOREIGN CREDIT CO., LTD.* (1884), 1 T. L. R. 1.

6941. — Sequestration in Scotland of deceased shareholder's estate—Sequestrator & another jointly entitled to beneficial interest—Payment to sequestrator on joint receipt.]—At the commencement of the winding up of the co. certain shares stood in the register in the name of A., a domiciled Scotchman, who was then dead. The shares were held by him as trustee. He had appointed exors. in Scotland, one of whom had accepted the office; but he had no legal personal representative in England. After A.'s death his estates were sequestrated in Scotland. The effect of this, according to Scotch law, was to vest in the sequestrator, as from the date of the sequestration, the whole of A.'s estate, including trust estates, & to divest the exor. entirely. The beneficial interest in the shares belonged to the sequestrator & another person jointly. There were surplus assets of the co. to be returned to the shareholders. The sequestrator was willing to give the joint receipt of himself & the other beneficiary upon payment to him of the proportion of the assets payable in respect of A.'s shares:—*Held*: the legal title to the shares was vested in the sequestrator, & the money might be paid to him upon the joint receipt offered.—*Re TUTICORIN COTTON PRESS CO., LTD.* (1894), 64 L. J. Ch. 198; 71 L. T. 723; 43 W. R. 190; 39 Sol. Jo. 61; 1 Mans. 464; 13 R. 225.

6942. Liability of liquidator—Delay in distribution.]—*KNOWLES v. SCOTT*, No. 6857, *ante*.

6943. — Distribution before creditors provided for.]—It is the duty of the liquidator to find out from the books & papers of the co., & the statement of affairs who are the creditors of the co., & if any creditor omits to put in his claim the liquidator shall communicate with him.

1862 Act, s. 133, imposes a statutory duty on the liquidator to pay the debts of the co. *pari passu*, & subject thereto, to distribute the property of the co. amongst the shareholders; & whilst the liquidation continues a contributory can apply under sect. 138 of the Act, & a creditor can apply under Companies Act, 1900 (c. 43), s. 25, to the ct. for relief in respect of his rights. When the co. is dissolved the statutory remedy is gone, but the duty remains, & a contributory or creditor has a remedy at common law for injury caused to him by a breach of the liquidator's statutory duty.

A co. went into voluntary liquidation & appointed a liquidator, & its business & assets were transferred as a going concern to a purchasing co. in consideration of fully paid-up shares in the purchasing co., who covenanted to pay all the debts & liabilities of the liquidating co. The liquidator received the purchase consideration of fully paid-up shares & distributed them amongst the shareholders of the liquidating co. The assets of the liquidating co. were sufficient to pay all its debts in full, but the liquidator, beyond advertising insufficiently for creditors, took no steps to ascertain the creditors of the liquidating co. or to see that they were paid. He left everything to the purchasing co. After the dissolution of the liquidating co.:—*Held*: the liquidator had been guilty of negligence in the discharge of his statutory duty, & was liable in damages to unpaid creditors of the liquidating co. of whose claims he was aware and who had no notice of the liquidation until long after the dissolution of the co.—

PULSFORD v. DEVENISH, [1903] 2 Ch. 625; 73 L. J. Ch. 35; 52 W. R. 73; 19 T. L. R. 688; 11 Mans. 393.

Annotations:—*Folld. Argylls v. Coxeter* (1913), 29 T. L. R. 355. *Refd. Woods v. Winskill*, [1913] 2 Ch. 303.

6944. — — — — —.]—Pltfs. sued a limited co. called C. & Sons, Limited, for the price of goods sold & delivered. During the progress of that action C. & Sons, Limited, went into voluntary liquidation, present defts. being appointed liquidators, & later, that co. was dissolved. Pltfs. were not aware of the liquidation & dissolution till a later date, & when they became aware thereof they sued defts. to recover from them as damages the price of the goods which had been supplied to the co., pltfs. alleging that defts. as liquidators had committed a breach of their statutory duty in allowing the co. to be dissolved before the co.'s debts had been paid. Pltfs. also claimed to recover from defts. the amount of the costs that had been thrown away in the action against C. & Sons, Limited, that action having abated on the dissolution of the co.:—*Held*: (1) defts. had committed a breach of their statutory duty in allowing the co. to be dissolved before its debts had been paid & they were liable in damages to pltfs. in respect of the claim for goods sold to the co.; (2) defts. were not in the circumstances liable for the costs thrown away in the action against C. & Sons, Limited, as the incurring of those costs was not the natural consequence of deft.'s breach of statutory duty.—*ARGYLLS, LTD. v. COXETER* (1913), 29 T. L. R. 355.

6945. Whether money in hands of liquidator can be attached—By judgment creditor of member.]—Money in the hands of the liquidator in a voluntary winding up of a co. cannot be attached by the judgment creditor of a shareholder.—*MACK v. WARD*, [1884] W. N. 16; 28 Sol. Jo. 234; Bitt. Rep. in Ch. 23.

Compare, No. 7037, *post*.

6946. Restraint of distribution—At instance of creditor—Until provision made—For future rent.]—A banking co. which had been registered under 1862 Act, obtained demises of premises from pltf. & covenanted to pay him rent at the usual periods during the terms. The shareholders passed a resolution for a voluntary winding up of the co., though it was not insolvent. A question having arisen as to pltf.'s claim for the future rent he brought an action for an injunction to restrain the distribution of the assets until the liability of the co. had been provided for:—*Held*: the lessor was entitled to have a sum set apart which, when invested in consols would with half-yearly rests, be sufficient to produce the amount of the rent.—*OPPENHEIMER v. BRITISH & FOREIGN EXCHANGE & INVESTMENT BANK* (1877), 6 Ch. D. 744; 46 L. J. Ch. 882; 37 L. T. 629; 26 W. R. 391.

Annotations:—*Consd. Gooch v. London Bankers' Asscn.* (1885), 1 T. L. R. 642. *Refd. Re Midland Coal, Coke & Iron Co., Craig's Claim*, [1895] 1 Ch. 267. *Mentd. Re Madras Irrigation & Canal Co., Wood v. Madras Irrigation & Canal Co.* (1883), 23 Ch. D. 248.

6947. — — — — —.]—An injunction was granted, on motion by the lessor, to restrain a co. in voluntary liquidation from distributing assets among its shareholders without setting aside sufficient assets to provide for future rent & other liabilities under a lease.—*GOOCH v. LONDON BANKING ASSOCN.* (1885), 32 Ch. D. 41; 1 T. L. R. 642; *on appeal* (1886), 32 Ch. D. 49, C. A.

Annotations:—*Refd. Re Midland Coal, Coke, & Iron Co., Craig's Claim*, [1895] 1 Ch. 267. *Mentd. Re Law Car & General Insce. Corpn.*, [1913] 2 Ch. 103.

6948. — — — — —.]—When a limited co. is voluntarily wound up a lessor who has

granted a lease to the co. not assignable without his consent may obtain an interdict against the liquidator of the co. dividing the surplus among the shareholders until some provision to meet his future contingent claims against the co. is made.—

ELPHINSTONE (LORD) v. MONKLAND IRON & COAL CO. (1886), 11 App. Cas. 332; 35 W. R. 17, H. L. *Annotations*:—**Reid**. *Re* Midland Coal, Coke, & Iron Co., *Craig's Claim*, [1895] 1 Ch. 267. **Mentd.** *Adams v. Great North of Scotland Ry.*, [1891] A. C. 31; *Law v. Redditch L. B.*, [1892] 1 Q. B. 127; *Willson v. Love*, [1896] 1 Q. B. 626; *Stegmann v. O'Connor* (1899), 81 L. T. 627; *Clydebank Engineering & Shipbuilding Co. v. Yzquierdo y Castaneda*, [1905] A. C. 6; *Diestal v. Stevenson*, [1906] 2 K. B. 345; *Re Law Car & General Insce. Corpn.*, [1913] 2 Ch. 103; *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, [1915] A. C. 79.

B. Payments of Fees, Costs, Charges and Expenses.

6949. Liquidator's remuneration & costs—Postponed to petitioner's costs.—*Re* NEW YORK EXCHANGE CO., No. 7340, *post*.

6950. ——— & costs of liquidator's solicitor.]—Where a co. has gone into voluntary liquidation & appointed a liquidator, & afterwards, on a creditor's petition for a compulsory order, a supervision order is made directing petitioner's & liquidator's costs to be taxed & paid out of the assets, the liquidator's remuneration for the period from the commencement of the winding up to the supervision order must be postponed to the taxed costs of petitioner & of the liquidator's solr., & also to any further costs for work properly done by the solr. by the authority of the liquidator subsequently to the order.—*Re* SANITARY BURIAL ASSOCN., [1900] 2 Ch. 289; 69 L. J. Ch. 551; 82 L. T. 639; 7 Mans. 459; *sub nom.* *Re* SANITARY BURIAL ASSOCN., LTD., *Ex p.* WINGFIELD, 48 W. R. 529; 44 Sol. Jo. 488, C. A.

6951. Costs of legal proceedings by & against company—Proceedings against company—Caused by company's wrongful opposition to claim.—F. was induced by D., who was agent of the U. co., to insure his premises in that co. D. inspected the premises & described them as roofed with slate, whereas one of the smaller buildings was roofed with felt. The premises were partially destroyed by fire, the felt-roofed building, however, being uninjured:—*Held*: this was not a misdescription so material as to avoid the policy, but even if it was material it was cured by the fact of D., who was agent for the U. co., having inspected the premises & given the description.

The co. having unjustly resisted the claim, & compelled the claimants to file a petition for winding up, & to bring an action at law, & having subsequently gone into voluntary liquidation:—*Held*: the costs of the claimants' petition & action at law were allowed priority.—*Re* UNIVERSAL NON-TARIFF FIRE ASSURANCE CO., *Ex p.* FORBES & CO. (1875), as reported in 23 W. R. 464.

6952. ———.]—Although 1862 Act, s. 163, making void all proceedings against a co. in liquidation taken after the commencement of the winding up, applies in terms only to cases in which the co. is being wound up by the ct., or subject to the supervision of the ct., & not to the case of a voluntary winding up, yet, having regard to the scheme of the Act, & especially to sect. 133, which enacts that, as a consequence of a voluntary winding up, the property of the co. shall be applied in satisfaction of its liabilities *pari passu*, a creditor who, before the resolution to wind up, has commenced an action against the co. but does not obtain judgment until after the resolution, is not entitled to enforce his judgment so as to obtain priority over other creditors for his judgment debt & costs; & if, subsequently to the

judgment, a supervision order is made, the ct. may, in the exercise of its discretion under sect. 87, either stay further proceedings in the action or allow pltf. to continue them on terms.

Thus, where shortly after an action had been commenced in Scotland against an English co. for damages for personal injuries to one of the co.'s workmen at their works in Scotland, the co. passed a resolution to wind up voluntarily, & pltf. in the action, though having notice of the resolution, proceeded with his action & obtained judgment for damages & costs, but before he was able to enforce his judgment by execution against the co.'s property in Scotland, an order was made in England continuing the winding up under supervision, the ct. allowed pltf. to continue his proceedings under the judgment, but on the terms that he should have no priority over the other creditors in the winding up; & that, so far as the proceedings in the action interfered with the winding up, he should do all in his power to enable the liquidator to get in the co.'s assets in Scotland.

A creditor-pltf. in an action against a co. in voluntary liquidation is not entitled to any priority in the winding up for his costs of the action; he can only add them to his debt.—*Re* THURSO NEW GAS CO. (1889), 42 Ch. D. 486; 61 L. T. 351; 38 W. R. 156; 5 T. L. R. 562; 1 Meg. 330.

Annotations:—**Folld.** *Re* Snyder Dynamite Projectile Co. (1893), 37 Sol. Jo. 304. **Distd.** *Re* Wenborn, [1905] 1 Ch. 413. **Reid.** *Harrison v. Mortgage Insce. Corpn.* (1893), 10 T. L. R. 141.

6953. ———.]—*Re* SNYDER DYNAMITE PROJECTILE CO., LTD. (1893), 37 Sol. Jo. 304.

6954. ——— Claim for damages repudiated by liquidator.]—Where there is a winding up of a co., whether compulsory or voluntary, all claims of creditors, including those in respect of costs, ought *prima facie* to be dealt with in the winding up in accordance with the rules applicable to the distribution of the assets; but if an action is pending to which the co. is a party, & the co. by its liquidator determines to prosecute or defend the proceedings for the estate, the estate must be treated as the party litigant, & must in case of failure pay the costs in full.

C. brought an action against a co. for damages for breach of contract. After a day had been fixed for the trial the co. passed an extraordinary resolution for voluntary winding up. Within a week afterwards C. wrote to the liquidator asking whether he was prepared to admit C.'s claim in whole or in part. The liquidator replied that he could not admit the claim. At the trial C. recovered judgment for damages & costs:—*Held*: the liquidator had adopted the defence of the action, & C.'s costs of it must be paid in full out of the assets of the co.—*Re* WENBORN & CO., [1905] 1 Ch. 413; 74 L. J. Ch. 283; 92 L. T. 228; 53 W. R. 332; 21 T. L. R. 229; 49 Sol. Jo. 259; 12 Mans. 45.

Annotation:—**Appld.** *Re* Free (1911), 56 Sol. Jo. 175.

6955. ——— Proceedings by company—Proceedings unsuccessful.]—Costs of unsuccessful litigation given against a co., whether merely ordered to be paid, or ordered to be paid out of the assets, or by the liquidator out of the assets or otherwise, & whether the co. is in voluntary or compulsory winding up, ought to be paid out of the assets of the co. in priority to the co.'s own costs.

The P. Syndicate, in voluntary liquidation, & others brought an action against B. Limited for an injunction. The action was dismissed, & it was ordered that debts in the action should recover

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their costs against pltfs. B. Limited's costs were taxed at £300 & co. file at Somerset House showed assets of the P. Syndicate in land sufficient to satisfy this sum in full. But the liquidator of the P. Syndicate paid the costs of that syndicate's own solr. in full, & only paid the residue, the sum of £86 to B. Limited on account of their costs. On a summons taken out by B. Limited against the P. Syndicate for the payment of £214 the balance of their costs:—*Held*: B. Limited's costs ought to have been paid in priority to the P. Syndicate's costs, & the liquidator must pay the appcts. the balance of their costs.—*Re PACIFIC COAST SYNDICATE, LTD.*, [1913] 2 Ch. 26; 108 L. T. 823; 57 Sol. Jo. 518; 20 Mans. 219; *sub nom. Re PACIFIC COAST SYNDICATE, LTD., Ex p. BRITISH COLUMBIAN FISHERIES, LTD.*, 82 L. J. Ch. 404.

6956. Amount required to satisfy lessor's claims under covenant to repair.]—*Re LEVI & Co.*, No. 6907, *ante*.

C. Distribution amongst Creditors.

6957. Dividend paid to some creditors under prior inspectorship deed.]—Under 1862 Act, s. 133, the assets of a co. which is being wound up must be applied in satisfaction *pari passu* of the liabilities of the co. as they exist at the commencement of the winding up. Where, therefore, prior to the winding up, a dividend had been paid under an inspectorship deed to some creditors of the co., but not to others:—*Held*: there being no question of fraudulent preference, those who had not received any dividend were not entitled to a dividend under the winding up in priority to those who had.—*Re SMITH, KNIGHT & Co.*, *Ex p. ASHBURY* (1868), L. R. 5 Eq. 223; 37 L. J. Ch. 264; 18 L. T. 45; 16 W. R. 473.

6958. Servants—Salary payable out of "profits."]—P. & V. agreed to serve a co. at a fixed salary which they were not to be entitled to draw except only out of profits (if any) arising from the business of the co. which might from time to time be available for such purposes, but such salary should nevertheless be cumulative, & accordingly any arrears thereof should be payable out of any succeeding profits. The business of the co. included the purchase & sale of shares. In the course of & for the purposes of its business the co. acquired shares & debentures in another co. The shares were sold for cash & the proceeds brought into profit & loss account. The debentures were included in the yearly balance-sheets of the co. as an unvalued asset. In the voluntary liquidation of the co. the whole of the assets were sold, the debentures realising £3,072. All the creditors, except P. & V., to whom about £8,000 in respect of arrears of salary was due, were paid in full, & all the subscribed capital was returned to the shareholders, leaving a surplus of £3,328 in the hands of the liquidator:—*Held*: (1) the surplus in the hands of the liquidator ought to be treated as undrawn profits arising from the business of the co. out of which P. & V. were entitled to be paid; (2) meaning of "profits" explained.—*Re SPANISH PROSPECTING CO., LTD.*, [1911] 1 Ch. 92; 80 L. J. Ch. 210; 103 L. T. 609; 27 T. L. R. 76; 55 Sol. Jo. 63; 18 Mans. 91, C. A.

Annotations:—*Mentd. Garwood v. Garwood* (1911), 104 L. T. 341; *Pool v. Guardian Investment Trust Co.*, [1922] 1 K. B. 347.

6959. Statute-barred creditors.]—A voluntary liquidator having surplus assets available for

distribution issued a summons to determine (*inter alia*) whether he was at liberty to pay statute-barred creditors thereof. At the hearing of the summons the statute-barred creditors contended that he was, & the shareholders that he was not, at liberty to do so. The ct. declined to answer the question specifically, but directed the liquidator to apply the assets in a due course of administration. The liquidator having subsequently paid certain statute-barred creditors the shareholders issued another summons to determine whether it was a proper payment:—*Held*: having regard to the shareholders' objection formally taken on the first summons, & to the order made thereon, the payment to the statute-barred creditors was improper.—*Re FLEETWOOD & DISTRICT ELECTRIC LIGHT & POWER SYNDICATE*, [1915] 1 Ch. 486; 84 L. J. Ch. 374; 112 L. T. 1127; 31 T. L. R. 221; 59 Sol. Jo. 383; [1915] H. B. R. 70.

6960. As between different classes of debenture-stocks.]—A private co. in 1912 created an issue of £20,000 6 per cent debenture-stock secured by a deed-poll dated June 12, 1912, which gave the debenture-holders a right in a winding up to 50 per cent. of the surplus assets. This debenture-stock, of which £15,950 was issued, could be paid off at any time by the co. on six months' notice. In 1913 the debenture-stockholders by extraordinary resolutions sanctioned the issue in priority to the existing debenture-stock of £20,000 perpetual Prior Lien Debenture-Stock, carrying 6 per cent interest payable out of profits only & the right to one-third of the surplus assets in a winding up; & they resolved that the interest on the 6 per cent debenture-stock should only be payable out of profits & that they should be entitled only to one-third of the surplus assets in a winding up. £10,000 Prior Lien Debenture-Stock were issued accordingly. In Apr. 1920, the co. sold its principal asset, & out of the purchase-money paid off the two debenture-stocks. In Oct. 1920, it was resolved by special resolution that the co. should be voluntarily wound up:—*Held*: as to both debenture-stocks, the holders were entitled to share in the surplus assets, as there was nothing in the bargains inconsistent with or repugnant to the right of redemption.—*Re CUBAN LAND CO.*, [1921] 2 Ch. 147; 90 L. J. Ch. 440; 125 L. T. 792; 65 Sol. Jo. 680; [1921] B. & C. R. 168.

Right of creditors to restrain distribution—Until provision made for future claims.]—*See Nos. 6946–6948, ante.*

D. Distribution amongst Contributories.

(a) *In General.*

6961. As between shares with different amounts paid up—Vendor's fully paid-up shares—Effect of agreement for sale with promoters.]—By an agreement set out in arts. of assocn., a certain number of the shares, called "vendors' shares," were issued as fully paid up, & it was agreed that the holders of these shares should be entitled to dividends upon so much thereof as should be equal to the amount paid up on the ordinary shares, & to interest at five per cent upon the remainder. £7 only out of £10 was called up on the ordinary shares. The co. went into voluntary liquidation, & after paying all the debts & liabilities, the liquidator, having a considerable surplus in his hands for distribution among the contributories, paid interest at five per cent to the holders of the vendors' shares on £3 per share, up to the date of the commencement of the

winding up. On motion made by the liquidator for the order of the ct. as to the distribution of the remaining assets of the co.:—*Held*: the agreement was binding as between the shareholders, & £3 a share must be repaid to the holders of the vendors' shares, with interest thereon at five per cent from the date of the winding up until such repayment, before any payment could be made to the ordinary shareholders.—*Re EXCHANGE DRAPERY CO.* (1888), 38 Ch. D. 171; 57 L. J. Ch. 914; 58 L. T. 544; 36 W. R. 444; 4 T. L. R. 381.

Annotations:—*Reid*. *Lock v. Queensland Investment & Land Mortgage Co.*, [1896] 1 Ch. 397; *Re United Provident Assce.*, [1910] 2 Ch. 477.

6962. —.—.]—*Re SCINDE, PUNJAUB & DELHI CORPN.* (1867), 6 Ch. App. 53, n.

Annotations:—*Appld.* *Re Hodges' Distillery Co.*, *Ex p. Maude* (1870), 6 Ch. App. 51. *Consd.* *Re Driffeld Gas Light Co.*, [1898] 1 Ch. 451.

6963. —.—.]—(1) A co. having called up & exhausted all its capital, raised new capital, on the terms that, in the event of the winding up of the co., no call should be made on the new shares for any purpose other than for payment of the debts of the co., & that no call should be made for repayment to the holders of the original shares. Upon the co. being subsequently wound up voluntarily, there was found to be a surplus after payment of debts:—*Held*: this surplus, though arising from payments by the new shareholders, could not be returned under the above resolution to the new shareholders alone, but must be divided between both sets of shareholders. (2) The original shares of £1 each were fully paid up, but only 16s. had been paid upon the new £1 shares:—*Held*: the surplus must be divided among both sets of shareholders in proportion to the amounts paid up, & the old shareholders were not entitled to have their shares equalised with the new shares before division of the surplus.—*Re ECLIPSE GOLD MINING CO.* (1874), L. R. 17 Eq. 490; 43 L. J. Ch. 637.

6964. —.—.]—*Re LONDON & BRIGHTON STOCK-EXCHANGE CO., LTD.* (1887), 4 T. L. R. 2.

Annotation:—*Reid*. *Birch v. Cropper, Re Bridgewater Navigation Co.* (1889), 14 App. Cas. 525.

6965. —.—.]—The arts. of assocn. of a limited co. incorporated under 1862 Act, provided that the net profits of each year should be divided *pro rata* upon the whole paid-up share capital, & that the directors might declare a dividend thereout on the shares in proportion to the amounts paid up thereon. The arts. contained no provisions as to the distribution of assets on the winding up of the co. The original capital consisted of ordinary shares, partly paid up. Afterwards preference shares were issued entitling the holders to a dividend at a fixed rate with priority over all dividends & claims of the ordinary shareholders. The preference shares were fully paid up. The undertaking having been sold under an Act which made no provision for the distribution of the purchase-money among the shareholders, the co. was voluntarily wound up & assets remained for distribution:—*Held*: in distributing the assets "amongst the members according to their rights & interests in the co.," & in adjusting "the rights of the contributories amongst themselves" under 1862 Act, s. 133 (1), (10), the liability of the ordinary shareholders for the unpaid balance of their shares must not be disregarded, & after discharging all debts & liabilities & repaying to the ordinary & preference shareholders the capital paid on their shares, the assets ought to be divided among all the shareholders, not in proportion to the amounts paid

on the shares, but in proportion to the shares held.—*BIRCH v. CROPPER, Re BRIDGEWATER NAVIGATION CO., LTD.* (1889), 14 App. Cas. 525; 59 L. J. Ch. 122; 61 L. T. 621; 38 W. R. 401; 5 T. L. R. 722; 1 Meg. 372, H. L.

Annotations:—*Consd.* *Re Sheppard's Corn Malting Co.*, *Ex p. Lowenfeld* (1893), 70 L. T. 3; *Re Anglo-Continental Corpn. of Western Australia*, [1898] 1 Ch. 327; *Re Driffeld Gas Light Co.*, [1898] 1 Ch. 451; *Re Mutoscope & Biograph Syndicate*, [1899] 1 Ch. 896; *Re Odessa Waterworks Co.*, [1901] 2 Ch. 190, n. *Reid*. *Re Weymouth & Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66; *Re New Transvaal Co.*, [1896] 2 Ch. 750; *Re Welsh Whisky Distillery Co.* (1900), 16 T. L. R. 246; *Re Espuela Land & Cattle Co.*, [1909] 2 Ch. 187; *Will v. United Lankat Plantations Co.*, [1912] 2 Ch. 571; *Re Fraser & Chalmers*, [1919] 2 Ch. 114. *Mentd.* *Re Wakefield Rolling Stock Co.* (1892), 36 Sol. Jo. 524; *Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361; *Welton v. Saffery*, [1897] A. C. 299; *Re Printers & Transferrers Soc.*, *Challinor v. Maskery* (1899), 68 L. J. Ch. 537; *Re Welsbach Incandescent Gas Light Co.*, [1904] 1 Ch. 87.

6966. —.—.]—The undertaking of the co. had been purchased in 1885 by the Indian Govt. according to the terms of a special Act, & the question was as to the rights of stockholders & holders of partly paid-up shares *inter se* in the distribution of the purchase-money. The cts. below had decided that they were entitled to have the sum divided among them ratably, in proportion to the amounts actually paid by them respectively, not in proportion to their nominal interest in the co. The holders of partly paid shares appealed:—*Held*: the judgment of the ct. below must be affirmed.—*SHEPPARD v. SCINDE, PUNJAUB & DELHI RY. CO.* (1889), 60 L. T. 641, H. L.; *affg.* (1887), 56 L. J. Ch. 866; 57 L. T. 585; 36 W. R. 1; 3 T. L. R. 721, C. A.

Annotations:—*Consd.* *Birch v. Cropper, Re Bridgewater Navigation Co.* (1889), 14 App. Cas. 525; *Re Driffeld Gas Light Co.*, [1898] 1 Ch. 451. *Reid*. *Re London & Brighton Stock-Exchange Co.* (1887), 4 T. L. R. 2. *Mentd.* *Re Beeston Pneumatic Tyre Co.* (1898), 14 T. L. R. 338.

6967. —.— *Shares issued at discount.*]—A co. was incorporated in 1857 with limited liability, by registration under 1856 Act. The capital was divided into £10 shares, & the shares issued were paid up in full cash. In 1861 the co. was in difficulties, & the market value of the shares was only £3 per share. The co. resolved to increase their capital, & special resolutions were passed, after notice sent by post to every shareholder in accordance with the co.'s regulations, to increase the capital by the creation of additional £10 shares, which, as well as the unissued original shares, were to be issued at a discount of £7 per share. In pursuance of these resolutions, notices offering the new shares for subscription were sent to all the existing shareholders, & thereupon a number of shares were applied for & issued as fully paid-up, on payment by the allottees of only £3 per share. The shares thus issued were treated for upwards of twenty years, as to payment of dividend & otherwise, in every respect on the same footing as the original shares. In 1889 the co. resolved on a voluntary winding up. The creditors were all satisfied, & there remained a surplus of £25,000 for division among the shareholders. The liquidator applied to the ct. to determine the mode in which the fund ought to be divided:—*Held*: the contract entered into by the holders of the discount shares was a contract as between themselves & the co. alone & *ultra vires*; & as between those shareholders & the old there was no contract, either express or implied, that in the event of the co.'s debts being satisfied & there being surplus assets, the new shareholders should be entitled to any priority or advantage in the distribution of those assets.—*Re WEYMOUTH & CHANNEL ISLANDS STEAM PACKET CO.*,

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[1891] 1 Ch. 66; 60 L. J. Ch. 93; 63 L. T. 39 W. R. 49; 7 T. L. R. 67; 2 Meg. 283, 366, C. A.

Annotations:—Appld. *Re Railway Time Tables Publishing Co., Ex p. Welton*, [1895] 1 Ch. 255. **Refd.** *Re Wakefield Rolling Stock Co.*, [1892] 3 Ch. 165; *Welton v. Saffery*, [1897] A. C. 299. **Mentd.** *Hong-Kong & China Gas Co. v. Glen*, [1914] 1 Ch. 527.

6968. —.]—In the winding up of the co. all the debts had been paid & the costs of the liquidation provided for, & there remained surplus assets available for distribution among the shareholders, but not sufficient to repay them in full the amount of capital contributed by them. The capital consisted of—first £1 shares which were fully paid; secondly, £5 shares upon which £1 per share had been called up, & that amount only paid; & thirdly, £5 shares upon which the shareholders had paid various sums in advance of calls in addition to the £1 per share called up. These shareholders had been receiving interest upon the amount of their advances. The question was upon what principle the surplus assets should be distributed among the shareholders:—**Held:** the £5 shares must be treated as five £1 shares, with 4s. per share paid up; & the surplus must be applied—first, in repaying to the £5 shareholders who had paid money in advance of calls the amount of their advances, with interest thereon to the time of repayment; secondly, in repaying to the £1 shareholders 16s. per share; & thirdly, when all the shares had thus been brought to the level of having 4s. paid thereon, the remainder must be distributed among all the shareholders equally, the £5 shares being treated as five £1 shares.—*Re WAKEFIELD ROLLING STOCK CO.*, [1892] 3 Ch. 165; 61 L. J. Ch. 670; 67 L. T. 83; 40 W. R. 700; 8 T. L. R. 660; 36 Sol. Jo. 524.

Annotations:—Refd. *Re Espuela Land & Cattle Co.*, [1909] 2 Ch. 187; *Re United Provident Assco.*, [1910] 2 Ch. 477.

6969. — **Unlimited company.**—1862 Act, ss. 109, 133, do not supply a rule for the mode of adjusting loss of capital or of distributing surplus assets, but only supply the necessary powers for giving effect to the rights & interests of the parties. In ascertaining those rights in the case of co.'s constituted under the Cos. Acts, in the absence of any provision in the memorandum or arts. of assocn., the capital account must first be equalised, & the balance must be appropriated according to the nominal amount of the shares, & a clause in the memorandum or arts. regulating the distribution of dividends will not of itself govern the distribution of surplus.

In the case of co.'s not constituted under the Acts effect must be given to any clause, in the deed under which the co. was constituted, with regard to surplus assets, but a provision as to distribution of dividends does not of itself govern the distribution of surplus.

By the deed of settlement under which a co. was originally constituted losses were to be made good by the shareholders "in proportion to their respective shares," profits were to be divided amongst them "according to the amount of their respective shares," & upon a winding up the residue, after paying debts, was to be "divided between the several proprietors"—namely, shareholders—"for the time being in proportion to their respective shares." The shares were of £10 each. Some were fully paid, others were only paid up to the extent of £6 10s. per share, & some of both classes had been issued at a premium. The co. was afterwards registered under 1862 Act, Part VII., as an unlimited co. It sold its

undertaking & went into voluntary liquidation, & after payment of its debts & the costs of liquidation had a surplus more than sufficient to return all the paid-up capital:—**Held:** (1) the surplus must first be applied in returning the paid-up capital; (2) the balance must be distributed amongst all the shareholders in proportion to the nominal amounts of their shares, & without regard to the premiums paid by any shareholders, or the manner in which dividends were payable or had in fact been paid.—*Re DRIFFIELD GAS LIGHT CO.*, [1898] 1 Ch. 451; 67 L. J. Ch. 247; 78 L. T. 162; 46 W. R. 411; 14 T. L. R. 259; 42 Sol. Jo. 325; 5 Mans. 253.

Annotation:—As to (2) Consd. *Re Mutoscope & Biograph Syndicate*, [1899] 1 Ch. 896.

6970. —.]—The regulations of a co. with a nominal capital in £1 shares provided that if upon the winding up the surplus assets should be more than sufficient to repay the whole paid-up capital, the excess should be distributed among the members in proportion to the capital paid or which ought to have been paid on the shares held by them respectively at the commencement of the winding up. Some of the shares issued were fully paid up; on others only 10s. per share had been paid. There was an excess in the winding up after paying debts & expenses & repaying all the paid-up capital:—**Held:** the excess was distributable in proportion to the capital actually paid up.—*Re MUTOSCOPE & BIOGRAPH SYNDICATE*, [1899] 1 Ch. 896; 68 L. J. Ch. 417; 81 L. T. 22; 47 W. R. 520; 43 Sol. Jo. 479; 6 Mans. 298.

Annotation:—Appld. *Re Welsh Whisky Distillery Co.* (1900), 16 T. L. R. 246.

6971. —.]—*Re WELSH WHISKY DISTILLERY CO., LTD.* (1900), 16 T. L. R. 246; 44 Sol. Jo. 296.

6972. — **Whether shares fully paid up—Bankruptcy of holder of partly-paid shares—Proof by company for amount uncalled.**—The holder of £1 shares in a limited co., on which 10s. per share had been paid, became bkpt., & the co. proved in the bkpcy. for a call of 1s. per share, which had been made just before the bkpcy., & for the bkpt.'s liability in respect of the uncalled 9s. per share. The proof was admitted, & the trustee in the bkptcy. paid a dividend of 1s. 6d. in the pound. It was expected that a further dividend of 1s. 6d. in the pound would be paid. The co. went into voluntary liquidation, & after satisfying its debts & liabilities, there remained surplus assets in the hands of the liquidator:—**Held:** the bkpt.'s shares could not by reason of the proof in the bkpcy. be treated as fully paid shares for the purpose of the distribution of the surplus assets, but that the holders of the other shares, which were in fact paid up in full, were alone entitled to share in the surplus assets until the amount paid on their shares respectively was reduced to that which had been in fact paid on the bkpt.'s shares.—*Re WEST COAST GOLD FIELDS, LTD., ROWE'S TRUSTEE'S CLAIM*, [1906] 1 Ch. 1; 93 L. T. 609; 54 W. R. 116; 22 T. L. R. 39; 50 Sol. Jo. 43; *sub nom. Re WEST COAST GOLD FIELDS, Ex p. SALAMAN*, 75 L. J. Ch. 23; 12 Mans. 415, C. A.

Annotation:—Refd. *Re Peruvian Ry. Construction Co.* (1915), 85 L. J. Ch. 129.

6973. —.]—The original capital of a co. consisted of preference & ordinary shares, the preference shares having a fixed dividend but no priority as to capital. The co. having power to convert its paid-up shares into stock converted its ordinary shares into ordinary stock at face

value, but in converting its preference shares into preference stock bearing a lower rate of interest it gave the holders extra bonus stock to maintain their former dividends. The co. also made direct issues of fully-paid preference & ordinary stock for cash without going through the formality of first issuing fully-paid shares & converting them. The co. also made direct issues of partly-paid ordinary shares & partly-paid ordinary stock for cash. All the holders were placed on the register & received dividends. Many years after these issues were made the co. was wound up voluntarily, & after paying all the creditors the liquidator had a balance of surplus assets for distribution among the members:—*Held*: (1) having regard to the lapse of time, the irregularity in the direct issues of the fully-paid preference & ordinary stock must be treated as waived, & the holders were entitled to rank for the full amount of their holding; (2) the original holders & transferees of preference stock converted from fully-paid preference shares could only rank for the amount representing conversion at face value & not for the bonus stock, which was wholly *ultra vires* & must be treated as non-existent; (3) the holders of partly-paid shares were entitled to rank for the amount paid & were subject to a call for equalisation; (4) the original holders & transferees of partly-paid ordinary stock were not entitled to rank at all, as their stock was wholly *ultra vires* & must be treated as non-existent; (5) no call could be made on the holders of the bonus or partly-paid stock.—*Re HOME & FOREIGN INVESTMENT & AGENCY CO., LTD.*, [1912] 1 Ch. 72; 81 L. J. Ch. 364; 106 L. T. 259; 56 Sol. Jo. 124; 19 Mans. 188.

6974. ———.]—By one of the arts. of assocn. of a co. it was provided that “If the co. shall be wound up, & the assets available for distribution among the members as such shall be insufficient to repay the whole of the paid-up capital, such assets shall be distributed so that as nearly as may be, the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, at the commencement of the winding up, on the shares held by them respectively.” The issued capital of the co. consisted of fully paid shares & partly paid shares. Upon the application of the liquidator in the voluntary winding up of the co. for the determination of the principle upon which the assets available for distribution which were insufficient to return to the shareholders the whole of their paid-up capital, ought to be distributed:—*Held*: the assets available for distribution among the members of the co. ought, without calling up any uncalled capital & exclusive of such uncalled capital, to be distributed among such members in proportion to the amounts actually paid up or which, according to the calls made before the commencement of the winding up, ought to have been paid up before the commencement of the winding up on the shares held by such members.—*Re KINATAN (BORNEO) RUBBER, LTD.*, [1923] 1 Ch. 124; 92 L. J. Ch. 613; 128 L. T. 216; 39 T. L. R. 53; *sub nom. Re KENATON (BORNEO) RUBBER, LTD.*, 67 Sol. Jo. 113.

6975. As between different classes of shares—*Right of preference shareholders.*—*GRIFFITH v. PAGET*, No. 7140, *post*.

Preference shares fully paid—*Ordinary shares partly paid.*—*BIRCH v. CROPPER*, *Re BRIDGEWATER NAVIGATION CO., LTD.*, No. 6965, *ante*.

6977. ——— Reserve funds.]—The arts. of assocn. of a limited co. provided that the directors

might, in priority to any dividend, set aside out of profits such sum as they thought proper as a reserve fund for certain specified purposes, or for meeting any other contingencies of the co.; & that, subject to that provision, the entire net profits of each year should belong to the shareholders. At the date of the sale of the undertaking, the capital of the co. consisted of ordinary shares, & shares with a fixed preferential dividend. In Aug. 1887, during the currency of a financial year, the undertaking of the co. was sold at a price which, after repaying to the ordinary & preference shareholders the capital paid up on their shares, & discharging all the liabilities of the co., left a large surplus. It had been the practice of the co. to apportion a part of the annual profits to three funds—namely, the depreciation of steamers fund, the canal improvement fund, & an insurance fund—but no part of these funds was ever required for the purposes for which they were intended. In the accounts for the year 1886, the plant & debts due to the co. were estimated below, & the debts due from the company were estimated above, what proved to be their actual value:—*Held*: (1) the reserve funds were divisible as profits among the ordinary shareholders; (2) the ordinary shareholders were entitled to the net profits of the broken year, after paying an apportioned dividend to the preference shareholders, & in taking the accounts the actual values of the plant & debts ought to be substituted for the estimated values.—*Re BRIDGEWATER NAVIGATION CO.*, [1891] 2 Ch. 317; 60 L. J. Ch. 415; 64 L. T. 576; 7 T. L. R. 360, C. A.

Annotations:—As to (1) *Appld.* *Bishop v. Smyrna & Cassaba Ry.* (No. 2), [1895] 2 Ch. 596. *Consd.* *Re Odessa Waterworks Co.*, [1901] 2 Ch. 190, n.; *Re Crichton's Oil Co.*, [1902] 2 Ch. 86. *Refd.* *Re Armitage, Armitage v. Garnett*, [1893] 3 Ch. 341, n.; *Re Eastern & Australian S.S. Co.* (1893), 3 R. 370; *Re Spanish Prospecting Co.*, [1911] 1 Ch. 92; *Re National Telephone Co.*, [1914] 1 Ch. 755. *Generally, Mentd.* *Pool v. Guardian Investment Trust Co.*, [1922] 1 K. B. 347.

6978. ———.]—By one of the clauses of the arts. of assocn. of a co., which was in course of being wound up voluntarily, it was provided that, if the co. should be wound up, & the surplus assets should be insufficient to repay the whole of the paid-up capital, such surplus assets should be first applied in repaying to the preference shareholders *pro rata* the amount of capital paid up on the preference shares held by them respectively at the commencement of the winding up, so far as such surplus assets should extend, & that the balance of such surplus assets, if any, should be distributed amongst the ordinary shareholders:—*Held*: the general rule established by *Birch v. Cropper*, No. 6965, *ante*, that the surplus assets of a co. were divisible among all the shareholders in proportion to their nominal interest in the subscribed capital of the co., was not affected by the above clause, & there was no reason for giving the words “surplus assets” in that clause any other than its *prima facie* meaning, namely, all the capital of the co., including unpaid calls which might remain after the debts, liabilities, & costs of the co. had been discharged.—*Re SHEPPARD'S CORN MALTING CO., LTD.*, *Ex p. LOWENFELD* (1893), 70 L. T. 3; 1 Mans. 325; 7 R. 337, C. A.

Annotations:—*Consd.* *Re Anglo-Continental Corp'n. of Western Australia*, [1898] 1 Ch. 327. *Appld.* *Re Welsh Whisky Distillery Co.* (1900), 16 T. L. R. 246.

6979. ——— Profits earned before liquidation.]—A sum of money standing to the revenue account of a limited co. at the date of the commencement of the liquidation of the co. & representing net profits earned by the co. down to that

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date, is applicable in the liquidation to the payment of arrears of dividend due at that date to the preference shareholders, in priority to the payment of a deficit on the capital account & of the costs of the liquidation.—*BISHOP v. SMYRNA & CASSABA RY. CO.*, [1895] 2 Ch. 265; 64 L. J. Ch. 617; 72 L. T. 773; 43 W. R. 647; 11 T. L. R. 393; 39 Sol. Jo. 469; 2 Mans. 429; 13 R. 561.

Annotations:—Distd. Re Odessa Waterworks Co., [1901] 2 Ch. 190, n. *Consd. Re Crichton's Oil Co.*, [1902] 2 Ch. 86. *Refd. Re Spanish Prospecting Co.* (1910), 80 L. J. Ch. 210; *Re Wakley, Wakley v. Vachell*, [1920] 2 Ch. 205.

6980. ———.—[The capital of a trading co. consisted of £10 shares, preference & ordinary, all paid up in full, the former being entitled to a cumulative preferential dividend. The arts. of assocn. empowered the directors to set aside out of the profits such sums as they thought proper as a reserve fund. For some years the preferential dividend was paid & then for three years the business was carried on at a loss, the result being a loss of capital to the amount of £4,346. In the next year there was a profit of £1,675 on the year's trading, but the directors did not declare a dividend or make any appropriation of that sum. The co. went into voluntary liquidation, the debts were all paid, and the capital to the extent of £7 per share was returned to the shareholders. The sum of £1,675 remained in the hands of the liquidator:—*Held*: upon the construction of the arts. the preference shareholders were not entitled to have this sum applied in paying them dividends for the four years in which they had received none, but that it must be divided as capital ratably among all the shareholders.—*Re CRICHTON'S OIL CO.*, [1902] 2 Ch. 86; 71 L. J. Ch. 531; 86 L. T. 787; 18 T. L. R. 556; 9 Mans. 402, C. A.

Annotations:—Distd. Re Hall, [1909] 1 Ch. 521. *Refd. Re Accrington Corpn. Steam Tram Co.*, [1909] 2 Ch. 40; *Re Spanish Prospecting Co.* (1910), 80 L. J. Ch. 210; *Re Wakley, Wakley v. Vachell*, [1920] 2 Ch. 205.

6981. ———.—**Effect of agreement for sale of undertaking.**—*Re BEESTON PNEUMATIC TYRE CO., LTD.* (1898), 14 T. L. R. 338.

Annotation:—Distd. Re North West Argentine Ry., [1900] 2 Ch. 882.

6982. ———.—[The A. co., with a capital of £550,000, divided into shares of £10 each, of which 35,000 were preference shares & 20,000 were ordinary shares, & with arts. of assocn. which were silent as to how the surplus assets were to be divided between the two classes of shareholders in the event of winding up, entered into an agreement, under a power in its memorandum of assocn., to sell its undertaking & assets to the C. co.

Part of the consideration for the sale was a sum of £310,000 stock of the C. co., which was to be distributed among the holders of the preferred & deferred shares of the A. co., & accepted by them in satisfaction of their interests in the property sold; & the agreement was expressed to be conditional on all necessary resolutions of the shareholders of the A. co. being passed.

The agreement was silent as to the proportions in which the stock was to be divided between the two classes of shareholders, & so was the notice convening a meeting of the shareholders to pass a resolution approving the agreement & authorising the directors of the A. co. to carry the same into effect. A circular sent by the secretary of the A. co. with the notice stated that the purchase consideration to the shareholders of £310,000 stock was to be distributed among them in the proportion of £210,000 to the preferred share-

holders, & £100,000 to the deferred shareholders. This suggested mode of distribution was referred to at the meeting, where it was also pointed out that the suggested mode was not in accordance with the legal rights of the two classes of shareholders in a winding up. There were absentees from the meeting, & only a majority of the shareholders present voted for the resolution:—*Held*: the ct. could not draw an inference from the facts that all the parties concerned had agreed upon a mode of distribution not in accordance with the legal rights of the two classes of shareholders, & unless successful proceedings could be taken against the A. co. or its directors, or to set aside the resolution, or all individual consents of shareholders could be obtained, the liquidators must distribute the £310,000 stock in accordance with the legal rights of the shareholders.—*Re NORTH WEST ARGENTINE RY. CO.*, [1900] 2 Ch. 882; 70 L. J. Ch. 9; 83 L. T. 675; 49 W. R. 134; 17 T. L. R. 20; 45 Sol. Jo. 46.

6983. ———.—[*Re ODESSA WATERWORKS CO., LTD.*, [1901] 2 Ch. 190, n.

Annotations:—Consd. Re Crichton's Oil Co., [1902] 2 Ch. 86. *Refd. Re Hall* (1909), 78 L. J. Ch. 382.

6984. ———.—[There is no general rule that where preference shareholders have a preference as to repayment of capital they can have no further share in surplus assets. The question depends on the construction of the memorandum & arts. of assocn. But if these documents contain no provisions on the point, surplus assets must in a winding up be divided amongst all the shareholders, ordinary & preference, in proportion to the nominal value of the shares.

A co. incorporated in 1884 had an issued capital of 28,222 ordinary & 26,905 preference shares of £5 each; the preference shares were entitled to a cumulative preferential dividend of 10 per cent out of "the divisible profits of the co. in each year," & "a preferential right to be repaid the amount paid up thereon & interest out of the assets of the co. if the co. should be wound up." The co. never paid any dividend except in the year 1905, when they paid 3 per cent on the preference shares. In 1900 the capital of the co. was reduced by writing down the ordinary shares to 1s. per share. In 1908 the co.'s assets were sold for a sum sufficient to pay all their liabilities, repay the capital of both classes of shares, & leave a large surplus:—*Held*: (1) the surplus was not divisible profits of the co. & the preference shareholders were not entitled to have it applied in payment of their cumulative dividends; (2) they were entitled to have their capital repaid with interest at the rate of 5 per cent *per annum* from the date of the winding-up order; (3) the surplus, after paying to the ordinary shareholders their reduced capital of 1s. per share, must be divided among the preference & ordinary shareholders in proportion to the nominal value of their shares.—*Re ESPUELA LAND & CATTLE CO.*, [1909] 2 Ch. 187; 78 L. J. Ch. 729; 101 L. T. 13; 16 Mans. 251.

Annotations:—As to (3) Consd. Re National Telephone Co., [1914] 1 Ch. 755. *Folld. Re Fraser & Chalmers*, [1919] 2 Ch. 114. *Consd. Anglo-French Music Co. v. Nicoll* (1920), 90 L. J. Ch. 183. *Refd. Will v. United Lankat Plantations Co.*, [1912] 2 Ch. 571.

6985. ———.—**Ultra vires issue of bonus preference stock.**—*Re HOME & FOREIGN INVESTMENT & AGENCY CO., LTD.*, No. 6973, *ante*.

6986. ———.—[Either with regard to dividend payable while a co. is a going concern, or with regard to rights in a winding up the express gift or attachment to preference shares, on their creation, of preferential rights, whether in respect

of dividend or return of capital, is, *prima facie*, a definition of the whole of their rights in these respects, & negatives any further or other right to which, but for the specified rights, they would have been entitled.

Arts. of assocn. of a co. entitled the holders of its first preference shares "to receive a preferential cumulative dividend of 6 per cent *per annum* & no more, on the amount for the time being paid up . . . thereon, out of the profits of the co., & to the preferential repayment of the amount paid up . . . on any such shares out of the assets of the co. in the event of the co. being wound up . . . in priority to any payment in respect of the ordinary shares of the co., but to no other participation in profits."

Second preference shares were created, on an increase of capital, by resolution which provided that "the holders thereof (subject to the payment of the preferential dividend on the original preference shares)" should "be entitled to a cumulative preferential dividend at the rate of 6 per cent *per annum*," & that, after the ordinary shares had received 6 per cent *per annum* out of the profits of each year, "the second preference share & the ordinary shares shall participate ratably, according to the amounts paid up thereon in any surplus profits." The resolution also provided that "in the event of the co. being wound up, the surplus assets thereof shall be applied in the first place in repaying to the holders of the original preference shares the full amount paid up thereon, & subject thereto, in repaying to the holders of the second preference shares the full amount paid up thereon, in priority to any payment in respect of the ordinary shares."

After the first & second preference shares had been issued the co. adopted a new set of arts., one of which provided that if on winding up the "surplus assets shall be more than sufficient to repay the whole of the paid-up capital, then, subject as to any new shares to the special terms upon which they may be issued, the excess shall be distributed among the members in proportion to the capital paid . . . on the shares, other than first & second preference shares held by them respectively, at the commencement of the winding up. . . . But this clause is to be without prejudice to the rights of the holders of the first & second preference shares, and any other shares issued upon special conditions."

After the adoption of the new articles a number of unissued ordinary shares were, pursuant to a resolution, issued upon the terms that the holders should "be entitled to a non-cumulative dividend at the rate of 5 per cent *per annum* on the amount paid up thereon," & that, "in the event of the winding up of the co.," the surplus assets thereof should be applied first in repaying to the holders of the first & second preference shares the full amount paid up thereon, & that "such surplus assets shall next be applied in repaying to the holders of the third preference shares . . . the full amount paid up thereon."

The remaining ordinary shares were issued on the terms that when fully paid they should be converted into two classes of stock, of which one, called "preferred stock," was, as between the two classes, to carry a fixed cumulative dividend of 6 per cent *per annum* on the capital paid up thereon, & in the event of winding up was to rank for repayment of capital, together with a bonus of 5 per cent, in priority to the other class, called "the deferred stock," & that the deferred stock was to "confer a right to the surplus profits, & in the event of a winding up, to the surplus

assets of the co. to which the ordinary shares would, but for the said conversion, have been entitled."

In the voluntary winding up of the co., after satisfaction of its liabilities, & repayment to all the share & stock holders of the capital paid up by them, & payment to the preferred stock holders of their 5 per cent bonus, there remained for distribution a surplus consisting of the remains of a reserve fund which had not been capitalised, & which, while the co. was a going concern, might have been distributed as dividend:—*Held*: (1) the claims of the first, second & third preference shareholders, had been satisfied by the return to them of their paid-up capital, inasmuch as in each case there was an implied negating of any right to receive more than their dividend at the specified rate up to the winding up, & a return of their paid-up capital on winding up; (2) the preferred stock holders' claims had also been fully satisfied; (3) the deferred stock holders were entitled to the whole of the fund.—*Re NATIONAL TELEPHONE Co.*, [1914] 1 Ch. 755; 83 L. J. Ch. 552; 109 L. T. 389; 29 T. L. R. 682; 58 Sol. Jo. 12; 21 Mans. 217.

Annotations:—*As to* (1) *N.F. Re Fraser & Chalmers*, [1919] 2 Ch. 114. *Consd.* *Anglo-French Music Co. v. Nicoll*, [1921] 1 Ch. 386.

6987. — **Arrears of preferential dividend.**—A co.'s capital included 15,000 preference shares of £1 each on which 15s. 6d. only had been paid. The preference shareholders were entitled to a cumulative preferential dividend of 10 per cent *per annum* on the amount paid up on their shares, & in a winding up to have the surplus assets applied first, in paying off their capital; secondly, in paying the arrears, if any, of the preferential dividend to the commencement of the winding up, & to have the residue, after payment of the capital of the ordinary shares, divided between the ordinary & preference shareholders in proportion to the amount paid up on their shares.

The arts. of assocn. provided that no dividends should be declared except out of profits. No dividends had ever been declared, & the last balance-sheet of the co., issued in Sept. 1914, showed a loss on profit & loss account to date of £9,000. The co. went into voluntary liquidation on Sept. 3, 1915. The co. held a large stock of antimony, & this had so risen in price that the surplus assets were sufficient to cover the loss, pay all arrears of preferential dividends, & a dividend upon the ordinary shares. The liquidator took out this summons for directions how the surplus assets were to be divided:—*Held*: the arrears of preferential dividends payable could not be limited to dividends actually declared, & the holders of preference shares were entitled to be paid preferentially out of the surplus assets 10 per cent *per annum* on the amount paid up on their shares from the date of their issue to the commencement of the winding up. *Semble*: it would have made no difference if the surplus assets had not included any profits, but as there plainly were profits the point did not arise.—*Re NEW CHINESE ANTIMONY Co., LTD.*, [1916] 2 Ch. 115; 85 L. J. Ch. 429; 114 L. T. 989; 60 Sol. Jo. 513; [1916] H. B. R. 8.

Annotation:—*Fold. Re Springbok Agricultural Estates*, [1920] 1 Ch. 563.

6988. — — — — —.]—A co. incorporated in 1903 passed a special resolution in 1905 sanctioning the issue of preference shares & providing that the dividends on them should be paid out of profits only & that "In the event of the winding up of the co. the holders of the preference shares

Sect. 37.—Voluntary winding up: Sub-sect. 9, D. (a) & (b); sub-sect. 10.]

shall be entitled to have the surplus assets applied first in paying off the capital paid up on the preference shares . . . secondly, in paying off the arrears, if any, of the preferential dividend . . . to the commencement of the winding up & thereafter to participate ratably with the holders of other shares in the residue, if any, of such surplus assets which shall remain after paying off the capital paid up on such other shares." In 1919 the co. went into voluntary liquidation & there were surplus assets in the hands of the liquidators. No preference dividends had ever been declared nor profits earned:—*Held*: all unpaid preferential dividends were "arrears" of preferential dividends although no profits had been earned by the co., so that subject to the payment off of the preference shares the surplus assets were applicable in the first place in paying off the whole of the unpaid preferential dividends down to the commencement of the winding up.—*Re SPRINGBOK AGRICULTURAL ESTATES, LTD.*, [1920] 1 Ch. 563; 89 L. J. Ch. 362; 123 L. T. 322; 64 Sol. Jo. 359; [1920] B. & C. R. 107.

6989. ——.].—A provision merely giving preference shareholders priority for repayment of their capital in a winding up does not negative their ordinary right as corporators to participate in surplus assets.—*Re FRASER & CHALMERS, LTD.*, [1919] 2 Ch. 114; 88 L. J. Ch. 343; 121 L. T. 232; 35 T. L. R. 484; 63 Sol. Jo. 590; [1918–19] B. & C. R. 186.

Annotation:—*Consd.* *Anglo-French Music Co. v. Nicoll* (1920), 90 L. J. Ch. 183.

6990. As between members by whom subscriptions paid & members to whom advances made.]—A joint-stock co., partaking to some extent of the character of a building society, was established for the purpose of raising moneys by means of subscriptions from members, & advancing money on security to members, & repaying to members the amounts of their subscriptions, & ultimately dividing the profits among continuing members. By the arts. interest was payable to members on their subscriptions; members were to obtain advances on "certificates" in respect of which periodical sums were made payable, but some or all of such periodical payments were allowed to be, & in many cases in fact were, made in advance; & members were allowed to withdraw from the society obtaining repayment of their investments out of premiums & returns of appropriations. The co. having gone into voluntary liquidation:—*Held*: (1) the net assets of the co., after discharging all liabilities, were to be expended; (a) as to the premiums & returns of appropriations, in repayment to members who had given notice to withdraw before the winding

up; (b) as to the general fund, in the first place in paying interest which was due in respect of subscriptions at the date of the winding up, & in the second place, in payments to such members as had paid sums on their certificates in advance, so calculated as to equalise the amounts paid per certificate as far as possible; (2) if the general fund was not sufficient to render the amounts paid per certificate equal in all cases, no call could be made upon the members who had paid the least in respect of their certificates, for the purpose of producing an absolute equality.—*Re LAND, BUILDING, GOVERNMENT & GUARANTEED SECURITIES SOCIETY* (1882), 46 L. T. 758.

6991. Set-off—Of debt due to company from shareholder.]—Certain fully paid shares in a co. which went into voluntary liquidation in 1914 formed part of the estate of a testator who died insolvent in 1908 & indebted to the co. In 1909 a decree for administration of testator's estate was made, & the co. were found to be creditors. The arts. of assocn. of the co. gave it no lien on the fully paid shares for the debt:—*Held*: the rights of the parties were settled at the date of the decree for administration & the liquidator was not entitled to have the full amount of testator's debt paid before the exors. could share in the surplus assets of the co. or to get more than the dividend to which he was entitled in the administration.—*Re PERUVIAN RAILWAY CONSTRUCTION CO., LTD.*, [1915] 2 Ch. 442; 85 L. J. Ch. 129; 113 L. T. 1176; 32 T. L. R. 46; 60 Sol. Jo. 25, C. A.

Annotations:—*Refd.* *Re Melton, Milk v. Towers*, [1918] 1 Ch. 37. *Mentd.* *Re Savage, Cull v. Howard*, [1918] 2 Ch. 146.

(b) Adjustment of Rights between Contributories.

6992. How rights adjusted—Calls on shares not fully paid up.]—Where, under the voluntary winding up of a co., all debts had been provided for:—*Held*: the liquidators were justified in making a call upon the partly paid-up shareholders for the purpose of adjusting the rights between them & the fully paid-up shareholders.—*Re ANGLESEA COLLIERY CO.* (1866), 1 Ch. App. 555; 35 L. J. Ch. 809; 15 L. T. 127; 30 J. P. 692; 12 Jur. N. S. 696; 14 W. R. 1004, L. JJ.

Annotations:—*Apld.* *Re Hodges' Distillery Co., Ex p. Maude* (1870), 6 Ch. App. 51. *Folld.* *Re Coed Madog Slate Co.*, [1877] W. N. 190. *Apld.* *Re Osmondthorpe Hall Freehold Garden & Bldg. Allotment Soc.* (1913), 58 Sol. Jo. 13. *Refd.* *Re Barned's Banking Co., Andrew's Case* (1867), 3 Ch. App. 161; *Sheppard v. Seinde, Punjab & Delhi Ry. & Abbott* (1887), 56 L. J. Ch. 558; *Birch v. Cropper, Re Bridgewater Navigation Co.* (1889), 14 App. Cas. 525; *Re Sheppard's Corn Malting Co., Ex p. Lowenfeld* (1893), 70 L. T. 3; *Re Driffeld Gas Light Co.*, [1898] 1 Ch. 451. *Mentd.* *Re Imperial Mercantile Credit Assocn.* (1867), L. R. 3 Eq. 361.

6993. ——.].—co. in which some of the shareholders had paid up £10 per share & others

PART III. SECT. 37, SUB-SECT. 9.—D. (b).

6992 i. How rights adjusted—Calls on shares not fully paid up.]—The arts. of assocn. of a co. provided that members holding fully paid-up shares should not be contributories within the meaning of the Act, & no call should be made for the purpose of adjusting the rights of members holding fully paid-up & partly paid-up shares respectively; that if the co. should be wound up, the assets available for distribution among the members should be distributed in proportion to the capital paid up or credited as paid up on the shares held by them respectively; but these provisions were to be without prejudice to the rights of the holders of shares issued upon special conditions. Of the shares in

the co. that were issued, 2,000 were fully paid up to £1, 3,000 were paid up to 10s., and 18,100 were paid up to 6s. 6d. The co. went into voluntary liquidation, & after realisation of the assets & the payment of debts there remained the sum of £1,469 in the hands of the liquidator:—*Held*: no call was to be made for the purpose of adjusting the rights of members; the assets available for distribution comprised only the said sum of £1,469; & the assets were to be distributed in proportion to the capital already paid up.—*Re FEDERAL PORTLAND CEMENT CO., LTD.* (1905), 24 N. Z. L. R. 813.—N.Z.

6992 ii. ——.].—In the voluntary winding up of a co. under Joint Stock Companies Act, 1858, payment of calls might be exacted from a contribu-

tory after the whole debts due to the creditors of the co. had been paid the object of the Act being not only to provide for the payment of the debts of a co. but also to equalise the losses of the contributories.—*GRAHAM v. WESTERN BANK* (1866), 4 Macph. (Ct. of Sess.) 484 38 Sc. Jur. 216.—SCOT.

6992 iii. ——.].—A holder of fully-paid shares is a contributory for the purposes of distribution of surplus assets; therefore in a voluntary winding up after the payment of all debts & expenses the liquidator is bound in order to "adjust the rights of contributories among themselves" to make a call upon the ordinary partly-paid shareholders, to equalise the payments of the ordinary shareholders with the nominal advances of

only £5 per share was ordered to be wound up voluntarily on the understanding that no call would be made under any circumstances, except insufficiency of the assets to discharge the debts of the co. The assets in hand were more than sufficient to discharge all the liabilities of the co., & the surplus was, by an order of the ct., applied towards equalising the shares, but not being sufficient for that purpose, on an application for an order on the liquidator to make a call:—*Held*: there must be a call to equalise the shares.—*Re PROVISION MERCHANTS' CO., LTD.* (1872), 26 L. T. 862.

6994. ———.]—*Re COED MADOG SLATE CO.*, [1877] W. N. 190.

6995. ———.]—*Re HOME & FOREIGN INVESTMENT & AGENCY CO., LTD.*, No. 6973, *ante*.

SUB-SECT. 10.—APPLICATIONS TO COURT.

6996. *Jurisdiction of court.*—Under a voluntary winding up the ct. may, under 1862 Act, ss. 138, 165, do anything that it could do if the winding up were compulsory.

A member of a co. in course of voluntary liquidation, presented a petition praying that the liquidators might be removed, & that the winding up might be continued either by, or under the supervision of, the ct., on the grounds that the directors who were the present liquidators being under the influence of the solrs. of the co., had paid to them previous to the commencement of the winding up a bill of costs, in which were charged several large sums which were not properly payable out of the assets of the co., & that the accounts as presented to the shareholders were erroneous & inaccurate in many particulars. The creditors of the co. had been paid in full, & all that now remained to be done in the winding up was to distribute a sum of about £400 among the shareholders:—*Held*: the petition was demurrable, & must accordingly be dismissed with costs, but the costs of affidavits filed in answer to the petition & the costs of shareholders who appeared to oppose it were refused.—*Re STAR & GARTER, LTD.* (1873), 42 L. J. Ch. 374; 28 L. T. 258.

Annotation:—*Refd.* *Re Steam Stoker Co.* (1875), 32 L. T. 143.

6997. ——— *To consider conduct of directors.*—When breaches of trust on the part of the directors are alleged by petition, & the evidence does not justify an immediate order against them, the ct. will not exercise its summary jurisdiction under 1862 Act, but will leave the parties to their remedy by bill; but when the ct. is of opinion that there are questions to be tried, leave will be given to

shareholders who had taken fully-paid shares in exchange for the property sold to the co.—*PATERSON v. M'FARLANE, ETC.* (1875), 2 R. (Ct. of Sess.) 490; 12 Sc. L. R. 318.—*SCOT.*

6992 iv. ———.]—In the voluntary winding up of a limited co., after all debts & expenses have been paid, a shareholder who has been allotted fully paid-up shares in consideration of his services as promoter of the co. is entitled to have the liquidator ordained to make a call upon the holders of shares not fully-paid, so as to equalise the actual payments made on these shares with the amount credited as paid up on the paid-up shares, & thereafter to proceed with the adjustment of the rights of the contributories among themselves.—*STEWART v. SCOTO-AMERICAN SUGAR SYNDICATE (LIQUIDATOR)* (1901), 3 F. (Ct. of Sess.) 585; 38 Sc. L. R.

398; 8 S. L. T. 476.—*SCOT.*

s. ——— *Where contributory overpaid by mistake—In sharing surplus assets.*

—Where a fully-paid shareholder is by mistake paid by the liquidators of the co. a greater share in the surplus assets than he is entitled to receive, he may be placed on the list of contributories, & repayment of the amount overpaid to him may be enforced by summons under Companies Act, 1882, s. 164.—*Re KAITANGATA RAILWAY & COAL CO., LTD.* (1903), 22 N. Z. L. R. 588.—*N.Z.*

PART III. SECT. 37, SUB-SECT. 10.

t. *Jurisdiction of court*—*To order money in hands of liquidator to be paid into court.*—Upon the application under Companies Statute, 1864 (No. 190), s. 121, of a liquidator of a co. under the Act, which is being volun-

tioners to sue in the name of the co., upon their giving a sufficient indemnity against the costs.—*BANK OF GIBRALTAR & MALTA* (1865), 1 Ch. App. 69; 35 L. J. Ch. 49; 13 L. T. 386; 11 Jur. N. S. 916; 14 W. R. 69, L. JJ.

Annotations:—*Consd.* *Re Beaujolais Wine Co.* (1867), 3 Ch. App. 15; *Re Royal Hotel Co. of Great Yarmouth* (1867), L. R. 4 Eq. 244; *Re Brighton Brewery Co.*, Hunt's Case (1868), 37 L. J. Ch. 278. *Appld.* *Re County Marine Insee.*, Rance's Case (1870), 6 Ch. App. 104. *Refd.* *Re St. David's Gold Mining Co.* (1866), 14 L. T. 539; *Re Mercantile Trading Co.*, Stringer's Case (1869), 4 Ch. App. 475; *Re Irrigation Co. of France*, Fox's Case (1870), 23 L. T. 453; *Silber Light Co. v. Silber* (1879), 12 Ch. D. 717; *Cape Breton Co. v. Fenn* (1881), 50 L. J. Ch. 321. *Mentd.* *Re Imperial Bank of China, India & Japan* (1866), 1 Ch. App. 339; *Re Gold Co.* (1879), 11 Ch. D. 701.

6998. ———.]—Certain directors of a co. were alleged to have been guilty of mismanaging its affairs. The co. afterwards wound up voluntarily, & the same directors appointed official liquidators:—*Held*: the question of their misconduct could not be dealt with in the winding-up proceedings, & the proper course to adopt in such a case was to file a bill against the directors; but the ct. declined to say whether the case was one in which a bill ought to be filed.—*Re LONDON BANK OF SCOTLAND* (1867), 16 L. T. 783; 15 W. R. 1103.

6999. ——— & *order repayment of money.*—By virtue of 1862 Act, s. 138, the ct. has, upon the application of the liquidator in a voluntary winding up of a co., the same jurisdiction to exercise the powers conferred by sect. 165 of that Act, as it would have in a compulsory winding up, or in a winding up under supervision. Therefore, upon the application of the liquidator in a voluntary winding up, a director of the co. may be ordered to refund what he received in respect of a bonus or dividend which was improperly paid by the co.—*Re COUNTY MARINE INSURANCE CO.*, RANCE'S CASE (1870), 6 Ch. App. 104; 40 L. J. Ch. 277; 23 L. T. 828; 19 W. R. 291, L. JJ.

Annotations:—*Refd.* *Re National Funds Assee.* (1878), 10 Ch. D. 118; *Ammonia Soda Co. v. Chamberlain*, [1918] 1 Ch. 266. *Mentd.* *Guinness v. Land Corp. of Ireland* (1882), 22 Ch. D. 349; *Re Denham* (1883), 25 Ch. D. 752; *Leeds Estate Building & Investment Co. v. Shepherd* (1887), 36 Ch. D. 787; *Lee v. Neuchatel Asphalte Co.* (1889), 41 Ch. D. 1; *Municipal Freehold Land Co. v. Pollington* (1890), 63 L. T. 238; *Re Sharpe, Re Bennett, Masonic & General Life Assee. v. Sharpe*, [1892] 1 Ch. 154; *Re Kingston Cotton Mill Co. (No. 2)*, [1896] 1 Ch. 331; *Dovey v. Cory*, [1901] A. C. 477; *Clark v. Sun Insee. Office* (1911), 104 L. T. 520.

7000. ——— *To confirm agreement for sale.*—On an application for the ct.'s confirmation of an agreement made between the liquidators of a co., in the course of being voluntarily wound up, & another co., the ct., on its appearing that such agreement was fit & proper, & for the benefit of the co., granted under 1862 Act, s. 138, the order

tarly wound up, for the advice of the ct., the ct. has no jurisdiction to order moneys in his hands to be paid into ct., or invested, but may intimate its opinion as to the course the liquidator ought to pursue as to them.—*Re BROKEN HILL NORTH SILVER MINING CO., LTD.* (1888), 14 V. L. R. 170.—*AUS.*

a. ——— *To stay proceedings to wind up company—When exercised.*—To justify the ct. in staying the proceedings in a voluntary winding up, there must be clear evidence that it is not merely in the interests of creditors & shareholders, but that it will not be detrimental to the public.—*Re GOLDEN BUTTERFLY GOLD MINING CO.*, No LIABILITY, [1916] S. A. L. R. 177.—*AUS.*

b. ——— *Against company in voluntary liquidation.*—Companies Act, 1862, s. 138:—*Held*: does not give the

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11, A., B. & C.]*

asked for.—*Re SCINDE, PUNJAUB & DELHI BANK CORPN., LTD.* (1867), 15 L. T. 602.

7001. — To rescind contract.]—A co. was formed for the purpose of entering into, & had executed, an agreement for the purchase of certain options. The arts. of assocn. provided that it should be no objection to the agreement that the vendors were promoters & directors & stood in a fiduciary relation to the co. The options depended on an agreement between the vendors & the French owners of a business; this agreement was disputed, & ultimately declared void by a French ct. The co. then went into voluntary liquidation, & the liquidators took out this summons to set aside the agreement between the co. & the vendors:—*Held*: it was doubtful whether the ct. had jurisdiction on a summons under 1908 Act, s. 193, to set aside a contract, but if it had such jurisdiction, it was discretionary & ought not to be exercised in this case.—*Re CENTRIFUGAL BUTTER CO., LTD.*, [1913] 1 Ch. 188; 82 L. J. Ch. 87; 108 L. T. 24; 57 Sol. Jo. 211; 20 Mans. 34.

7002. To what court applications made.]—Where there is a voluntary winding up of a co., every proceeding with reference to it must be taken in the same branch of the ct., & there being a suit in the Rolls Ct. a petition to one of the Vice-Chancellors was ordered to be presented at the Rolls.—*Re ALEXANDRA PRINTING INK CO., LTD.* (1868), 18 L. T. 18; 16 W. R. 456.

7003. How applications made—Motion.]—*Re UNION BANK OF KINGSTON-UPON-HULL*, No. 7109, *post*.

7004. — Summons.]—*Re BRITISH ENVELOPE MANUFACTURING CO.*, [1885] W. N. 84.

7005. Who may apply — Liquidators.]—A liquidator having allowed a claim against the co. under a voluntary winding up, ought not, in consequence of objections on the part of some of the shareholders, to bring the matter himself before the ct. under 1862 Act, s. 138, but should leave the dissentient shareholders to do so.—*Re LICENSED VICTUALLERS' GENERAL PLATE GLASS INSURANCE CO., LTD.*, *Ex p.* WESSON (1867), 17 L. T. 8; 15 W. R. 917.

7006. — —.]—*Re UNION BANK OF KINGSTON-UPON-HULL*, No. 7109, *post*.

7007. — Creditor—Where also contributory—In respect of matter affecting him as creditor only.]—The fact that a creditor of a co. is also a contributory entitles him to make an application, under 1862 Act, s. 138, in respect of a claim in which he is concerned only as creditor.—*Re CENTRAL DE KAAP GOLD MINES* (1899), 69 L. J. Ch. 18; 7 Mans. 82.

Annotations:—Mentd. *Inman v. Ackroyd & Best*, [1901] 1 K. B. 613; *Morrell v. Oxford Portland Cement Co.* (1910), 26 T. L. R. 682; *Moriarty v. Regent's Garage & Engineering Co.*, [1921] 1 K. B. 423.

ct. power to stay proceedings against a co. which is being wound up voluntarily.—*SDEUARD v. GARDNER* (1876), 3 R. (Ct. of Sess.) 577; 13 Sc. L. R. 363.—**SCOT.**

c. — *To order service out of jurisdiction—For enforcement of calls.]*—Where, upon the voluntary winding-up of a co., the liquidator applied for leave to issue & serve out of the jurisdiction an originating summons to enforce the payment of calls, the ct. made the order sought.—*Re WAKE (GEORGE J.), LTD.* (1911), 45 I. L. T. 270.—**IR.**

d. — *To adjudicate on claim for breach of contract—Properly enforceable in ordinary courts.]*—A contributory & creditor of a co. in volun-

tary liquidation alleging a claim of damages against the co. for wrongful dismissal from his position as managing-director, presented a petition under Cos. Act, 1862, s. 138, & Cos. Act, 1900, s. 25, praying for the determination of the ct. on the validity & extent of his claim. The ct. refused the petition on the ground that a claim for damages ought to be constituted before a ct. of ordinary jurisdiction & that it was not "just & beneficial" that it should be determined by the ct.—*CRAWFORD v. McCULLOCH*, [1909] S. C. 1063.—**SCOT.**

e. — *To inquire into conduct of liquidator—At instance of co-liquidator.]*—Where two liquidators have been appointed in the case of the

7008. Who may be heard—Individual creditor—Application by creditor opposed by company.]—*Re BRITISH NATION LIFE ASSURANCE ASSOCN.*, No. 6882, *ante*.

7009. Appeals—To what court—From county court judge—Order to pay workman commuted sum under Workmen's Compensation Act, 1906 (c. 58), s. 8.]—Under a power in a debenture-deed of a co. a receiver & manager was appointed, & shortly afterwards there was a voluntary winding up of the co. An application was then made under above sect. by a workman who had obtained an award against the co., for a weekly payment as compensation for an accident, to have a commuted sum assessed in place of the weekly payment & order was made that the liquidator "do pay" the workman £100. The liquidator appealed to the Ct. of Appeal:—*Held*: the appeal was not an appeal under above Act, & did not lie to the Ct. of Appeal direct, but must be decided in the winding up. *Semble*: the county ct. judge had jurisdiction to assess the sum payable only & not to order payment.—*HOMER v. GOUGH*, [1912] 2 K. B. 303; 81 L. J. K. B. 261; 105 L. T. 732; 5 B. W. C. C. 51, C. A.

7010. — Time for appeal—Extension of time—When ordered.]—The Master of the Rolls refused an application by the liquidator of a co., which was being wound up voluntarily, for an injunction to restrain a creditor from selling goods of the co. which he had taken in execution; & more than three weeks elapsed without the liquidator giving notice of his intention to appeal. An injunction having, in an analogous case, been granted by Stuart, V.-C., the liquidator applied for leave to appeal, notwithstanding the delay:—*Held*: the fact of a contrary decision in a different, though analogous, case having been pronounced by a judge of co-ordinate jurisdiction, was not aground on which the Ct. of Appeal would exercise its discretion of extending the time for appealing.—*Re HULL FORGE CO., LTD.*, *Ex p.* MITCHELL (1867), 36 L. J. Ch. 337; 15 W. R. 474, L. J.J.

Annotations:—Mentd. *Re Thurso New Gas Co.* (1889), 42 Ch. D. 486; *Westbury v. Twigg, Gregson, Claimant* (1891), 61 L. J. Q. B. 32.

7011. Costs—Taxation.]—A petition was presented for the compulsory winding up of a co. which was already in voluntary winding up; but at the hearing the judge made no order except that the question was to be tried as on a summons under 1862 Act, s. 138, "costs reserved"; he also fixed a certain date for the trial. On that date witnesses were examined, & the judge decided substantially in favour of appct. with costs. No summons had so far been taken out, & on drawing up the order the registrar required a summons to be taken out in the voluntary winding up. As an originating summons had previously been taken out by the liquidator for a private examination under 1862 Act, s. 115,

voluntary winding up of a co., the ct. has jurisdiction to entertain an application made by one of the liquidators petitioning for an inquiry into the conduct of his co-liquidator.—*Re MIRANDA COAL & IRON CO., LTD.* (1893), 11 N. Z. L. R. 640.—**N.Z.**

f. *For order against accountant—To deliver up company's books—Order without prejudice to accountant's lien.]*—An accountant who had received certain books & papers of a co. for the purpose of preparing a balance-sheet of the co.'s affairs declined to surrender them to the liquidator in the voluntary liquidation of a co. unless the liquidator paid or assumed responsibility for his fees. The liquidator presented a petition to the ct. in which he craved

on which an order had been made for an examination & reserving "liberty to apply," the registrar directed that the summons to be taken out & mentioned in the order was to be an ordinary & not an originating summons. On taxation the registrar disallowed the costs of instructions for brief.—*Held*: as the direction for trial treated the summons as issued in a "pending cause or matter," within the meaning of R. S. O., 1883, Ord. 71, r. 1 (a), the summons was not an originating summons; & although, if Appendix N. to the Rules, item 81, was construed strictly, it referred to an issue of fact directed to be tried as such, yet on taxation substance was to be regarded, & in substance the trial was of an issue of fact before a judge. The costs of instructions for the brief of appct.'s counsel must be allowed.—*CONSOLIDATED EXPLORATION & FINANCE CO.*, [1899] 2 Ch. 599; 68 L. J. Ch. 752; 81 L. T. 522; 7 Mans. 45.

SUB-SECT. 11.—RESTRAINT OF PROCEEDINGS.

A. In General.

Duty of liquidator.—See No. 6954, *ante*; No. 7035, *post*.

B. Winding-up Proceedings.

7012. When stay ordered—Reconstruction—Assent of creditors proved.—A co. having gone into voluntary liquidation a petition was presented by the liquidator to stay all proceedings in the winding up with a view to the reconstruction of the co. 1862 Act, s. 89, gives the ct. power after an order for winding up a co., upon the application of a creditor or contributory, to make an order staying proceedings in the winding up; & sect. 138 of the Act gives power to the liquidator or contributories in a voluntary winding up to apply to the ct. when any question arises, in the same way as when any question arises in the case of a compulsory winding up or a winding up under supervision:—*Held*: under these sections the ct. had jurisdiction to make an order as asked, the ct. being satisfied with the evidence as to the assent of the creditors.—*Re STEAMSHIP TITIAN CO., LTD.* (1888), 58 L. T. 178; 36 W. R. 347.

7013. — Subject to conditions—Dissentient members.—*Re CHIGWELL STEAMSHIP, LTD.* (1888), 4 T. L. R. 308.

7014. —.—*Re SCHANSCHIEFF ELECTRIC BATTERY SYNDICATE, LTD.*, [1888] W. N. 166.

7015. — Subject to provision for creditors.—*Re CONDES CO. OF CHILL, LTD.* (1892), 36 Sol. Jo. 593.

an order for delivery without prejudice to any lien that might be competent to the accountant:—*Held*: the liquidator was entitled under Companies Consolidation Act, 1908, ss. 174, 193, to the order craved as delivery of the books & papers "without prejudice" would not deprive the accountant of any right he might be entitled to found on his possession thereof.—*FINDLAY (LIQUIDATOR OF SCOTTISH WORKMEN'S ASSURANCE CO., LTD.) v. WADDELL*, [1910] S. C. 670; 47 Sc. L. R. 478; 1 S. L. T. 315.—*SCOT.*

g. Who may apply—Not creditor—Where also contributory—In respect of matters affecting him as creditor only.—A contributory of a co. in voluntary liquidation, who had for some time acted as liquidator of the co. but had resigned, applied to the ct., under Companies Act, 1862, s. 138, to fix his remuneration as liquidator:—*Held*:

the application was incompetent, in respect that appct. was not liquidator, & did not make the application in respect of his interest as contributory, but as a creditor of the co.—*MACPHERSON v. BROWN* (1898), 25 R. (Ct. of Sess.) 945; 35 Sc. L. R. 732; 6 S. L. T. 55.—*SCOT.*

PART III. SECT. 37, SUB-SECT. 11.—C.

h. Leave to proceed—Right of mortgagee applying under Winding-up Rules, Alta, rule 22.—Unless the ct. is prepared to say to a mtgce. that his claim will be at once recognised & allowed in liquidation proceedings his application under above rule for leave to proceed by action to enforce his mtgce., may not be refused.—*CAPITAL TRUST CORPN. v. YELLOWHEAD PASS COAL & COKE CO. & REVILLON WHOLESALE* (1916), 33 W. L. R. 873; 9

7016. Summons for balance order—Debt due from company unpaid.—A co., while a going concern, sued Y. for calls on shares alleged to be held by him. Before the action was ripe for trial the co. resolved on voluntary winding up, & the liquidator settled Y. on the list of contributories in respect of the amount of the calls. The liquidator then by notice discontinued the action & took out an originating summons against Y. under 1862 Act, ss. 101, 138, for a balance order in respect of the calls. Y.'s costs of the action having been taxed, & the liquidator having refused to pay them, Y. applied for a stay of the originating summons until payment:—*Held*: Y. was not entitled to the stay, but that the amount of the costs must be deducted from any sum recovered by the liquidator on the originating summons.—*Re UNITED SERVICE ASSOCN.*, [1901] 1 Ch. 97; *sub nom. Re UNITED SERVICE ASSOCN., Ex p. YOUNG*, 70 L. J. Ch. 15; 84 L. T. 145; 49 W. R. 216; 8 Mans. 97.

—**Distribution of assets.**—See Nos. 6946–6948, *ante*.

C. Actions, etc.

7017. Jurisdiction of court to stay.—Under a voluntary winding up. the ct. has jurisdiction to stay actions by creditors against the co.

Upon granting an injunction to stay an action by a creditor against a co., during a voluntary winding up, the ct. required the liquidators to give the creditor access to the proceedings, & gave to the creditor his costs down to the time he had notice of the winding up.—*Re KEYNSHAM CO.* (1863), 33 Beav. 123; 2 New Rep. 479; 8 L. T. 687; 9 Jur. N. S. 885; 11 W. R. 926; 55 E. R. 313. *Annotations*:—*Folld. Re Sablonière Hotel Co.* (1866), L. R. 3 Eq. 74; *Re Poole Firebrick & Blue Clay Co.* (1873), L. R. 17 Eq. 268.

7018. When stay ordered—General rule.—*HARRISON v. MORTGAGE INSURANCE CORPN.* (1893), 10 T. L. R. 141, D. C.

7019. — Action impeaching preliminary proceedings in winding up—& charging fraud—Action not bonâ fide.—A suit against a co. & one of its directors, impeaching dealings by them with its funds, was commenced by pltf. on behalf of himself & all other shareholders. Pltf. was a holder of shares to a very small value, which he admitted that he had purchased with the sole view of qualifying himself to institute these proceedings. Shortly after the commencement of the suit resolutions were passed at a meeting of the co. for its voluntary winding up, & its assets were sold to a new co. Answers being put in & excepted to, & the exceptions ripe for hearing, a motion, by defts., to stay proceedings or take the bill off the

W. W. R. 1275.—*CAN.*

k. — Application by motion—Practice.—An application to the ct., in the matter of a co. being voluntarily wound up under Cos. Act, 1862, to stay an action at law brought by a creditor against the co., may be made by motion on notice for a day certain at the sitting of the ct.—*Re BELFAST & ULSTER BREWERY CO.* (1873), 1 R. 7 Eq. 441.—*IR.*

l. — Existing suit—Discretion of court.—The Supreme Ct. may, under Cos. Act, 1908, s. 244, grant leave to a party to proceed with an existing suit in the Warden's Ct. against a co., notwithstanding that an effective resolution had been passed for the winding up of the co. The granting of such leave is discretionary with the ct., & the onus of establishing a claim for its existence is on the party applying.—*CAISLEY v. NEW WELCOME*

Sect. 37.—Voluntary winding up: Sub-sect. 11, C.

file, on the ground of pltf.'s admitted object in becoming a shareholder, of the insignificant value of his interest, & of the winding up of the co., was refused:—*Held*: the suit being on behalf of all shareholders, the value of the aggregate interest, & not of the individual interest, must be regarded; & the voluntary winding up having begun after the commencement of the suit, & the bill, in substance, impeaching the proceedings with reference to it, & charging fraud, pltf. was entitled to have the merits tried at the hearing, & he had not disqualified himself therefrom by his conduct, however reprehensible, in becoming a shareholder.—*SEATON v. GRANT* (1867), 2 Ch. App. 459; 36 L. J. Ch. 638; 16 L. T. 758; 15 W. R. 602, L. J. J. Annotations:—*Apld.* *Robson v. Dodds* (1869), L. R. 8 Eq. 301. *Refd.* *Edmunds v. A.-G.* (1878), 47 L. J. Ch. 345.

7020. —.]—It having been determined to wind up a co. voluntarily by the usual resolutions, a creditor brought an action against the co. upon bills of exchange after notice of the resolutions. On motion for injunction under the Act, order made & for payment by the creditor of the costs of the motion & action.—*Re EAST KENT SHIPPING CO., LTD.* (1868), 18 L. T. 748.

7021. — *Relief sought not inconsistent with winding up.*—After resolutions had been passed & confirmed for the voluntary winding up of a co., a shareholder, in ignorance thereof, commenced an action against the co. & the directors to have his name removed from the register, for a rescission of his contract to take shares, on the ground of misrepresentations in the prospectus, & to obtain repayment of all moneys already paid, & an indemnity against future liability in respect of his shares:—*Held*: the relief asked in the action was not inconsistent with the winding up & a motion by the voluntary liquidator to stay all further proceedings in the action was refused with costs.—*HALL v. OLD TALARGOCH LEAD MINING CO.* (1876), 3 Ch. D. 749; 45 L. J. Ch. 775; 34 L. T. 901; 3 Char. Pr. Cas. 40.

Annotation:—*Refd.* *Stone v. City & County Bank, Collins v. Same* (1877), 3 C. P. D. 282.

7022. *Denial of liability by liquidator—No special ground for stay.*—A co. having gone into voluntary liquidation an action was brought against it for money alleged to be payable to pltf. in respect of services rendered by him to the co. The liquidator denied any liability on the part of the co. On the liquidator's applying for a stay of proceedings in the action on the ground that the co. was in liquidation:—*Held*: the question of the co.'s liability being a matter which was *prima facie* properly determinable in the ordinary way by an action & no special ground for a stay of proceedings being made out, the application should, in the exercise of the discretion of the ct., be refused.—*CURRIE v. CONSOLIDATED KENT COLLIERIES CORPN., LTD.*, [1906] 1 K. B. 134; 75 L. J. K. B. 199; 94 L. T. 148; 13 Mans. 61, C. A.

— *Foreclosure action.*—*Compare* Nos. 5100, 5101, *ante*.

7023. *On what terms stay ordered—Creditor to have access to winding-up proceedings.*—*Re KEYNSHAM CO.*, No. 7017, *ante*.

7024. — *Creditor to prove for debt & costs.* A creditor brought an action against a co., which

afterwards resolved voluntarily to wind up. On an application by the co.:—*Held*: all further proceedings in the action must be stayed upon the creditor being allowed to prove for his debt & the costs of the action & of the application.—*Re LIFE ASSOCN. OF ENGLAND, LTD.* (1864), 34 L. J. Ch. 64; 10 L. T. 833; 10 Jur. N. S. 762; 12 W. R. 1069.

Annotation:—*Folld.* *Re Poole Firebrick & Blue Clay Co.* (1873), L. R. 17 Eq. 268.

7025. —.]—Where a co. is being wound up voluntarily, & a creditor brings an action in one of the Common Law Divs. of the High Ct. against the co., a judge of the Ch. Div. will upon the application of the liquidator under 1862 Act, s. 135, stay all proceedings in the action, upon the terms of the creditor being admitted to prove in the winding up for the amount of his claim, the costs of the action & the costs of the application to stay proceedings.—*NEEDHAM v. RIVERS PROTECTION & MANURE CO.* (1875), 1 Ch. D. 253; 33 L. T. 403; 24 W. R. 317; 2 Char. Pr. Cas. 64; *sub nom.* *Re RIVERS PROTECTION & MANURE CO., LTD.*, *NEEDHAM v. SAME*, 45 L. J. Ch. 132; 20 Sol. Jo. 92.

Annotation:—*Refd.* *Re Stapleford Colliery Co.* (1875), 24 W. R. 173.

7026. —.]—Where an action had been brought in the Ct. of Q. B. against a co. after the passing of a resolution to wind it up voluntarily, to which resolution pltf. was a party, & the liquidator applied to the Q. B. Div. under Jud. Act, s. 24 (5), for an order to stay proceedings, the ct. made the order absolute, staying proceedings upon the terms that the costs be added to the debt on proof in the liquidation.—*WALKER v. BANAGHER DISTILLERY CO.* (1875), 1 Q. B. D. 129; 45 L. J. Q. B. 134; 33 L. T. 502; 1 Char. Pr. Cas. 31.

Annotation:—*Refd.* *Re Rivers Protection & Manure Co., Needham v. Same* (1875), 45 L. J. Ch. 132.

7027. —.]—*OWENS v. STEAM COAL CO.*, [1876] W. N. 9; Bitt. Prac. Cas. 83; 1 Char. Cham. Cas. 11.

7028. — *Unless action continued after notice of winding up.*—Upon an application to stay an action brought against a co. which was being voluntarily wound up, it appeared that pltf. had gone on with the action after notice of the winding up & an offer from the co. to allow him to prove against the estate for his debt & costs, if he would undertake not to proceed further:—*Held*: on making the order to stay proceedings pltf. could not be allowed to add to his debt his costs of appearing upon the application.—*ROSE v. GARDEN LODGE COAL CO.* (1878), 3 Q. B. D. 235; 47 L. J. Q. B. 338; 38 L. T. 101; 26 W. R. 353.

Annotation:—*Refd.* *Freeman v. General Publishing Co.*, [1894] 2 Q. B. 380.

7029. — *Payment by plaintiff of costs of application—Action begun after notice of winding up.*—*Re EAST KENT SHIPPING CO., LTD.*, No. 7020, *ante*.

7030. —.]—Where an order is made staying an action brought against a co. which is being voluntarily wound up the ct. or judge has power in a proper case to order pltf. to pay the costs of the application.—*FREEMAN v. GENERAL PUBLISHING CO.*, [1894] 2 Q. B. 380; 63 L. J. Q. B. 678; 70 L. T. 845; 42 W. R. 539; 38 Sol. Jo. 532; 1 Mans. 366; 10 R. 366, D. C.

GOLD-MINING CO., LTD. (1912), 31 N. Z. L. R. 820.—N.Z.

m. *Right of creditor to sue—Debts incurred prior to liquidation.*—Where a co. has gone into a voluntary liquidation, it can still be sued for debts

incurred prior to liquidation although the fact that there are liquidators may be material if execution of the decree is sought.—*KOTHANDAPANI v. SOMAS UNDARAM* (1891), 1 L. R. 15 Mad. 97.—IND.

n. —.]—The mere fact of voluntary liquidation does not disentitle a creditor to sue for judgment against a co.—*COOTE v. ESTATE & HOTEL CO., LTD.* (1914), W. R. 169.—S. AF.

D. Execution.

7031. When stay ordered—Judgment after winding up.—A creditor who commenced an action, & signed judgment, after a resolution, of which he had notice, was passed & duly confirmed to wind up voluntarily a limited co. was restrained from issuing execution.—*Re SABLONIERE HOTEL Co.* (1866), L. R. 3 Eq. 74; 15 L. T. 238; 15 W. R. 85.

Annotations:—*Consd.* *Re Bank of Hindustan, China & Japan* (1867), 16 W. R. 102; *Re Thurso New Gas Co.* (1889), 42 Ch. D. 486. *Refd.* *Westbury v. Twigg* (1891), 61 L. J. Q. B. 32.

7032. — — —.]—Where, after the commencement of a voluntary winding up, a creditor brings an action & recovers judgment against the co., the ct. will, under 1862 Act, s. 138, stay execution upon the terms of the creditor being admitted to prove in the winding up for the amount of his debt, the cost of the action at law, & the cost of the application to stay execution.—*Re POOLE FIREBRICK & BLUE CLAY CO.* (1873), L. R. 17 Eq. 268; 43 L. J. Ch. 447; 22 W. R. 247.

Annotations:—*Mentd.* *Stone v. City & County Bank, Collins v. City & County Bank* (1877), 3 C. P. D. 282; *Re Preservation Syndicate* (1895), 64 L. J. Ch. 723.

7033. — — —.]—*Re THURSO NEW GAS CO.*, No. 6952, *ante*.

7034. — — — **Judgment before winding up—Right of company to recover money from third party based on company's liability to judgment creditor—No ground for not staying execution.**—*ANGLO-BALTIC & MEDITERRANEAN BANK v. BARBER & Co.*, [1924] W. N. 206, D. C.

PART III. SECT. 37, SUB-SECT. 11.—*D.*

7031 i. When stay ordered—Judgment after winding up.—After a resolution had been duly passed & advertised for the voluntary winding up of a co., resp. obtained judgment against the co. Notwithstanding such winding up, resp. claimed the right to attach property of the co. in execution of the judgment:—*Held*: the ct. had the power under Cos. Act, 1892, s. 186, to restrain such attachment.—*BROMLEY (CHARLES) & Co. (IN LIQUIDATION) v. SHENKER & Co.* (1904), 21 S. C. 30.—S. AF.

7035 i. Execution issued after winding up.—At a general meeting of the shareholders of the co., a resolution was carried that it was advisable to wind up the co. The notice convening such meeting stated that a resolution "would be considered, & if necessary, adopted as special, extraordinary, or otherwise," to the effect that the co. could not, by reason of its liabilities, carry on its business, & that it was advisable to wind up the same:—*Held*: on application for an injunction to restrain a creditor from proceeding with a judgment recovered against the co. on a date subsequent to the resolution, the form of notice was sufficient, as it intimated to the shareholders that the resolution might be adopted as extraordinary.

At the date of the resolution the co. was not in a position to meet all its liabilities at once, but probably would be able to meet them in time:—*Held*: the injunction must go, as by coming in now the creditor might defeat the equality of division essential to the winding up.—*Re NEW SOUTH WALES PROPERTY INVESTMENT CO.* (1889), 10 N. S. W. Eq. 214; 6 N. S. W. W. N. 103.—AUS.

7035 ii. — — —.]—Z., on Dec. 11, 1913, commenced an action against a co., claiming damages for injuries & loss caused by the co.'s negligence. On Dec. 31, 1913, the co. went into voluntary liquidation, & on Jan. 13, 1914, Z. was informed of that fact. The action was, however, allowed to

proceed & on Feb. 5, 1914, Z. obtained judgment against the co. for damages & costs. On Feb. 9, 1914, Z. issued execution. On Feb. 10, 1914, the liquidator of the co. informed Z. that he would allow him to prove in the winding up for the amount of the judgment debt & costs. Z. refused to discontinue the execution, whereupon liquidator took out a summons to restrain Z. from proceeding with it:—*Held*: Z. had no preferential right to payment of his judgment debt & costs, & the execution must be stayed, but he was at liberty to prove for the debt & costs & also for the costs of the execution already incurred.—*Re BALLARAT MOTORS PROPRIETARY, LTD. (ZEENG'S EXECUTION)*, [1914] V. L. R. 136.—AUS.

o. — Writ of *fi. fa.*—Winding up before sale.—Judgment had been recovered against a co., & a writ of *fi. fa.* issued thereon against the co.'s land. Before sale by the sheriff under this writ, the co. went into voluntary liquidation:—*Held*: the ct. had power to stay any further proceedings in the execution of the writ.—*Re BUCKLEY'S SWAMP ESTATE CO. (IN LIQUIDATION)* (1892), 18 V. L. R. 664.—AUS.

p. — Discharge of garnishee summons.—Upon application by liquidator of a co. which was being voluntarily wound up under Alberta Winding-up Ordinance, the ct. stayed proceedings, & discharged a garnishee summons in an action against the co. as the policy of the Ordinance & of the law generally is equality among all creditors; & the ct., under the Ordinance, has power, & ought to exercise it, to prevent pltf. from obtaining a preference over the other creditors.

As pltf. commenced his action before the winding-up proceedings, he was entitled to have his costs of the action added to his claim.—*CROWN HARDWARE CO., LTD. v. DELICATESSEN, LTD.* (1914), 26 W. L. R. 689.—CAN.

q. — Order for attachment—Obtained after winding up.—The D. manufacturing co., limited, carried on

7035. — Execution issued after winding up.]

—A voluntary resolution for winding up a co. was passed at 9.30 a.m., & on the same day, at 3 p.m., a creditor, who had obtained a judgment, issued execution against the co., & put the sheriffs in possession. On the following day notice of the resolution & of the appointment of the liquidator was served on the sheriff, who interpleaded, & the liquidator assented to be joined as claimant:—*Held*: the liquidator's proper course was to have applied to the ct., as soon as execution was put in, for an order staying it, instead of appearing as claimant in interpleader proceedings; & the liquidator was entitled to an order staying execution.—*WESTBURY v. TWIGG & Co.*, [1892] 1 Q. B. 77; 61 L. J. Q. B. 32; 66 L. T. 225; 40 W. R. 208, D. C.

Annotation:—*Refd.* *Harrison v. Mortgage Insee. Corpn.* (1893), 10 T. L. R. 141.

7036. — — — Postponement of execution obtained by trickery.—Where a judgment creditor of a co. has been induced by conduct of officers of the co. amounting to trickery to refrain from issuing execution on his judgment until after a resolution has been passed for the voluntary winding up of the co., the ct. will, in the exercise of its discretion, allow him to proceed with his execution.—*ARMORDUCT MANUFACTURING CO., LTD. v. GENERAL INCANDESCENT CO., LTD.*, [1911] 2 K. B. 143; 80 L. J. K. B. 1005; 104 L. T. 805; 18 Mans. 292, C. A.

7037. — Garnishee—Dividend in hands of liquidator—Leave to issue execution.—Judgment

business at D. & had its registered office at Bombay. M., was the manager at D., & he had authority to borrow money & draw hundis on behalf of the co. In Aug. 1894, the directors opened negotiations for the sale of the co.'s factory to H. & in Sept. 1894, while the negotiations were pending, a special resolution was passed to wind up the co. voluntarily. The resolution was confirmed in Oct. 1894, & A. was appointed liquidator under Indian Cos. Act, VI. of 1882, s. 177. In Dec. 1894, the liquidator agreed to sell the factory to H. for the sum of Rs. 38,000. Under the agreement, H. was to enter into possession of the factory, but the co. was to have a lien upon it until the completion of the purchase which was to take place in May, 1895. A month before the date fixed for the completion of the sale, pltf. filed a suit against M. the manager of the co., in his individual capacity & as manager of the co. His claim was professedly against the co., but he did not make the co., which was then in liquidation, a party to the suit. Subsequently pltf. applied for & obtained an order for attachment before judgment of the co.'s factory at D. No notice of the application or of the order made on it was given to the liquidator. He at once applied to the ct. to raise the attachment, contending that the ct. had no power to attach the property of the co., which was not a party to the suit. The ct. made the co. a party, & dismissed the liquidator's application, confirming its previous order for attachment. The liquidator appealed to the High Ct.:—*Held*: the order of attachment should be reversed; the intended sale by the liquidator, which was the sole reason for making the order, was not with intent to obstruct any decree that pltf. might obtain against the co., but was being effected by the liquidator in the course of his duty & in pursuance of a contract entered into long before the suit was instituted; pltf.'s claim, if established, would be satisfied *pari passu* with the other debts of the co.; pltf. was not entitled to security for

of the demised premises, & gave H. bills of exchange for rent overdue, which bills were dishonoured. After the dishonour the co. passed an extraordinary resolution for voluntarily winding up, & then the landlord distrained for the rent on the co.'s chattels. These, however, were subject to a floating security contained in debentures covering all the co.'s assets, which were insufficient in value to satisfy the debenture debt. No receiver had been appointed. The liquidators having moved to restrain the landlord from proceeding with the distress:—*Held*: but for the existence of the debentures, & notwithstanding *ex parte Clemence* (1883), 23 Ch. D. 154, which the ct. declined to follow, the landlord would have been restrained, as he had a right to prove in the winding up.—*Re HARPUR'S CYCLE FITTINGS CO.*, [1900] 2 Ch. 731; 69 L. J. Ch. 841; 83 L. T. 407; 8 Mans. 90.

7044. For rates—When stay ordered.]—*Re SAMPSON ENGINEERING CO., LTD.* (1899), 43 Sol. Jo. 752.

SUB-SECT. 12.—TRANSFER OF PROCEEDINGS.

7045. To court in which winding up begun.]—Where debt. bank had gone into voluntary liquidation & application was made on behalf of official liquidator an order was made for a stay of proceedings & a transfer of the claim to the Ch. Div. to which the winding up was attached.—*MOORE v. CITY & COUNTY BANK* (1875), Bitt. Prac. Cas. 59; 1 Char. Cham. Cas. 10.

7046. To county court—Misfeasance proceedings.]—Under 1890 (Winding-up) Act, s. 10, the ct. may examine into the conduct of any promoter, director, manager, or other officer of a co. which is being wound up, & compel him to repay or restore moneys or property of the co. which he has misapplied or retained or for which he has become liable or accountable.

By sect. 3 "the winding up of a co. or any proceedings therein may be transferred from one ct. to another ct. & by sect. 1 both the High Ct. & County Ct. have jurisdiction to wind up companies.

The liquidator of a co. in voluntary liquidation obtained an *ex p.* order from a chief clerk in chambers in the Ch. Div. for an examination into the conduct of a manager of the co. under sect. 10, & subsequently obtained an *ex p.* order from the same chief clerk transferring the proceedings under the first order to the county ct. The first order was drawn up, & bore the seal of the ct. The county ct. judge refused to hear the matter:—*Held*: there was power under sect. 3 to transfer proceedings in a voluntary winding up & even assuming that the order under sect. 10 could not be made by a chief clerk, the validity of such order could not be questioned in the county ct., but only upon an appeal against, or motion to set aside, such order.—*R. v. EAST STONEHOUSE COUNTY COURT JUDGE & HOW* (1891), 65 L. T. 730, C. A.

SUB-SECT. 13.—RECONSTRUCTION AND AMALGAMATION.

A. In General.

See, now, 1908 Act, sect. 192.

7047. Application of 1862 Act, s. 161—To what

assets of the co. & he can only rank as an ordinary creditor in subsequent proceedings under Dominion Winding-up Act.—*Re JASPER LIQUOR CO., LTD.*, *Ex p. SCOTT* (1915), 32 W. L. R. 213; 9 W. W. R. 6, 364; 25 D. L. R.

84.—CAN.

b. ———.]—The effect of Winding-up Ordinance, Alta., s. 7 (2), is to destroy a landlord's right of distress, & any right to preferential

winding-up proceedings—**Voluntary winding up.]**—1862 Act, s. 95, clause 3, only sanctions the sale of the property of a co. which is wound up, & does not apply to the transfer or sale of the whole concern. Sect. 161 of the Act, which does sanction such a transfer, applies only to cases where the co. is wound up voluntarily.

A scheme was proposed for the transfer of the business of A. co. to B. co.; after which A. co. was ordered to be wound up compulsorily, but was eventually wound up voluntarily under the supervision of the ct. Certain shareholders in A. co. applied for & were allotted shares in B. co. in lieu of their shares in A. co., & on the understanding that the transfer would be completed. The ct., however, held that the transfer could not be effected. The shareholders then applied to the ct. for an order to rectify the register of members in B. co. by striking out their names therefrom:—*Held*: their names must be struck out, & B. co. must pay them their costs.—*Re LONDON & EXCHANGE BANK, LTD.* (1867), 16 L. T. 340; *sub nom. Re LONDON & EXCHANGE BANK, LTD.*, *Ex p. COLLISON, SWEETINGBURGH & BROWNING*, 15 W. R. 778.

——— **Winding up under supervision.]—**See Sect. 38, *post*.

7048. ——— To what companies—Limited company—Amalgamation with unlimited company with different objects.]—*Re UNITED PORTS & GENERAL INSURANCE CO., BROWN'S CASE, TUCKER'S CASE*, No. 7579, *post*.

7049. ——— Unregistered company—Becoming registered.]—*SOUTHALL v. BRITISH MUTUAL LIFE ASSURANCE SOCIETY*, No. 7515, *post*.

7050. ——— Foreign company.]—*Re IRRIGATION CO. OF FRANCE*, *Ex p. FOX*, No. 7107, *post*.

7051. ———.]—An English co. cannot transfer or sell its business to a foreign co. under 1908 Act, s. 192. The "transferee co." mentioned in that sect. must be a "co." within the definition in sect. 285.—*THOMAS v. UNITED BUTTER COS. OF FRANCE, LTD.*, [1909] 2 Ch. 484; 79 L. J. Ch. 14; 101 L. T. 388; 25 T. L. R. 824; 53 Sol. Jo. 733; 16 Mans. 345.

Annotation:—Refd. Re Anglo-Continental Supply Co., [1922] 2 Ch. 723.

7052. ——— Company under private Act.]—*COULTHURST v. WHITSTABLE OYSTER FISHERY CO.* (1897), 41 Sol. Jo. 641.

7053. ———.]—*Re ANGLO-CONTINENTAL SUPPLY CO.*, No. 7385, *post*.

7054. Wishes of creditors—How far court will give effect to.]—*Re TUNIS RYS. CO., LTD.*, *TOLMÉ v. TUNIS RYS. CO., LTD.* (1874), 31 L. T. 264, L. J.J.; *affg.*, 10 Ch. D. 270, n.

7055. Sanction of court—Application for—Undertaking by new company.]—Counsel who come here & ask me to approve a reconstruction scheme must come with a scheme which provides in so many words that the new co. which is to be formed to carry out the reconstruction will undertake to obey the order of the ct. as to any proceeding the ct. may think it right should be taken against the officers of the old co. Recent experience has shown me that unless there is a very positive provision for retaining not only the power of the ct. to order proceedings to be taken against delinquents but also the power of the ct.

treatment by the ct. in regard to rent accrued before the winding-up resolution, if the landlord being a creditor can prove in the winding up.—*Re CITY TRANSFER CO.* (1917), 34 D. L. R. 457.—CAN.

Sect. 37.—Voluntary winding up: Sub-sect. 13, A., B. & C.]

to order the appropriation of a part of the transferred assets to the payment of the costs of such proceedings, delinquents may get off altogether. In future therefore any scheme of reconstruction must provide not only that the proceedings against delinquents may be continued & that the new co. will not directly or indirectly release its rights in respect of the subject-matter of any such proceedings, but it must provide in terms that the new co. will, if so ordered by the ct., pay the expenses of any proceedings that the ct. may think right to order (VAUGHAN WILLIAMS, J.).—*Re CITY OF CHICAGO GRAIN ELEVATORS CO., Re LANCASHIRE TRUST & MORTGAGE INSURANCE CORPN., Re IMPERIAL PROPERTY INVESTMENT CO. (1894), 1 Mans. 368.*

— *To resolution for reconstruction.*—*See Nos. 7064–7066, post.*

B. What amounts to.

7056. General rule.—Neither “reconstruction” nor “amalgamation” has any definite legal meaning. Each word is a commercial & not a legal term & even as a commercial term has no exact definite meaning.

Where an undertaking is being carried on by a co., & is in substance preserved & transferred, not to an outsider but to another co., consisting substantially of the same shareholders, with a view to its being continued by the transferee co., that is a reconstruction; & it is none the less a reconstruction because all the assets do not pass to the new or resuscitated co., & all the shareholders of the transferor co. are not shareholders in the transferee co. & the liabilities of the transferor co. are not taken over by the transferee co.

To constitute “amalgamation” there must be a blending of substantially two or more existing undertakings into one undertaking, the shareholders of each blending co. becoming substantially the shareholders in the co. which holds the blended undertakings; & there may be amalgamation either by the transfer of two or more undertakings to a new co., or by the transfer of one or more undertakings to an existing co.

It is not necessary that a resolution for winding up should refer to “reconstruction” or “amalgamation” in order to constitute a “winding up for the purpose of reconstruction or amalgamation,” but the purpose of the winding up may be gathered from the whole of the circumstances which result in reconstruction or amalgamation.

The S. co. had powers under its memorandum of assocn. to amalgamate with any other co., & to sell its undertaking, or any part thereof, for shares or debenture-stock of any other co., & under its arts. of assocn. the liquidator, in the case of winding up had power to divide amongst the contributories in specie any part of its assets. Its memorandum of assocn. also gave to its preference shareholders the right in the event of a “winding up for the purpose of reconstruction or amalgamation” to a bonus by way of percentage on the par value of the preference shares.

The S. co. issued debenture-stock, constituted & secured by a trust deed under which the stock was redeemable only at a premium in the event of the security becoming enforceable by reason of a voluntary winding up of the co. for the purpose of reconstruction or amalgamation.

After the S. co. had carried on business for a short time, a rival co., the I. co., was formed, &

accordingly in Feb. 1902, the A. co. was incorporated to take over the business & certain of the assets of the S. co. The memorandum of assocn. & debenture-stock deed of the A. co. gave to its preference shareholders & debenture-stock holders respectively rights to bonus & premium in the case of a winding up of that co. for the purpose of reconstruction or amalgamation.

In the same month the A. co. agreed with the S. co. to purchase the business & some of the assets of the latter for £1,000,000, to be satisfied in cash & in fully paid preference & ordinary shares & debenture-stock of the A. co. The remaining, unsold assets, of the S. co. consisted of cash, investments, & other things of the value of over £1,500,000.

In May, 1902, the C. co. was incorporated with, after an increase of capital, an ordinary capital twice the amount of the ordinary capital of the S. co., & a preference capital equal to the preference capital of the S. co.

In Aug. 1902, heads of agreement, formally entered into by an agreement of May, 1903, were entered into under which the A. co. was to sell to the I. co. the business & assets purchased by the former from the S. co. & the stock-in-trade & working capital of the A. co. The purchase consideration was to be £1,650,000, to be satisfied as follows: £1,000,000 in fully paid shares of the I. co., representing the £1,000,000 ordinary share capital of the A. co.; £500,000 in debentures of the I. co. to replace the preference share capital & debenture-stock of the A. co.; & £150,000 payable to certain firms interested in the I. co. There was no provision that the A. co. should wind itself up, but £500 was to be retained out of its assets for liquidation expenses. At a meeting of the A. co. held in Sept. 1902, a distribution on the lines above indicated was mentioned in speeches by the chairman of the co. & others.

In view of an agreement of Feb. 1903, referred to below, a meeting of the S. co. was held at which the chairman & others referred to an intended winding up of the co., & to the manner in which the shares of the C. co. were to replace the shares in the S. co.

By an agreement of Feb. 1903, the S. co. agreed to sell to the C. co. all its remaining assets, including the shares in the A. co. to which it was entitled as the consideration for the previous sale to that co., excepting assets of the value of £295,000 retained to pay the debts of the S. co. The consideration for this sale was to be the whole of the 618,000 ordinary shares, and 150,000 preference shares of the C. co., to be allotted as fully paid up.

Subsequently both the A. co. and the S. co. passed special resolutions simply for voluntary winding up, without referring to any amalgamation or reconstruction, or consideration or distribution of shares. At one of the meetings of the S. co. for passing the resolution of that co. reference was made by the chairman to the proposed distribution of the C. co.'s shares. Afterwards the S. co. passed an extraordinary resolution authorising its liquidators to distribute in specie amongst its contributories in the proportion of two shares for every ordinary share in the S. co. the 618,000 ordinary shares in the C. co. which formed part of the consideration referred to in the agreement of Feb. 1903:—*Held*: (1) there was a reconstruction of the S. co., & its winding up was for the purpose of reconstruction; (2) there was an “amalgamation” of the A. co. with the I. co. & the winding up of the A. co. was for the purpose

of amalgamation.—*Re* SOUTH AFRICAN SUPPLY & COLD STORAGE CO., *WILD v. SAME CO.*, [1904] 2 Ch. 268; 73 L. J. Ch. 657; 91 L. T. 447; 52 W. R. 649; 12 Mans. 76.

Annotation:—*Generally, Refd. Re* Espuela Land & Cattle Co., [1909] 2 Ch. 187.

7057. "Reconstruction."—A. co. issued debentures of £100 each bearing interest at 5 per cent payable in 1896, but subject to provisions that the co. might, at any time after the expiration of one year from the date of the debenture, redeem the same by giving three calendar months' notice to the holder & paying to such holder £105 for each £100 debenture with interest up to the day of payment, & that, if the co. commenced to be wound up otherwise than for the purposes of reorganisation or reconstruction, the principal money secured by the debenture should become immediately payable. In June 1892, the co. entered into an agreement for its amalgamation with another co. & resolutions for voluntary liquidation were passed for the purpose of carrying such agreement into effect:—*Held*: (1) the transaction, which was that of a small co. joining with a larger co. was not a reconstruction or reorganisation of the co.; (2) meaning of the expressions "reconstruction" & "reorganisation" of a co. considered.—*HOOPER v. WESTERN COUNTIES & SOUTH WALES TELEPHONE CO., LTD.* (1892), 68 L. T. 78; 41 W. R. 84; 9 T. L. R. 17; 37 Sol. Jo. 10; 3 R. 58.

—*See, also*, No. 7056, *ante*.

7058. "Reorganisation."—*HOOPER v. WESTERN COUNTIES & SOUTH WALES TELEPHONE CO., LTD.*, No. 7057, *ante*.

7059. "Amalgamation."—*Re* EMPIRE ASSURANCE CORPN., *Ex p. BAGSHAW*, No. 7578, *post*.

7060. — Taking over assets & liabilities of friendly society.—The N. C. S. C., a limited co., had power by its memorandum to make & carry into effect such arrangements with respect to the union of interests or amalgamation, either in whole or in part, or working arrangements with any other cos. or persons of a similar nature to that of the co.:—*Held*: the taking over bodily, the stock, assets, & liabilities of the N. S. A., a friendly society, which had the same objects, & giving a new class of shares in the N. C. S. C. to the share-

holders of the N. S. A., was an amalgamation within the power of the co.—*PULBROOK v. NEW CIVIL SERVICE CO-OPERATION, LTD.* (1877), 26 W. R. 11.

i. 7056, *ante*.

C. Resolutions.

7061. Convention of meeting — Contents of notice.—*IMPERIAL BANK OF CHINA, INDIA & JAPAN v. BANK OF HINDUSTAN, CHINA & JAPAN*, No. 7068, *post*.

7062. — — — — ——*Re* IRRIGATION CO. OF FRANCE, *Ex p. FOX*, No. 7107, *post*.

7063. — — — — ——*COULTHURST v. WHITSTABLE OYSTER FISHERY CO.* (1897), 41 Sol. Jo. 641.

7064. — — — — — Directors personally interested in adoption of scheme of reconstruction.—Where the directors of a co. are personally interested in the adoption of a proposed scheme for its reconstruction & are to be remunerated by means of a call on shares, the notice convening the extraordinary general meeting to pass the requisite resolutions must disclose such interest in order that the matter upon which the shareholders are to vote may be fairly brought before them. Where this has not been done & the resolutions for reconstruction have been passed & confirmed, the notice will not be sufficient to bind absent shareholders, & the directors & the co. will be restrained by injunction from carrying such resolutions into effect.—*TIESSEN v. HENDERSON*, [1899] 1 Ch. 861; 68 L. J. Ch. 353; 80 L. T. 483; 47 W. R. 459; 6 Mans. 340.

Annotation:—*Refd. Etheridge v. Central Uruguay Northern Extension Ry.*, [1913] 1 Ch. 425.

—*See, generally*, Sect. 30, sub-sect. 3, B. (d), *ante*.

7065. Necessity for sanction of court—When sanction can be given.—When a resolution has been passed by a co., under sect. 161, for the transfer or sale of its assets to another co., the sanction of the ct. cannot be given to such resolution under that sect. when there is no compulsory or supervision order, but the co. is being wound up voluntarily. The ct. may give its sanction at the same time that it makes such order.—*Re CALLAO BIS CO.* (1889), 42 Ch. D. 169; 58 L. J. Ch.

PART III. SECT. 37, SUB-SECT. 13.—B.

7059 i. "Amalgamation."—In 1889, the city of T. entered into similar agreements with debt. cos. by which they authorised these cos. to lay down & operate underground wires & appliances for the distribution & supply of electricity, & gave them other privileges in connection with their business. By these agreements debts. were forbidden to lease to, amalgamate with, or sell out to any other co., without the consent of ptfs.; & if they did so, all rights granted thereby were to cease & determine. In 1896, the I. Co. sold out all their assets & the shareholders transferred their shares to the E. L. Co.:—*Held*: the E. L. Co. had not in purchasing fallen within the prohibition clause, for to hold to the contrary would be to add the word "buy" to that clause; also, what had been done was not an amalgamation of the two cos., inasmuch as the purchase was for cash & for cash only, & the I. Co. acquired no interest whatever in the assets & affairs or otherwise of the other co.—*CITY OF TORONTO v. TORONTO ELECTRIC LIGHT CO., CITY OF TORONTO v. INCANDESCENT LIGHT CO. OF TORONTO & TORONTO ELECTRIC LIGHT CO.* (1905), 10 O. L. R. 621; 6 O. W. R. 443.—CAN.

7059 ii. — — — — ——Pursuant to the power granted by Ontario Act, 62 Vict. c. 11, s. 36, the Commissioners for the Queen Victoria Niagara Falls Park, by an agreement of Jan. 29, 1903, granted to certain persons called "The Syndicate," for the purpose of generating electricity & pneumatic or any other power to be transmitted, & capable of being transmitted, to places beyond the Park, "a license irrevocable to take from the waters of the Niagara River within the Park a sufficient quantity of water to develop 125,000 electrical or pneumatic or other horse-power for commercial use." By clause 14 of the agreement, the license was granted for 50 years, with certain rights of renewal, the syndicate paying therefor a yearly rental of \$15,000 & a further sum "for each electrical horse-power generated & used & sold or disposed of over 10,000 electrical horse-power." By clause 25, the syndicate should not amalgamate with any other co. nor enter into any arrangement which might have that effect. "The Syndicate" was to be understood to mean not only the named individuals, but also their & each of their heirs, exors., administrators, & assigns. By clause 27, the syndicate agreed that, within two years from the date of the agreement, they would sell, assign, convey, &

transfer to a co. having power to construct & operate the works proposed, all the rights & franchises conferred. On Mar. 25, 1903, the syndicate assigned its rights under the agreement to the E. D. Co., & the agreement & assignment were confirmed by 5 Edw. VII, c. 12 (O). On Apr. 16, 1908, an agreement was entered into between the E. D. Co. & a transmission co. & the Y. P. Co., by which the undertakings of the E. D. Co. & of the transmission co. were leased to the T. P. Co. from the date of the agreement for a term exceeding by one month the duration of the license granted & its renewal terms. In consideration of this, the T. P. Co. agreed to assume & pay the rental due to the Commissioners & to make all accruing payments upon debentures issued by the E. D. Co., & if the earnings permitted a sum which would enable that co. to pay dividends upon its preferred shares. In an action by the Attorney General & the Commissioners against the E. D. & T. P. Cos.:—*Held*: the arrangement last referred to was not an amalgamation of the two cos. nor had it the effect of an amalgamation.—*A.-G. FOR ONTARIO v. ELECTRICAL DEVELOPMENT CO., LTD.* (1919), 45 O. L. R. 186.—CAN.

Sect. 37.—Voluntary winding up: Sub-sect. 13, C. & D.

826; 61 L. T. 534; 38 W. R. 21; 5 T. L. R. 569; 1 Meg. 261, C. A.

7066. ———.]—*Re* NEW FLAGSTAFF MINING Co. (1889), 5 T. L. R. 570.

D. Validity.

7067. Scheme under which liabilities imposed on shareholders.] — (1) Where misrepresentation appears between the terms of an arrangement contained in a circular, by which an amalgamation with another co. was to be brought about, & the terms of the arts. of assocn. of the co. proposing the amalgamation, & is so alleged & proved:—*Held*: such amalgamation would be set aside, although confirmed by resolutions of the shareholders of the respective cos.

(2) A co. agreed to amalgamate with or purchase the goodwill & property of another co. in consideration of 25,000 shares in the purchasing co. to be allotted amongst the shareholders of the selling co.; the assets of the selling co. were to be applied in payment of its liabilities, & then in payment of £6 a share on each of the 25,000 shares; & if the assets were insufficient, a call was to be made on the shareholders in the selling co.:—*Held*: such an arrangement, by which liabilities were imposed on the shareholders, was void as *ultra vires*, & could not be supported under 1862 Act, s. 161. *Semble*: such an arrangement would be void, even if only the shareholders who assented to it were to be bound by it.—*CLINCH v. FINANCIAL CORPN.* (1868), 4 Ch. App. 117; 38 L. J. Ch. 1; 19 L. T. 334; 17 W. R. 84, L. C. & L. JJ.

Annotations:—*As to* (2) *Apld.* *Imperial Bank of China, India & Japan v. Bank of Hindustan, China & Japan* (1868), L. R. 6 Eq. 91. *Consd.* *Cleve v. Financial Corpn., Williams v. Same* (1873), L. R. 16 Eq. 363; *Postlethwaite v. Port Phillip & Colonial Gold Mining Co.* (1889), 43 Ch. D. 452. *Distd.* *New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock*, [1894] 1 Q. B. 622. *Consd.* *Thomson v. Henderson's Transvaal Estates*, [1908] 1 Ch. 765. *Refd.* *Re Oriental Commercial Bank, Ex p. Alabaster* (1868), 38 L. J. Ch. 32; *London v. Northern Insee. Corpn., Stace & Worth's Case* (1869), 4 Ch. App. 682; *Bank of Hindustan v. Alison* (1870), L. R. 6 C. P. 54; *Re Irrigation Co. of France* (1870), 39 L. J. Ch. 663; *Southall v. British Mutual Life Assce. Soc.* (1870), L. R. 11 Eq. 65; *Nicholl v. Eberhardt Co.* (1888), 59 L. T. 860. *Generally, Mentd.* *Re Trent & Humber Shipbuilding Co., Ex p. Bailey & Leatham* (1869), 38 L. J. Ch. 485; *Re Bank of South Australia* (2), [1895] 1 Ch. 578.

7068. ———.]—(1) In order to bring a transfer of the business of one co. to another co. within 1862 Act, s. 161, the circular convening the meeting at which the transaction is to be submitted to the shareholders must contain distinct notice that the arrangement is to be carried out by the liquidators under sect. 161. (2) An arrangement for the transfer of the business of A. co. to B. co., by which, in addition to having their liabilities per

share raised from £50 to £100, the shareholders of A. co. can only obtain shares in B. co. upon payment of £6 premium per share, is not a valid sale or arrangement within the provisions of sect. 161. Acquiescence, to bind all the members of a co. to a bargain which there is no power to confirm, must be acquiescence by every member of the co.

If the arrangement was bad in *Clinch's Case*, No. 7067, *ante*, a fortiori it is bad here, & I do not hesitate to say that an arrangement under that clause cannot be valid if it contains a condition precedent on the individual shareholder to pay something, not towards the capital of the new co. in respect of which he is to receive profit, but by way of premium for the shares (*GIFFARD, V.C.*).—*IMPERIAL BANK OF CHINA, INDIA & JAPAN v. BANK OF HINDUSTAN, CHINA & JAPAN* (1868), L. R. 6 Eq. 91; 16 W. R. 1107.

Annotations:—*As to* (1) *Folld.* *Coulthurst v. Whitstable Oyster Fishery Co.* (1897), 41 Sol. Jo. 641. *As to* (2) *Consd.* *Bank of Hindustan v. Alison* (1870), L. R. 6 C. P. 54; *Re Irrigation Co. of France, Ex p. Fox* (1871), 6 Ch. App. 176. *Refd.* *Re London & Northern Insee. Corpn., Stace & Worth's Case* (1869), 4 Ch. App. 682. *Generally, Mentd.* *Re Bank of Hindustan, China & Japan, Campbell's Case, Hippisley's Case, Alison's Case* (1873), 9 Ch. App. 1.

———.]—*See, also*, Nos. 7084, 7086, *post*.

7069. Sale to person about to form company.]—The directors of a co. entered into an agreement with A. to sell him the business & assets of the co., upon the terms that the directors should forthwith call an extraordinary meeting & endeavour to get the sanction of the shareholders to the carrying out the sale, & on such sanction being obtained, he should pay the directors £250 in cash, & if he should succeed in establishing a new co. for the same purpose, should, within three months from the allotment of shares, pay a further sum of £1,250 in cash, & £2,000 in fully paid-up shares of the new co. The co., at an extraordinary general meeting, passed a resolution for affixing the seal of the co. to the agreement, which was done, & A. paid the £250:—*Held*: the agreement was *ultra vires* & invalid, & effect could not be given to it under 1862 Act, s. 161, for that sect. only authorises a sale to a co., not to a person about to form a co.—*BIRD v. BIRD'S PATENT DEODORIZING & UTILIZING SEWAGE CO.* (1874), 9 Ch. App. 358; 43 L. J. Ch. 399; 30 L. T. 281, L. JJ.

Annotations:—*Refd.* *Re Hester* (1875), 44 L. J. Ch. 757; *Re Canning Jarrah Timber Co. (Western Australia)*, [1900] 1 Ch. 708.

7070. Scheme providing for time limit for exercise of option—To take share in purchasing company.]—*Re LLANWRST LEAD MINING CO., LTD.* (1881), *Palmer's Company Precedents*, 4th ed., p. 618.

Annotation:—*Consd.* *Postlethwaite v. Port Phillip & Colonial Gold Mining Co.* (1889), 43 Ch. D. 452.

7071. ——— **Option open for reasonable**

PART III. SECT. 37, SUB-SECT. 13.—D.

c. Scheme transferring assets & liabilities to new company—Option to new company to cancel arrangement—If liabilities exceed certain amount.]—A co. issued 50,000 £1 shares, of which 20,000 were fully paid & 30,000 paid up to 10s. per share. It was agreed to wind up & reconstruct the co. & a liquidator was appointed & authorised to consent to the registration of a new co. & to enter into an agreement, then approved with the new co., which was subsequently carried out. It was agreed *inter alia* between the new co., the old co. & the liquidator of the old co. that the new co. should purchase all the assets & liabilities of the old co. & that every member of the old

co. should be entitled to receive a fully-paid share for every share intended to have been fully paid in the old co. & a contributing share paid up to 10s. a share plus the amount of calls made & paid for each contributing share in the old co. It was also agreed that if the liquidator, to carry the sale into effect, should have to purchase the interest of any member of the old co., the new co. should pay to the liquidator such sum as by arbn. between the old co. & such member or by agreement made with him & the liquidator should be determined, but if it should be necessary for the liquidator to purchase the interests of more than one-third of the old shareholders, the new co. was to be at liberty to cancel the agree-

ment. The agreement was carried out & filed with the registrar & consequently A. applied for 200 fully-paid shares & 2,000 contributing shares paid up to 18s. a share in the new co., being the number of shares held by him & the amounts up to which they were credited in the old co. A winding-up order was made, & the official liquidator sought to place A. on the list of contributories in respect of these shares, with a liability to pay 20s. on each share after giving credit for calls made & paid. A. had paid calls amounting to 2s. a share on the contributing shares & all the debts & liabilities of the old co. had been paid in full:—*Held*: the reconstruction of the old co. was not a fraud, a valid contract had been registered within Companies Act, 1874, s. 57,

time.]—A scheme for the reconstruction of a co. by the transfer of its assets to a new co. in consideration of shares under 1862 Act, s. 161, is not vitiated by the insertion of a limit of time within which the option given to the shareholders of the old co. to take shares in the new must be exercised, provided the limit be such as to leave the option available for a reasonable time.—**POSTLETHWAITE v. PORT PHILLIP & COLONIAL GOLD MINING CO.** (1889), 43 Ch. D. 452; 59 L. J. Ch. 201; 62 L. T. 60; 38 W. R. 246; 6 T. L. R. 130; 2 Meg. 10.

Annotations:—**Consd.** *Burdett-Coutts v. True Blue (Hannan's) Gold Mine*, [1899] 2 Ch. 616.

7072. ——— **Shares unapplied for to be at disposal of new company.**—**BURDETT-COUTTS v. TRUE BLUE (HANNAN'S) GOLD MINE**, No. 7088, *post*.

7073. Sale for shares in purchasing company—Under memorandum powers—Whether 1862 Act, s. 161, applicable.—1862 Act, s. 161, in no way prohibits a co. from carrying into effect a resolution passed in pursuance of a provision in its arts. or memorandum of assocn. for the sale of its undertaking to another co. in consideration of shares in such purchasing co., although for the purposes of carrying the resolution into effect the vending co. proposes to go into voluntary liquidation.—**COTTON v. IMPERIAL & FOREIGN AGENCY & INVESTMENT CORPN.**, [1892] 3 Ch. 454; 61 L. J. Ch. 684; 67 L. T. 342; 8 T. L. R. 777.

Annotations:—**Expld. & Distd.** *Payne v. Cork Co.*, [1900] 1 Ch. 308. **Foldd.** *Doughty v. Lomagunda Reefs* (1903), 88 L. T. 337. **Overd.** *Bisgood v. Henderson's Transvaal Estates*, [1908] 1 Ch. 743.

7074. ——— **—**—The sale of all a co.'s assets & all its undertaking & the distribution of the proceeds cannot be a corporate object so that under a clause for that purpose introduced into the memorandum of assocn. such a sale & distribution can be made without regard to 1862 Act, s. 161.

A co. limited by shares cannot by its memorandum & arts. of assocn. provide as part of its constitution that in an event the corporator shall either submit to a liability in excess of the limit of liability on his shares or shall be dispossessed of his status as corporator.

Where, therefore, a limited co., which had issued 1,770,386 fully-paid shares of £1 each, acting under the powers of its memorandum & arts. of assocn. passed resolutions in general meeting approving a scheme of reconstruction & for a voluntary winding up, & by the scheme the undertaking of the co. was to be sold to a new co. to be formed for the purpose in consideration of a like number of £1 shares in the new co., credited with 17s. 6d. per share as paid thereon, & the payment of the debts & the costs of liquidation of the old co., & the liquidator was to offer the shares in the new co., credited as aforesaid, for distribution among the members of the old co. at the rate of one of such new shares for each share in the old co. held by such members, & in the event of any of the old members not accepting their due proportion of such shares within a limited time, was to use his best endeavours to sell such shares & distribute the net proceeds among the non-accepting members in proportion to the number of

shares in the old co. held by them respectively:—**Held:** the scheme was *ultra vires*.

Cotton v. Imperial & Foreign Agency & Investment Corporation, No. 7073, *ante*, & **Fuller v. White Feather Reward, Ltd.**, No. 7086, *post*, *overd.*—**BISGOOD v. HENDERSON'S TRANSVAAL ESTATES, LTD.**, [1908] 1 Ch. 743; 77 L. J. Ch. 486; 98 L. T. 809; 24 T. L. R. 510; 52 Sol. Jo. 412; 15 Mans. 163, C. A.

Annotations:—**Consd.** *Etheridge v. Central Uruguay Northern Extension Ry.*, [1913] 1 Ch. 425. **Distd.** *Re Anglo-Continental Supply Co.*, [1922] 2 Ch. 723. **Consd.** *Dibble v. Wilts & Somerset Farmers*, [1923] 1 Ch. 342. **Refd.** *Re Jewish Colonial Trust (Juedische Colonial Bank)*, [1908] 2 Ch. 287; *Hickman v. Kent or Romney Marsh Sheep-Breeders' Assocn.*, [1915] 1 Ch. 881; *Re Aramayo Francke Mines*, [1917] 1 Ch. 451; *Re Guardian Assocn.*, [1917] 1 Ch. 431. **Mentd.** *Thomson v. Henderson's Transvaal Estates* (1908), 98 L. T. 815.

7075. ——— **—**—A co. which has power under its memorandum of assocn. to sell all or any part of its business or property to another co. in consideration of shares in that co., & also power to distribute such shares among its own members, does not fulfil the requirements of 1908 Act, sect. 192, sub-sect. 1, by passing merely an ordinary resolution sanctioning such a sale & special resolutions for voluntary liquidation & the mode of distribution of the compensation shares.

To comply with sect. 192, sub-sect. 1, there must at least be a special resolution authorising the liquidator to accept shares as the consideration for the sale. In the absence of such a special resolution there would be no special resolution to which the provision relating to dissentients in sect. 192, sub-sect. 3, could apply. *Semble:* a special resolution passed on a show of hands, no poll being demanded, by a three-fourths majority as provided by sect. 69 of the Act, & subsequently confirmed, is sufficient to satisfy the requirement of sect. 192, & validate the sale, notwithstanding a provision in the co.'s arts. of assocn. that every special resolution should unless resolved on without a dissentient, be decided by poll.—**ETHERIDGE v. CENTRAL URUGUAY NORTHERN EXTENSION RY. CO.**, [1913] 1 Ch. 425; 82 L. J. Ch. 333; 108 L. T. 362; 29 T. L. R. 328; 57 Sol. Jo. 341; 20 Mans. 172.

7076. ——— **—**—There is no very precise meaning in law to be given to the word "amalgamate" in the memorandum of assocn. of a co., but *semble* the sale by one co. to another in consideration of shares in the purchasing co., of all the vendor co.'s assets except certain shares in the purchasing co. held by the vendor co., is authorised by a clause in the memorandum of assocn. of the vendor co. allowing the co. to "amalgamate" with another co. In an agreement for such a sale a provision for distributing the shares received as consideration amongst the members of the vendor co. can upon a question of legality be severed from the agreement for sale.—**WALL v. LONDON & NORTHERN ASSETS CORPN.**, [1898] 2 Ch. 469; 67 L. J. Ch. 596; 79 L. T. 249; 47 W. R. 219; 14 T. L. R. 547, C. A.

Annotations:—**Mentd.** *Torbock v. Westbury*, [1902] 2 Ch. 871; *Bisgood v. Henderson's Transvaal Estates* (1908), 77 L. J. Ch. 486.

7077. ——— **—**—The memorandum of assocn.

& A. should not be placed on the list of contributories.—*Re NEW ENGLAND GOLD MINING CO., LTD.* (1892), 13 N. S. W. Eq. 171.—**AUS.**

d. Provision for payment of liabilities of selling company by purchasing company.—Deft. co. purchased the assets of two other cos., & paid the liabilities of both though in the purchase & sale agreements, there was

no provision for that. Deft. co. was formed for the purpose of carrying out a scheme for the amalgamation of the two other cos.; & the liabilities were paid by the officers of deft. co., without any specific instructions from the directors, in carrying out what all parties to the agreements believed to be the terms of the agreements:—**Held:** there was no wrong or fraudulent intention on the part of any of

defts., either in the scheme of amalgamation or in carrying it out; all interested except possibly pltf., who was a shareholder in deft. co., knew & intended that the liabilities of the dissolving cos. were to be assumed & paid by deft. co.; & therefore, there was no fraud on the part of defts. & the agreements were *intra vires* deft. co.—**JOHNSTON v. THOMPSON** (1914), 26 W. L. R. 814.—**CAN.**

. 37.

winding up: Sub-sect.

of a co. contained powers to sell its undertaking for shares in another co., & to distribute amongst its members in specie any of its property. Its arts. of assocn. empowered the liquidators in its winding up, with the sanction of an extraordinary resolution, to distribute in specie amongst the contributors any part of its assets. The co. while a going concern agreed to sell its undertaking & all its property to another co., the consideration being, (a) that the purchaser co. should pay the vendor co.'s debts & perform its obligations, & keep the vendor co. & its liquidators & contributors indemnified; (b) that the vendor co. should retain a sum to pay the costs of & incidental to its winding up; (c) the allotment to the vendor co. or its nominees of fully-paid shares in the purchaser co. The agreement was conditional on its being sanctioned by an extraordinary resolution of the vendor co. before Jan. 31, 1902. On Dec. 30, 1901, the vendor co. passed by a three-fourths majority resolutions, (a) that the agreement should be adopted & carried into effect; (b) for voluntary winding up & the appointment of a liquidator, who was authorised to distribute any of the assets amongst the members in specie. At a subsequent meeting resolution (b) was confirmed as a special resolution. BUCKLEY, J., decided that the sale was properly made under the power of sale in the memorandum, & was not vitiated by the fact that it involved the co.'s immediately going into voluntary liquidation; & that it was not in disguise a sale by the liquidator upon terms not justified by 1862 Act, s. 161. On appeal:—*Held*: the ct. could not make any declaration or grant any injunction in the absence of the purchaser co. which had not been made a party to the action; & without giving any opinion as to the rights of the parties, the appeal must be dismissed.—DOUGHTY v. LOMAGUNDA REEFS, LTD., [1903] 1 Ch. 673; 72 L. J. Ch. 331; 88 L. T. 337; 51 W. R. 564; 47 Sol. Jo. 384; 10 Mans. 189, C. A.

Annotations:—*Refd.* Fuller v. White Feather Reward, [1906] 1 Ch. 823; Bisgood v. Henderson's Transvaal Estates, [1908] 1 Ch. 743.

7078. ———.]—A limited co. formed in 1898, having by its memorandum power to sell its undertaking either for cash or for shares in any co., entered into an agreement, with a view to reconstruction, with certain guarantors for the sale to them of its undertaking, the purchasers agreement to form a new co. for the repurchase of the undertaking in consideration of the allotment & issue to such members of the old co. as should accept the same, of partly paid-up shares in the new co., with power for the liquidator of the old co., on its being wound up, to sell any shares not accepted by its members.

To carry out that agreement, a new co. was formed in 1902, with power, by its memorandum, to pay out of its funds all expenses it might incur having regard to Companies Act, 1900 (c. 48), s. 8, including commission for underwriting shares; & clause 9 of its arts. provided that if at any time it should offer its shares to the public for subscription the directors might pay a commission at a rate not exceeding 50 per cent. to any person in consideration of subscribing or agreeing to subscribe for shares.

An agreement was then entered into between the guarantors, the original purchasers, & the 1902 co. for the sale to that co. of the undertaking of the 1898 co. in consideration of the 1902 co. allotting & issuing to the guarantors its shares, partly paid up, for distribution among the members of the

1898 co., the guarantors agreeing that they by themselves or their nominees would accept an allotment of such of the shares as should not be required by the 1898 co. or its liquidator; & as the balance of the consideration for the sale, the 1902 co. agreed to pay the guarantors £12,300 in cash. Soon after the date of that agreement the 1898 co. passed resolutions for a voluntary winding-up. No prospectus of the 1902 co. had yet been issued offering any of its shares to the public for subscription.

In an action to restrain the carrying out of the latter agreement as being *ultra vires*:—*Held*: (1) the sale of the undertaking of the 1898 co., so far as it was in consideration of partly paid-up shares in the 1902 co., was authorised by the memorandum of the former co.; (2) the additional consideration of the payment by the 1902 co. of £12,300 in cash was *ultra vires* on the grounds that it was prohibited by above sect., sub-sect. 2, as being commission in consideration of subscribing or agreeing to subscribe for shares; (3) there had been no such offer of shares to the public for subscription as to bring the 1902 co. within the protection of sub-sect. 1; (4) the sum of cash was not a rate within clause 9 of that co.'s arts.—BOOTH v. NEW AFRIKANDER GOLD MINING CO., LTD., [1903] 1 Ch. 295; 72 L. J. Ch. 125; 87 L. T. 509; 51 W. R. 193; 19 T. L. R. 67; 47 Sol. Jo. 91; 10 Mans. 56, C. A.

Annotations:—*As to* (1) *Refd.* Bisgood v. Henderson's Transvaal Estates (1908), 77 L. J. Ch. 486. *As to* (2) & (4) *Refd.* *Re* Worthington, *Ex p.* Pathé Frères (1914), 83 L. J. K. B. 885. *Generally, Mntd.* Doughty v. Lomagunda Reefs (1903), 88 L. T. 337.

7079. Scheme providing for distribution otherwise than in accordance with rights of shareholders—Under 1862 Act, s. 133.—The capital of a co. was divided into preference & ordinary shares of £1 each fully paid up, the holders of the preference shares not being entitled to any priority as regarded capital. Resolutions were passed for the voluntary winding-up of the co. with a view to carrying out a scheme of reconstruction, under 1862 Act, s. 161, whereby a new co. was to be formed with a capital similarly divided, but with 5s. per share treated as unpaid, & each preference & ordinary shareholder in the old co. was to receive respectively a preference or ordinary £1 share in the new co. An action was brought by a shareholder on behalf of himself & all other shareholders who were opposed to the resolutions, for an injunction to restrain the co. from carrying out or giving effect thereto:—*Held*: (1) the scheme was invalid inasmuch as it did not provide for a *pro rata* division among the shareholders in accordance with 1862 Act, s. 133; (2) upon the winding-up the preference & ordinary shareholders stood on an equal footing; (3) it was not competent for a majority of shareholders under sect. 161 to give a benefit to one class of shareholders over another.—SIMPSON v. PALACE THEATRE, LTD. (1893), 69 L. T. 70; 9 T. L. R. 470; 2 R. 451, C. A.

7080. — Under articles—Preference & ordinary shareholders.—*Re* BEESTON PNEUMATIC TYRE CO., LTD. (1898), 14 T. L. R. 338.

Annotation:—*Refd.* *Re* North West Argentine Ry., [1900] 2 Ch. 882.

7081. Scheme providing for uncalled capital of transferor company to be called up—& amount realised transferred to new company—New company discharging liabilities of transferor company.—*Re* BANK OF SOUTH AUSTRALIA (2), No. 6861, *ante*.

7082. Scheme providing for payments to secretary & directors—Compensation for loss of office—Approval of shareholders.—An agreement between

two cos. for the sale of the undertaking of one co. to the other provided that the purchasing co. should pay to the selling co. the sum of £30,543 & a sum amounting to £3,250 to the directors & secretary as compensation for loss of office. Notice was given of an extraordinary general meeting of the shareholders of the selling co. for the purpose of considering &, if thought advisable of approving the terms of an agreement to be made between the A. co. of the one part, & the B. co. of the other part, being an agreement for the sale of the undertaking & assets of the A. co. to the B. co. A circular was afterwards sent to the shareholders stating the object of the agreement, & that, as the B. co. was desirous of having the management in their own hands, the directors & secretary have agreed to retire on being paid a lump sum as compensation for their loss of office. At the extraordinary general meeting a resolution confirming the agreement was passed by a large majority:—*Held*: (1) the agreement to pay various sums to the directors & secretary was not *ultra vires*, provided the shareholders approved of it; (2) as the notice of the extraordinary general meeting did not refer to such payments, it did not specify the “purpose” for which the meeting was called within 1845 Act, s. 71, & the resolution was not binding on a dissentient shareholder, & he was entitled to an injunction restraining the directors from carrying it into effect until it had been duly sanctioned by a meeting of the co. properly convened for that purpose.—*KAYE v. CROYDON TRAMWAYS CO.*, [1898] 1 Ch. 358; 67 L. J. Ch. 222; 78 L. T. 237; 46 W. R. 405; 14 T. L. R. 244; 42 Sol. Jo. 307, C. A.

Annotations:—*As to* (2) *Appl.* *Tiessen v. Henderson*, [1899] 1 Ch. 861. *Distd.* *Torbock v. Westbury*, [1902] 2 Ch. 871. *Refd.* *Allen v. Gold Reefs of West Africa* (1900), 69 L. J. Ch. 266; *Fuller v. White Feather Reward*, [1906] 1 Ch. 823; *Baillie v. Oriental Telephone & Electric Co.*, [1915] 1 Ch. 503; *Clarkson v. Davies*, [1923] A. C. 100. *Generally, Mntd.* *Young v. Ladies' Imperial Club*, [1920] 2 K. B. 523.

7083. Sale for partly-paid shares in purchasing company—Forfeiture of shareholder's interest in default of taking up new shares.]—A co. which had power under its memorandum of assocn. to sell its undertaking & to accept in payment for the same shares of any other co., whether wholly or partly paid up, entered into an agreement for a sale of its undertaking to a new co., part of the consideration being shares in the new co. of 5s. with 4s. credited as paid up. A clause of the agreement provided that if the selling co. should go into liquidation & distribute the shares forming part of the consideration amongst its members, all shares not accepted by members within twenty-one days should be sold & applied in payment of debts & liabilities of the selling co. in relief of the obligation of the new co. under the agreement:—*Held*: the agreement was not justified by the memorandum of assocn. & was *ultra vires*, for the selling co. had no power to contract that upon a liquidation the assets should be divided amongst its shareholders, or that if a shareholder did not choose to undertake the liability under the shares in the new co. his shares should be forfeited.—*MANNERS v. ST. DAVID'S GOLD & COPPER MINES, LTD.*, [1904] 2 Ch. 593; 73 L. J. Ch. 764; 91 L. T. 277; 20 T. L. R. 729; 11 Mans. 425, C. A.

Annotations:—*Expld. & Distd.* *Fuller v. White Feather Reward*, [1906] 1 Ch. 823. *Consd.* *Bisgood v. Nile Valley Co.*, [1906] 1 Ch. 747; *Bisgood v. Henderson's Transvaal Estates*, [1908] 1 Ch. 743. *Appl.* *Dibble v. Wilts & Somerset Farmers*, [1923] 1 Ch. 342.

7084. ———.]—A co. was empowered by its memorandum of assocn. to sell its undertaking

for shares in any other co., & to distribute any of the property of the co. among the members in specie. Part of its nominal capital has been issued & was fully paid. The co. was in need of further capital, &, being unable to place its unissued shares, a scheme for reconstruction was prepared, providing for the sale of the undertaking & assets of the co. to a new co. in consideration (*inter alia*) of partly-paid shares in the new co. of the same number & nominal amount as the fully-paid shares in the old co. & that if the old co. should go into liquidation before the shares were allotted, every member of the old co. in respect of each share therein held by him was to be entitled to claim an allotment to himself of one partly-paid share in the new co. A time limit was fixed within which members of the old co. were to exercise their option to claim such an allotment; & with regard to the proportion of the shares in the new co. which members of the old co. should be entitled to claim, but should not claim within the time limit, the liquidator was to sell the same in such manner as he in his absolute discretion should think fit, & the net proceeds of sale were to be distributed ratably in accordance with their rights & interests among the members who had not so claimed. This scheme was embodied in a draft agreement between the two cos., & a resolution adopting & authorising the directors to enter into the agreement with the new co. when formed was duly passed. On a motion by two dissentient members to restrain the co. from acting on the resolution:—*Held*: the agreement was a device or compelling shareholders of the old co. either to subscribe further capital or else to accept a share of the proceeds of sale of the unclaimed shares in the new co. to be ascertained under a scheme of distribution which was likely to be unfair & work injustice to the dissentient members, & was at any rate, not part of the bargain under which they had originally subscribed for their shares, & the agreement was *ultra vires*.—*BISGOOD v. NILE VALLEY CO., LTD.*, [1906] 1 Ch. 747; 75 L. J. Ch. 379; 94 L. T. 304; 54 W. R. 397; 22 T. L. R. 317; 50 Sol. Jo. 290; 13 Mans. 126.

Annotations:—*Apprvd.* *Bisgood v. Henderson's Transvaal Estates*, [1908] 1 Ch. 743. *Refd.* *Fuller v. White Feather Reward*, [1906] 1 Ch. 823.

7085. ——— Under memorandum powers.]—Under a clause in a memorandum of assocn., stating one of the objects of the co. to be “to sell the undertaking of the co. . . . for a consideration consisting in whole or in part of . . . shares . . . of any other co.”:—*Held*: the co. could sell for partly-paid shares.—*MASON v. MOTOR TRACTION CO., LTD.*, [1905] 1 Ch. 419; 74 L. J. Ch. 273; 92 L. T. 234; 21 T. L. R. 238; 12 Mans. 31.

Annotations:—*Refd.* *Fuller v. White Feather Reward*, [1906] 1 Ch. 823; *Bisgood v. Henderson's Transvaal Estates*, [1908] 1 Ch. 743.

7086. ——— Shares not taken up to be at disposal of purchasing company.]—One of the objects of a co. was to sell & dispose of its property for such consideration as it thought fit, & in particular for shares fully or partly paid up, & to divide the consideration amongst the members of the co. This power was to be exercisable either in view of a winding up of the co. or not. Another object was to distribute any of the assets of the co. among the members of the co.

The co. agreed to sell its assets & undertaking to another co. By the agreement the vendor co. was to be wound up; part of the consideration was to consist of partly-paid shares to be allotted to the vendor co. or its nominees. The vendor co. were within two calendar months to find people to take

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up these shares, & if any of them were not taken up they were to be at the disposal of the purchasing co., & the vendor co. was not to be liable to take them up itself. Resolutions were passed & confirmed at meetings of the vendor co. to wind up that co. voluntarily, & that the liquidator should offer the new shares to the members at the rate of one such share for each share held by the members.

By the amalgamation scheme it was provided that the liquidator should sell shares which were not accepted by the shareholders & distribute the net proceeds of sale among such members. A shareholder in the vendor co. objected to these proposals:—*Held*: the proposed scheme of reconstruction was within the powers conferred by the memorandum & ought to be allowed to proceed.—*FULLER v. WHITE FEATHER REWARD, LTD.*, [1906] 1 Ch. 823; 75 L. J. Ch. 393; 95 L. T. 404; 22 T. L. R. 400; 13 Mans. 137

Annotation:—*Overd.* *Bisgood v. Henderson's Transvaal Estates*, [1908] 1 Ch. 743.

7087. Re-transfer of assets to old company—On failure of amalgamation.—The M. co. was wound up & reconstructed by the formation of the M. corp., the shareholders taking shares in the corp. in exchange for their shares in the co., & the corp. taking over the co.'s assets & liabilities. The corp. failed to indemnify the co., & was itself wound up. Its capital was fully called up in the liquidation & it still owed large debts, besides the claim of the co. against it for indemnity. The co.'s capital had not been fully called up. It owed no debts, & had a balance of cash in hand. Under these circumstances an agreement was entered into between the liquidators, that the co. should take the assets of the corp., paying the creditors of the corp. 4s. in the pound, & retaining what else they might make of them. There was evidence that the assets, if realised carefully, might more than pay the co.'s claim in full. If sold immediately, the assets would probably pay about 3s. in the pound to all. On an order sanctioning this arrangement, giving dissentients the option of taking the present estimated value of their shares, certain exors. holding shares in the co. appealed from the order:—*Held*: order was valid.—*Re MARINE INVESTMENT CO., Ex p. POOLE'S EXECUTORS* (1873), 8 Ch. App. 702; 42 L. J. Ch. 620, L. JJ.

Annotations:—*Appld.* *Re Tunis Rys.* (1874), 10 Ch. D. 270, n. *Refd.* *Re Cambrian Mining Co.* (1882), 48 L. T. 114.

E. Effect.

(a) On Dissentient Members.

i. In General.

7088. General rule.—(1) Any shareholder, who does not approve of a scheme of reconstruction proposed under 1862 Act, s. 161, should attend at the meeting & vote against it. If he is outvoted & the necessary special resolution is passed sanctioning the liquidator entering into the agreement his next course is to dissent under the section.

(2) Where, on the voluntary winding up of a co., a reconstruction agreement is entered into, pursuant to a special resolution under 1862 Act, s. 161, between that co. & its liquidator of the one part & the new co. of the other part, for carrying out a transfer or sale of the undertaking of the old co. to the new, & providing that every holder of shares in the old co. "shall be entitled as of right" to claim an allotment of an equivalent number of

shares in the new co., further provisions fixing the time within which the application for shares must be sent in to the new co., & placing the shares not applied for within that time at the disposal of the new co., are not *ultra vires*; & therefore a member of the old co. who is not a dissentient member within the proviso in the sect. & whose application is out of time either through negligence or accident, such as absence abroad or illness, cannot compel the new co. to allot him the shares.

Qu.: whether, on an application to sanction a proposed scheme of reconstruction containing a clause placing shares not applied for by members of the old co. within a stipulated time at the disposal of the new co., the ct. will sanction such a clause without some modification for the protection of members of the old co.—*BURDETT-COUTTS v. TRUE BLUE (HANNAN'S) GOLD MINE*, [1899] 2 Ch. 616; 68 L. J. Ch. 692; 81 L. T. 29; 48 W. R. 1; 43 Sol. Jo. 672; 7 Mans. 85, C. A.

Annotations:—*As to* (2) *Appld.* *Fuller v. White Feather Reward*, [1906] 1 Ch. 823. *Fold.* *Bisgood v. Henderson's Transvaal Estates* (1908), 24 T. L. R. 413 (*See* (1908), 77 L. J. Ch. 486).

7089. Cannot be forced to become shareholders in new company.—Where a deed enables the majority of a body to bind the minority by a resolution passed in a certain manner, the provisions of the deed in that respect must be strictly complied with, otherwise the minority are not bound.

The subscribers' agreement of a provisionally registered co. authorised the directors, with the consent of a majority at a meeting of subscribers, summoned as therein mentioned, to amalgamate the undertaking with any other similar undertaking. The directors agreed to an amalgamation with the D. co., & sent a circular to the subscribers, stating the terms agreed upon. A majority of the subscribers assented to the amalgamation, & took the benefit of it, but no meeting ever was called to sanction it:—*Held*: the amalgamation was not binding on any shareholders, who had not assented to it.—*Re DIRECT EAST & WEST JUNCTION RY. CO., Ex p. JOHNSON* (1855), 3 Eq. Rep. 479, L. J.

Annotation:—*Mentd.* *Re Mercantile Trading Co.*, *Stringer's Case* (1869), 4 Ch. App. 475.

7090. — Effect of not dissenting within prescribed time.—(1) No shareholder in a joint-stock co. which is in course of voluntary liquidation is bound, in the absence of express assent on his part, to accept shares in any other co., although the liquidators may have agreed that such shall be taken, & such agreement may have been duly confirmed by a meeting of the shareholders in manner prescribed by the 1862 Act, s. 161. But if he does not express his dissent from the agreement in the manner or within the time specified in that sect., he can get no other consideration for his shares, & must submit to lose them utterly if he refuses to accept the new shares.

(2) General powers of amalgamation given to the directors in the arts. of assocn. do not authorise them to bind non-assenting shareholders to accept the new shares. *Semble*: no power which could be given to directors, short of express words to that effect, would enable them to do so.—*Re BANK OF HINDUSTAN, CHINA & JAPAN, LTD., HIGGS'S CASE* (1865), 2 Hem. & M. 657; 6 New Rep. 327; 12 L. T. 669; 13 W. R. 937; 71 E. R. 619.

Annotations:—*As to* (1) *Appld.* *Re New Quebrada Co.*, *Pontifex's Case* (1867), 36 L. J. Ch. 903. *Consd.* *Nicholl v. Eberhardt Co.* (1888), 59 L. T. 860. *Refd.* *Postlethwaite v. Port Phillip & Colonial Gold Mining Co.* (1889), 43 Ch. D. 452. *Generally, Mentd.* *Wall v. London & Northern Assets Corp.*, [1898] 2 Ch. 469.

7091. — — — — ——In the case of a co. being

wound up voluntarily under 1862 Act, s. 161, & amalgamated with another co., a shareholder of the absorbed co., who neither assents to the voluntary winding up, nor gives notice of dissent in the manner provided by that sect., cannot be compelled to take shares in the amalgamated co. which have been allotted to him in pursuance of the terms of agreement by amalgamation.—*Re BANK OF HINDUSTAN, CHINA & JAPAN, Ex p. LOS* (1865), 6 New Rep. 327; 34 L. J. Ch. 609; 12 L. T. 690; 11 Jur. N. S. 661; 13 W. R. 883.

Annotations:—**Consd.** *Re Empire Assce. Corpn., Ex p. Bagshaw* (1867), L. R. 4 Eq. 341. **Apld.** *Re New Quebrada Co., Pontifex's Case* (1867), 36 L. J. Ch. 903. **Refd.** *Re Imperial Bank of China, India & Japan* (1866), 14 L. T. 211; *Re London & Exchange Bank* (1867), 16 L. T. 340; *Postlethwaite v. Port Phillip & Colonial Gold Mining Co.* (1889), 43 Ch. D. 452.

7092. —.]—*Re LONDON, BOMBAY & MEDITERRANEAN BANK, LTD., DREW'S CASE*, No. 6901, *ante*.

7093. —.]—(1) In sanctioning a scheme for the reconstruction of a co. under liquidation, by a transfer of its assets to a new co. to be formed for the purpose, the ct. will have regard to the wishes of a majority of the shareholders & creditors, deliberately expressed upon full information fairly afforded to them, as against the opposition of a dissentient minority; & although a dissentient shareholder cannot be compelled to accept shares in the new co., or the valuation put upon his interest by the official liquidator, if he will accept neither of these alternatives the price of his interest must be settled by arbn., as provided by 1862 Act, s. 162. (2) Where no direct sum has been tendered by the official liquidator as the price of such dissentient shareholder's interest, the cost of the arbn. will not be at the risk of the shareholder, but will remain in the discretion of the ct. (3) 1862 Act, s. 161, does not relate to a purely voluntary winding up only, but includes a voluntary winding up under supervision of the ct. (4) A meeting of contributories had passed resolutions for a reconstruction. The ct. refused to make the liquidator pass his accounts on motion of a dissentient shareholder.—*Re IMPERIAL MERCANTILE CREDIT ASSOCN.* (1871), L. R. 12 Eq. 504; 41 L. J. Ch. 116.

Annotations:—*As to* (1) **Refd.** *Re Cambrian Mining Co.* (1882), 48 L. T. 114. *As to* (2) **Refd.** *Re Glamorganshire Banking Co.* (1884), 54 L. J. Ch. 765.

7094. **Scheme leaving no assets available to satisfy dissentient shareholders.**—An arrangement under 1862 Act, s. 161, that leaves no assets or uncalled capital out of which dissentients can be paid the value of their shares, cannot be carried out against their wishes. In such a case the ct. would find means to protect the dissentients by some order on a winding-up petition without driving them to file a bill.—*Re HESTER & Co., LTD.* (1875), 44 L. J. Ch. 757, L. JJ.

Annotations:—**Refd.** *Re Canning Jarrah Timber Co. (Western Australia)*, [1900] 1 Ch. 708; *Bisgood v. Henderson's Transvaal Estates*, [1908] 1 Ch. 743.

7095. — **Evidence of dissent.**—*Re AUSTIN GOLD MINES, LTD.* (1895), 39 Sol. Jo. 804.

7096. **Cannot be deprived of statutory rights—By articles.**—*PAYNE v. CORK Co., LTD.*, No. 6862, *ante*.

7097. **Petition for compulsory winding up—Right to present.**—Where a co. had entered into an agreement for an amalgamation, which was within the powers conferred on it by its memorandum of assocn., & for the purpose of carrying out the agreement had gone into voluntary winding up, the ct. refused to make a compulsory order on the petition of dissentient shareholders.—

Re NORTH BRITISH WATER GAS SYNDICATE (1894), 1 Mans. 132.

7098. **Right to support—Although requisition served under 1862 Act, s. 162, on liquidator.**—

The S. R. co. owned considerable liquid assets & also large mining claims of prospective though not present value, which it had been formed to purchase from the H. E. co. & for which in part payment it had allotted to the latter more than three-fifths of its issued shares. In 1906 the H. E. co. sold these shares to the E. corp. & procured the appointment of nominees of the latter to be the directors of the S. R. co., & these directors lent the greater part of the liquid assets to the E. corp. to enable it to complete the purchase. In 1908 resolutions were proposed at extraordinary general meetings of the S. R. co. & passed by means of the shares held by the E. corp. in spite of the opposition of nearly all the independent shareholders, for the voluntary winding-up of the S. R. co. & for the sale of its assets to a new co. which was to be formed to acquire them, & also the assets of the E. corp. & another co. All these assets were to be paid for in shares on the new co., & in fixing the values of the respective assets, & the number of shares to be paid to each co., the mining claims of the S. R. co. were wholly disregarded while the E. corp., besides being relieved of its debt to the S. R. co., was to receive so large a number of shares as to give it a great preponderance in the new co. A shareholder in the S. R. co., having petitioned for a compulsory order, & being supported by most of the independent shareholders, many of whom, but not the petitioner, had served on the liquidator the notice provided by 1862 Act, s. 161:—**Held**: (1) the scheme was eminently an unfair one, as regarded the shareholders of the S. R. co.; (2) the dissentient shareholders were not precluded by their notice from supporting the petition, & a compulsory order must be made.—*Re CONSOLIDATED SOUTH RAND MINES DEEP, LTD.*, [1909] 1 Ch. 491; 78 L. J. Ch. 326; 100 L. T. 319; 16 Mans. 81.

Right to have shares purchased.—*See Sub-sect. 13, E. (a) ii., post.*

7099. **Right to share in indemnity to shareholders of old company.**—Where one insurance co. A., transferred all its business, property, effects & liabilities to another co., B., on the terms of A. shareholders being indemnified on a bill by A. for specific performance of the agreement, the ct. decreed such indemnity, & the other co., which was ordered to be wound up, having by its official manager filed a cross-bill, alleging fraud & misrepresentation, & that such agreement was *ultra vires*, the second co., B., having had the benefit of the agreement:—**Held**: not to be entitled to object that the agreement was *ultra vires* & improperly entered into by the managing body, & the cross-bill was dismissed.—*ANGLO-AUSTRALIAN LIFE ASSURANCE Co. v. BRITISH PROVIDENT LIFE & FIRE SOCIETY* (1862), 3 Giff. 521; 66 E. R. 515; *sub nom.* *ANGLO-AUSTRALIAN ASSURANCE Co. v. BRITISH PROVIDENT ASSURANCE SOCIETY, BRITISH PROVIDENT ASSURANCE SOCIETY (OFFICIAL MANAGER) v. ANGLO-AUSTRALIAN ASSURANCE Co.*, 6 L. T. 68; 8 Jur. N. S. 299; *varied on appeal*, 4 De G. F. & J. 341, L. O.

Annotations:—**Expld.** *Woodhams v. Anglo-Australian & Universal Family Life Assce.* (1864), 10 L. T. 178. **Refd.** *Re British Provident Life & Fire Assce. Soc., Ex p. Anglo-Australian Asscn., Ex p. Teete, Ex p. Rumney, Ex p. Webster* (1864), 10 L. T. 326.

7100. **Application for liquidator to pass accounts—At instance of dissentient shareholder.**—*Re IMPERIAL MERCANTILE CREDIT ASSOCN.*, No. 7093, *ante*.

Sect. 37.—Voluntary winding up: Sub-sect. 13,

ii. Notice of Dissent.

7101. Who may give—Transferee of shares—Transfer not registered—Registration antedated.]—The ct. has power under 1862 Act, s. 35, to rectify the register of members after the liquidation of the co. has commenced; & such power is not limited by sect. 98 to rectification for the purpose of settling the list of contributories.

Where there has been unnecessary delay in registering a transfer of shares, & in consequence it had not been registered when the co. went into voluntary liquidation for the purpose of reconstruction under 1862 Act, s. 161, the ct., on the application of the transferee, ordered the transfer to be registered as of a date prior to the winding-up, which rendered valid a notice of dissent given by the transferee under sect. 161 after the date on which the transfer ought to have been, but was not, registered.—*Re SUSSEX BRICK CO.*, [1904] 1 Ch. 598; 73 L. J. Ch. 308; 90 L. T. 426; 52 W. R. 371; 11 Mans. 66, C. A.

7102. To whom given—Liquidator not in existence—But bound to come into existence if scheme carried out.]—The provisions of 1908 Act, s. 192 (3), are sufficiently complied with by the sending of notices to the liquidator at the co.'s offices, although the question of whether the co. is, or is not, to go into liquidation is to depend on the number of dissentients, & the liquidator accordingly will not in fact come into existence until after that number has been ascertained.—*Re NEEDHAMS, LTD.* (1923), 68 Sol. Jo. 236.

7103. Time for giving—Notice given before confirmation of special resolution—Objection to notice after confirmation of resolution.]—After the passing of resolutions by a co. for voluntary liquidation, the transfer of its business, & the appointment of the co.'s secretary as liquidator, but before the subsequent confirmation of such resolutions, a shareholder served notice of dissent on the secretary of the co. The notice was not objected to until one month after the confirmation of the resolutions, & was not returned:—*Held*: the notice was a valid notice of dissent within 1862 Act, s. 161.—*Re LONDON & WESTMINSTER BREAD CO., LTD.* (1890), 59 L. J. Ch. 155; 62 L. T. 224; 38 W. R. 277; 2 Meg. 30.

7104. Service—At London office—Registered office abroad.]—The pltf. was the holder of fully paid up shares in deft. co., which was in course of liquidation for the purpose of reconstruction. The co. was registered in 1903 under the Companies Ordinance, 1895, of Southern Rhodesia, & its registered office was in Bulawayo. By the co.'s arts. it was provided that the business of the co. should be carried on in England. At extra-

ordinary general meetings held in London on June 18 & July 3, 1909, resolutions had been passed for the voluntary winding up of the co., & all its assets were to be taken over by a new co.

Under sect. 158 of the Companies Ordinance, 1895, which was similar to 1862 Act, s. 161, a dissentient shareholder had to give notice of dissent at the registered office of the co. within seven days of the date of the meeting. The pltf. voted against the resolutions, & on July 5 gave notice of dissent at the London office of the co. On July 6 the liquidator sent him in reply a letter in the following terms: "I am in receipt of your letter of the 5th inst., & note that you do not consent to the reconstruction of the above co." Subsequently the liquidator refused to treat the notice of dissent as valid, on the ground that it was not served at the registered office of the co., & the pltf. brought this action. Under the Companies Ordinance, 1895, the liquidator had power to do all acts in the name & on behalf of the co.:—*Held*: the liquidator had waived the irregularity & the notice of dissent must be treated as valid.—*BRAILEY v. RHODESIA CONSOLIDATED, LTD.*, [1910] 2 Ch. 95; 79 L. J. Ch. 494; 102 L. T. 805; 54 Sol. Jo. 475; 17 Mans. 222.

7105. Contents—Declaration of dissent—Option to liquidator to purchase interest.]—A notice under 1908 Act, s. 192, sub-sect. 3, dissenting from a resolution for reconstruction, must not only contain a declaration of dissent, but must also expressly give the liquidator the option, either to abstain from carrying the resolution into effect, or to purchase the dissentient member's interest.—*Re DEMERARA RUBBER CO., LTD.*, [1913] 1 Ch. 331; 82 L. J. Ch. 220; 108 L. T. 318; 20 Mans. 148.

7106. Effect—Dissenting shareholder does not cease to be shareholder on giving notice.]—*Re IMPERIAL LAND CO. OF MARSEILLES, VINING'S CASE*, No. 7108, *post*.

iii. Purchase of Dissentient Member's Interest.

7107. Right to have interest purchased.]—A sale of the assets & business of a co. under 1862 Act, s. 161, may be made to a co. carrying on business in a foreign co. & framed under foreign law. But where a sale of the assets & business of a co. is intended to be made under sect. 161, the notices convening the meetings of the shareholders at which resolutions to that effect are to be proposed, ought on the face of them to show that proceedings are taken under sect. 161, in order that the shareholders may know that if they dissent from the proposed scheme, they will be entitled to require their interest in the co. to be paid for cash.

A co. which was in difficulties duly passed a

within the powers of the liquidator to waive informality in the notice of dissent.—*Re FLEMING SPINNING & WEAVING CO., LTD.*, *JEHANGIR GUSTADJI v. JOOSUB HAJI AHMED* (1883), 1 L. R. 7 Bom. 494.—IND.

PART III. SECT. 37, SUB-SECT. 13.—
E. (a) iii.

7107 i. Right to have interest purchased.]—*Re FLEMING SPINNING & WEAVING CO., LTD.* (1879), 1 L. R. 3 Bom. 299.—IND.

g. — How value of interest ascertained—Arbitration—Second reference to arbitration.]—*Re FLEMING SPINNING & WEAVING CO., LTD.*, *JEHANGIR GUSTADJI v. JOOSUB HAJI AHMED* (1883), 1 L. R. 7 Bom. 494.—IND.

PART III. SECT. 37, SUB-SECT. 13.—
E. (a) ii.

e. Service—By letter—No particular form of words necessary.]—The shareholders of a co. having passed a resolution for the voluntary winding up of the co., five dissentient shareholders gave notice of their dissent by a letter to the liquidators in the following terms: "With reference to the resolutions to wind up the co. voluntarily, & which were passed & confirmed, we hereby give you notice under Indian Companies Act, VI. of 1882, s. 204, & require you to purchase the interest held by us in the said co. at such price as may be determined either by private arrangement or by arbn., as we are dissentients from such resolutions":—*Held*: the letter was sufficient notice of dissent under the

provisions of that sect. as it provided no particular form of words in which the notice is to be given but merely provided that a member who has not voted in favour of the special resolution shall express his dissent in writing to the liquidators not later than 7 days after the date of the special resolution being passed.—*MOTTRAM BHAGUBHAI v. GORDON MILLS, LTD.* (1888), 1 L. R. 12 Bom. 526.—IND.

f. Contents—Requisition to liquidator—Waiver by liquidator.]—A notice of dissent under Indian Companies Act, 1866, s. 175, is insufficient if it does not contain the requisition to the liquidators required by that sect. & consequently, it is open to the liquidators to have the shareholder disentitled to a dissentient's right under that sect. It is, however,

resolution for voluntary winding up, with a view of disposing of its undertaking, which was carried on in France, to a French co. to be formed for the purpose; & at the same time it passed other resolutions as to the transfer to the French co., & a special resolution altering the arts. of assocn. so as to give power to carry out the arrangement without giving dissentient shareholders the option to receive the value of their shares in cash, as provided by 1862 Act, s. 161. These resolutions, except the resolution for winding up, were passed irregularly, but no shareholder dissented from them except one fully paid-up shareholder, who applied to the co. to pay him the value of his shares, which was refused. He then presented a petition praying that the co. might be wound up compulsorily, or under supervision, or that he might be at liberty to sue in the name of the co. to set aside the proposed arrangements, or that the value of his shares might be ascertained & paid:—*Held*: (1) the resolution to wind up voluntarily having been regularly passed, the ct. would not, on the application of a fully paid-up shareholder, interfere with it by ordering a compulsory winding up, or a winding up under supervision, against the wishes of nearly all the shareholders; (2) the winding-up resolution being good in itself, was not invalidated by being associated with resolutions which were not regularly passed; (3) leave to sue in the name of the co. had rightly been refused, as the resolutions authorising a transfer to the French co. were not *ultra vires*, but, although irregular, were capable of confirmation; (4) the special resolution altering the arts. while the co. was in difficulties, & as a part of the scheme for transfer to the French co., was invalid, & petitioner was entitled to have the value of his shares ascertained & paid, as provided by 1862 Act, s. 161.—*Re IRRIGATION CO. OF FRANCE, Ex p. FOX* (1871), 6 Ch. App. 176; 40 L. J. Ch. 433; 24 L. T. 336, L. J.J.

Annotations:—*As to* (1) *Apld.* *Re Tunis Ry.* (1871), 10 Ch. D. 270, n. *Distd.* *Thomas v. United Butter Cos. of France*, [1909] 2 Ch. 484. *Refd.* *Re Langley Mills Steel & Iron Works Co.* (1871), 40 L. J. Ch. 313; *Re Tumacacori Mining Land Co.* (1874), 43 L. J. Ch. 417; *Re Amalgamated Syndicate*, [1897] 2 Ch. 600; *Re Anglo-Continental Supply Co.*, [1922] 2 Ch. 723. *As to* (2) *Consd.* *Thomson v. Henderson's Transvaal Estates*, [1908] 1 Ch. 765. *As to* (3) *Refd.* *Etheridge v. Central Uruguay Northern Extension Ry.*, [1913] 1 Ch. 425. *As to* (4) *Refd.* *Re Hester* (1875), 44 L. J. Ch. 757.

7108. Power of liquidator—On requisition to purchase shares—Cannot release shareholder from liability to creditors—Can only purchase shareholder's interest.—A co. having resolved on a voluntary winding up, & the reconstruction of the co., with a new capital, new arts., & a new name, a dissentient shareholder gave notice to the liquidators, under 1862 Act, s. 161, requiring them to purchase his interest in the co. The liquidators accordingly took a transfer of his shares:—*Held*: the liquidators had no power, under sect. 161, to release the dissentient shareholder from his liability to the creditors, but only to purchase such interest as he had in the assets of the co.; & consequently, the shareholder's name must be put on the list of contributories.

Under sect. 161, does a shareholder by giving notice that he is a dissentient shareholder & that he insists either upon paying him off or discontinuing the arrangement, cease to be a shareholder so as not to be a member of the co. at the time of winding up? I find nothing in the Act of Parliament which says that a person being a shareholder ceases by virtue of that arrangement to be a shareholder (*JAMES, L.J.*).—*Re IMPERIAL LAND CO. OF MARSEILLES, VINING'S CASE* (1870),

6 Ch. App. 96; 40 L. J. Ch. 79; 19 W. R. 173, L. J.J.

Annotations:—*Refd.* *Re National Bank of Wales, Taylor, Phillips & Rickards' Cases*, [1897] 1 Ch. 298. *Mentd.* *Re Imperial Land Co. of Marseilles, Ex p. Jeaffreson* (1870), 19 W. R. 57.

7109. Requisition to purchase interest—Form—Necessity for writing.—Where a limited co. is being wound up voluntarily, & a special resolution has been passed under 1862 Act, s. 161, for the transfer or sale of its business to another co., the requisition to the liquidators under that sect. by any dissentient member of the co. in liquidation, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient, must, as well as the notice of dissent given to the liquidators, be in writing, & left at the office of the co., not later than seven days after the date of the meeting at which the special resolution was passed.

The liquidators in a voluntary winding up may apply to the ct. under 1862 Act, s. 138, to determine any question of difficulty fairly arising in the winding up, & any such application may be made by motion.—*Re UNION BANK OF KINGSTON-UPON-HULL* (1880), 13 Ch. D. 808; 49 L. J. Ch. 264; 42 L. T. 390; 28 W. R. 808.

Annotation:—*Consd.* *Re Demerara Rubber Co.*, [1913] 1 Ch. 331.

7110. — Service.—*Re UNION BANK OF KINGSTON-UPON-HULL*, No. 7109, *ante*.

7111. — Right of member serving requisition—To examine company's books—To see whether more advantageous to accept liquidator's offer.—A banking co. being in the course of voluntary winding up for the purpose of reconstruction, one of the members having been, with the others, offered 5s. in the pound for her holding in the old co. gave notice to arbitrate under sect. 161, as a dissentient. She then claimed the right to examine the books of the co. in order to see whether it would be better for her to accept the offer of 5s. or go on with the arbn.:—*Held*: application must be refused.—*Re GLAMORGANSHIRE BANKING CO., MORGAN'S CASE* (1884), 28 Ch. D. 620; 54 L. J. Ch. 765; 51 L. T. 623; 33 W. R. 209.

Annotation:—*Apld.* *Re British Building Stone Co.*, [1908] 2 Ch. 450.

7112. To examine witnesses under 1862 Act, s. 115—For purpose of increasing value of shares.—Where the undertaking of a co. in voluntary liquidation is being sold to another co. under 1862 Act, s. 161, & the liquidator has elected to purchase the interest of a dissentient member at a price to be determined by arbn. under sect. 162, the ct. will not give that dissentient member liberty to examine the officers of the co. under sect. 115 with the view of obtaining evidence to enhance the value of his interest in the arbn.—*Re BRITISH BUILDING STONE CO., LTD.*, [1908] 2 Ch. 450; 77 L. J. Ch. 752; 99 L. T. 608; 15 Mans. 349.

7113. — How value of interest ascertained "Agreement"—Provision in articles.—The arts. of assocn. of a co. provided that, "If at any time a sale or arrangement shall be made or proposed in pursuance of 1862 Act, s. 161, the purchase-money to be paid for the interest of any dissentient member shall be such sum of money as the liquidator can obtain by selling the shares, stock or other property to which such dissentient member would have been entitled upon the completion of the sale or arrangement had he not expressed his dissent."

The co. resolved upon a voluntary winding up, & authorised the liquidator to enter into an arrangement for the sale of the business & assets

Sect. 37.—Voluntary winding up: Sub-sect. 13, E.
(a) iii. & (b).]

of the co. to a new co.:—*Held*: the above clause of the arts. did not amount to an "agreement" within 1862 Act, s. 162, so as to deprive a member of the co. who dissented from the arrangements of his right under that sect. to have the value of his interest in the co. determined by arbn. *Semble*: the "agreement" intended by sect. 162 is an agreement between the dissentient member & the liquidator in the winding up of the co.—*BARING-GOULD v. SHARPINGTON COMBINED PICK & SHOVEL SYNDICATE*, [1899] 2 Ch. 80; 68 L. J. Ch. 429; 80 L. T. 739; 47 W. R. 564; 15 T. L. R. 366; 43 Sol. Jo. 494; 6 Mans. 430, C. A.

Annotations:—*Folld.* *Payne v. Cork Co.*, [1900] 1 Ch. 308; *Consd.* *Llewellyn v. Kasintoe Rubber Estates*, [1914] 2 Ch. 670. *Refd.* *Manners v. St. David's Gold & Copper Mines*, [1904] 2 Ch. 593; *Bisgood v. Henderson's Transvaal Estates*, [1908] 1 Ch. 743; *Dibble v. Wilts. & Somerset Farmers*, [1923] 1 Ch. 342.

Arbitration—Appointment of umpire.—By sects. 161, 162, of 1862 Act, on any co. being voluntarily wound up, it is lawful by special resolution to transfer the business, etc., to a new co., provided that any dissentient shareholder may require the liquidators either to abstain from carrying the resolution into effect, or to take his shares at a price, if not agreed upon, to be determined by arbn. under 1845 Act. That Act, by sects. 128–130, provides for the appointment of two arbitrators, one by each party; & the arbitrators are to appoint an umpire; but in case of their default sect. 131 only provides that if one of the parties be a railway co. the appointment of an umpire is to be by the Board of Trade. A dispute as to the price to be paid for his shares having arisen between a shareholder & a co. not a ry. co., & the arbitrators having neglected to appoint an umpire:—*Held*: the case was within the Common Law Procedure Act, 1854 (c. 125), s. 12, & a judge could therefore appoint an umpire under that sect.—*Re ANGLO-ITALIAN BANK & DE ROSAZ* (1867), L. R. 2 Q. B. 452; 16 L. T. 412.

Annotation:—*Folld.* *De Rosaz v. Anglo-Italian Bank* (1869), L. R. 4 Q. B. 462.

7115. ————. *Declaration*, that defts. were a banking co. incorporated under the Companies Act, 1862; that a resolution was passed for the winding up of the co. & the transfer of the business to another co.; that pltf. was a shareholder in the first co., & expressed a dissent in writing as required by sect. 161 of the statute, & required the liquidators either to abstain from carrying the resolution into effect, or to purchase his interest; that by the arts. of assocn., in the event of any difference arising between the co. & any of the shareholders, such difference was to be referred to two arbitrators, one of the arbitrators to be named by each party; the arbitrators to appoint an umpire; & if they did not do so within fourteen days, an umpire might be appointed by a judge under the Common Law Procedure Act, 1854 (c. 125), that the dispute relating to the settling of the price of pltf.'s shares was referred to two arbitrators; that they did not appoint an umpire; that an umpire was appointed by a judge; that the arbitrators did not agree; that the umpire duly made his award adjudging the price to be paid for the purchase of pltf.'s interest at £2,100, which sum he directed

to be paid to pltf., & further directed that defts. should pay to the pltf. his costs of the reference & award, & that defts. did not pay the money. On demurrer:—*Held*: (1) an action would lie against the co. on the award as in ordinary cases, as there was nothing in sect. 161 which took away the right of action; (2) the judge had power to appoint an umpire under the arts. of assocn.; or under 1845 Act, supplemented by the Common Law Procedure Act, 1854 (c. 125), on the authority of *Re Anglo-Italian Bank & De Rosaz*, No. 7114, *ante.*—*DE ROSAZ v. ANGLO-ITALIAN BANK* (1869), L. R. 4 Q. B. 462; 10 B. & S. 354; 38 L. J. Q. B. 161; 17 W. R. 724.

Annotation:—*Refd.* *Baring-Gould v. Sharpington Pick & Shovel Syndicate* (1898), 67 L. J. Ch. 622.

Commission for examination of witnesses abroad.—Where a co. is in voluntary liquidation & a dispute has arisen as to the price to be paid for the purchase of the interest of a dissentient member which, under 1862 Act, s. 162, has been referred to arbn., the ct., on the application of the liquidators, has jurisdiction under R. S. C. Ord. 38, r. 5, to order a commission to issue for the examination of witnesses abroad, the matter being one arising in the winding up within 1862 Act, s. 138, & the reference to arbn. being compulsory under the Act.—*Re MYSORE WEST GOLD MINING CO.* (1889), 42 Ch. D. 535; 58 L. J. Ch. 731; 61 L. T. 453; 37 W. R. 794; 5 T. L. R. 695; 1 Meg. 547.

Annotation:—*Mentd.* *Taylor v. Cripps* (1914), 7 B. W. C. C. 623.

7117. ————. **Right to enforce award by action.**—*DE ROSAZ v. ANGLO-ITALIAN BANK*, No. 7115, *ante.*

7118. ————. **Interest on amount of award.**—No interest is payable on the amount of an award settling the price to be paid for the purchase of the interest of a dissentient member under 1862 Act, s. 162, except from the date when payment of the amount awarded is demanded, & such interest is properly calculated at the rate of 4 per cent.—*Re UNITED STATES DIRECT CABLE CO., LTD.* (1879), 48 L. J. Ch. 665.

7119. ————. **Costs in discretion of court.**—*Re IMPERIAL MERCANTILE CREDIT ASSOCN.*, No. 7093, *ante.*

(b) On Allottees of Shares under Scheme.

7120. Whether allotment equivalent to return of capital.—Where a joint-stock co., limited, whose shares are fully paid up, has sold its business to another co., & as part of the consideration, the paid-up shares of the purchasing co. were allotted to the shareholders of the old co. in the proportion of one share to every two shares held by each shareholder in the old co. on the winding up of the old co., the ct. will not, if satisfied of the *bona fides* of the transfer, consider such an allotment of shares as a return of capital of the old co., or treat the shares in that co. as not fully paid up.—*Re CARDIFF PRESERVED COKE & COAL CO., Ex p. NORTON* (1863), 2 New Rep. 562; 9 L. T. 186; 11 W. R. 1007, L. C.

7121. No entry in register—Nor assent by other shareholders.—Whether allotted member of old company.—The N. co. having become amalgamated with the O. Bank, B., one of the shareholders of the co., in answer to an application for shares in the bank, received from the manager a

PART III. SECT. 37, SUB-SECT. 13.—
E. (b).

h. Failure to apply for shares—
Shares sold by liquidator & proceeds

handed to master for custody.—Where, on the liquidation of a co. the shareholders were entitled to receive shares in another co. & certain shareholders had failed to apply for such shares

after notice by means of two circular letters, addressed to each of such shareholders, & in various newspapers:—*Held*: the liquidators be authorised to sell the shares &, after payment of

letter inclosing such shares in lieu, as was stated, of the shares held by B. in the co. There was no entry in the register of this exchange, nor did it appear that the other shareholders of the co. had assented to it. More than a year afterwards the co. was wound up, & B.'s name having been placed on the list of contributories, he applied to the ct. to have it removed on the ground that he had ceased to be a shareholder in the co. from the date of the exchange:—*Held*: he was not entitled to have his name removed from the list.—*Re NATIONAL FINANCIAL CO., LTD., NASH'S CASE* (1867), 36 L. J. Ch. 811; 16 L. T. 689.

Annotation:—*Mentd.* *Heritage v. Paine* (1876), 34 L. T. 947.

7122. ——— **Under agreement for compromise of suit to set aside amalgamation—Whether binding on allottee.**—An agreement was entered into between A. co. & C. co. for amalgamation, on the terms that A. co. should purchase the assets of C. co., & give the shareholders of C. co. equivalent shares in A. co., & C. co. should be wound up voluntarily. On the footing of this amalgamation, H., who was a shareholder in C. co., applied for shares in A. co., which were allotted to him, & his name was placed on the register accordingly. Shortly afterwards H. & several other shareholders repudiated their shares in A. co., on the ground that C. co. had no power to amalgamate with another co., & that there had been misrepresentations in the circular. The repudiating shareholders acted by the same solr., & one of them, F., shortly afterwards filed a bill to set aside that amalgamation, & presented a petition to wind up C. co. A compromise was subsequently made of the suit on the terms that the amalgamation should be rescinded & the names of the repudiating shareholders should be removed from the register of A. co. This was agreed to by both cos. & sanctioned by the judge, but the name of H. still remained on the register of A. co., & that co. was also soon afterwards wound up. The agreement for compromise was signed by the solr. acting for the repudiating shareholders, who was also the solr. in F.'s suit, but there was no proof that H. had ever authorised him to agree to the compromise on his behalf, or to do any act in the matter, except to write a letter repudiating the shares:—*Held*: H. was liable as a contributory of A. co.—*Re LONDON & COUNTY GENERAL AGENCY ASSOCN., HARE'S CASE* (1869), 4 Ch. App. 503; 20 L. T. 157; 17 W. R. 628, L. JJ.

Annotations:—*Folld.* *Re Empire Assce. Corpn., Challis's Case, Somerville's Case* (1871), 6 Ch. App. 266. *Consd.* *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413. *Apld.* *Re Lennox Publishing Co., Ex p. Storey* (1890), 62 L. T. 791. *Refd.* *Re Bank of Hindustan, China, & Japan, Campbell's Case, Hippisley's Case, Alison's Case* (1873), 9 Ch. App. 1; *Re General Ry. Syndicate, Whiteley's Case*, [1899] 1 Ch. 770.

7123. ——— **Shares in transferee company improperly created—Allottee not estopped from denying liability.**—Two incorporated banking cos., the Bank of Hindustan & the Imperial Bank of China, under the powers contained in their respective arts. of assocn., agreed to amalgamate, the business of the latter co. being transferred to the former, & the shareholders in the Imperial Bank of China having the option of taking newly-created shares in the Bank of Hindustan at a premium, part of which was to be paid out of the funds of the Imperial Bank. The directors of the Bank of Hindustan, without pursuing the

course pointed out by the 1862 Act, ss. 12, 50, 51, but by a simple resolution passed at one meeting & confirmed at a subsequent meeting, resolved to create & issue 20,000 new shares of £100 each, for the purpose of carrying out the proposed amalgamation; their power to increase their capital under the arts. of assocn. having already been exhausted. They then issued circulars informing the shareholders in the Imperial Bank of the arrangement which had been made, & intimating to them that they had an option to take such new shares on the terms specified. Deft., a shareholder in the Imperial Bank, in consequence, in 1864, applied for & obtained an allotment of shares, paid a portion of the deposit & premium thereon, & by his letter of application engaged to pay the residue on a given day. Calls were afterwards made, of which deft. had notice; but he never repudiated his liability until an action was brought against him in 1867 for non-payment of those calls. In 1868 the supposed amalgamation of the two banks was in a suit by dissentient shareholders in the Imperial Bank, declared void:—*Held*: the directors of the Bank of Hindustan had no power to issue the new shares, & deft. was not by any acquiescence or conduct on his part estopped from denying that he was a shareholder in the Bank of Hindustan.—*BANK OF HINDUSTAN v. ALISON* (1871), L. R. 6 C. P. 222; 40 L. J. C. P. 117; 23 L. T. 854; 19 W. R. 505, Ex. Ch.

Annotation:—*Consd.* *Re Bank of Hindustan, China, & Japan, Campbell's Case, Hippisley's Case, Alison's Case* (1873), 9 Ch. App. 1.

7124. ———.]—By an agreement between two cos., one co. was to buy the business of the other co., the consideration to be paid in shares of the buying co., to be issued to the selling co. & divided amongst its shareholders. Resolutions approving of this agreement & also authorising the creation of the requisite new shares, all the shares authorised by the arts. of assocn. having been already issued, were passed at one extraordinary general meeting of the buying co., & were confirmed at a second meeting. A large majority of the shareholders of the selling co. assented to the agreement, & applied for & received what purported to be new shares of the buying co. Certain dissentient shareholders, however, filed a bill in Chancery & obtained a decision that the agreement was void. These shareholders were afterwards, by way of compromise, paid a sum of money by the official liquidator of the buying co., then in liquidation, & the suit in Chancery was stayed. Certain former shareholders of the selling co., holders of what purported to be new shares in the buying co., then applied to be repaid the money which they had paid to the buying co. for premium & on calls upon their shares:—*Held*: as the buying co. did really acquire, by a title which, though originally defective as against the dissentient shareholders, had been in the end confirmed, the property of the selling co., & as the shares were issued *bonâ fide*, the holders of the new shares could not now repudiate them.—*Re BANK OF HINDUSTAN, CHINA & JAPAN, CAMPBELL'S CASE, HIPPISELEY'S CASE, ALISON'S CASE* (1873), 9 Ch. App. 1; 43 L. J. Ch. 1; 29 L. T. 519, 524; 22 W. R. 113, L. C. & L. JJ.

Annotations:—*Consd.* *Hope v. International Financial Soc.* (1876), 4 Ch. D. 327. *Refd.* *Re County Palatine Loan & Discount Co., Teasdale's Case* (1873), 9 Ch. App. 54; *Imperial Hydropathic Hotel Co., Blackpool v.*

expenses, to hand over the proceeds to the master for custody until claimed by the shareholders.—*Ex p. HERALD* (1919), O. P. D. 31.—S. AF.

k. *Allotment of fully & paid shares—In respect of fully partly paid shares in old company—Valid contract registered—Whether allot-*

tee not placed on list of contributories.—*Re NEW ENGLAND GOLD MINING CO., LTD.* (1892), 13 N. S. W. Eq. 171.—AUS.

*Sect. 37.—Voluntary winding up: Sub-sect. 13, E.**(c) On Creditors.*

Hampson (1882), 23 Ch. D. 1; Taylor v. Pilsen Joel & General Electric Light Co. (1884), 27 Ch. D. 268; *Re Briton Medical & General Life Asscn.* (1889), 5 T. L. R. 502; *Eichbaum v. City of Chicago Grain Elevators*, [1891] 3 Ch. 459; *Re Wakefield Rolling Stock Co.*, [1892] 3 Ch. 165; *Mosely v. Koffyfontein Mines*, [1910] 2 Ch. 382; *Re North Cheshire Brewery Co.* (1920), 64 Sol. Jo. 463. **Mentd.** *Re Ruby Consolidated Mining Co.*, Askew's Case (1874), 43 L. J. Ch. 633; *Harriman v. Harriman*, [1909] P. 123.

See, also, Part V., Sects. 7, 8, sub-sect. 3, post.

7125. Allottee induced by misrepresentation to take shares.]—B. held fifty £100 shares, with £20 per share paid up, in the A. co., which was afterwards amalgamated with the W. co. He was offered, & accepted 500 £10 shares, with £2 per share paid up, in the W. co. in lieu of his shares on the A. co. At the time when he accepted these shares two calls had been made & were due, but he had then no information of this fact. Within sixteen days after he was applied to for payment of the calls, B., who was then very ill & has since died, gave the co. notice that he would dispute his liability to pay the calls:—**Held:** his name must be taken off the list of contributories.—*Re WESTERN INSURANCE CO., LTD., BRIGGS'S CASE* (1869), 19 L. T. 758.

7126. Allotment to wrong person—Transfer of shares in old company before reconstruction—Transfer not registered—Allotment of shares in new company to transferor.]—ROONEY v. STANTON (1900), 17 T. L. R. 28, C. A.

7127. Failure to allot—Liability of liquidator.]—*Re SOUTH AUSTRALIAN PETROLEUM FIELDS, LTD.*, [1894] W. N. 189.

7128. ———.]—A scheme for the reconstruction of a co., which was in voluntary liquidation under the supervision of the ct., provided that the undertaking should be sold to a new co., & that the shareholders should have the option of taking shares in the new co. in proportion to their holding in the old. In accordance with the terms of a circular issued by the liquidator, B., a shareholder in the old co., signed an application for shares in the new co. & sent it, with a cheque for the required deposit, to the bankers of the co., who sent him a receipt therefor. The bank subsequently sent to the liquidator, at his request, a list of persons who had applied for shares, but did not include therein the name of B. The liquidator afterwards sold the whole of the shares unapplied for, together with those which should have been allotted to B. He had no assets undistributed in his hands except the proceeds of sale of the shares unapplied for, & he had no shares which he could allot to B. Upon a summons by B. in the winding up:—**Held:** the ct. had no jurisdiction to declare the liquidator liable in damages.—*Re HILL'S WATERFALL ESTATE & GOLD MINING CO.*, [1896] 1 Ch. 947; 12 T. L. R. 316; *sub nom. Re HILL'S WATERFALL, ESTATE & GOLD-MINING CO., LTD.*, *Ex p. BAYLISS*, 65 L. J. Ch. 476; 74 L. T. 341; 3 Mans. 158.

7129. Construction of agreement.]—CALIAO BIS MINING CO. v. RONALDSON, [1887] W. N. 176.

As regards insurance companies.]—*See Part V., Sect. 8, sub-sect. 3, post.*

7130. Whether creditors bound.]—The reconstruction of an insolvent co. was attempted on the basis of the formation of a new co., to take over its assets & liabilities. The plan of reconstruction provided for the old co. to be wound up & the shareholders to exchange their old shares, which were of £20 each, with £10 paid up, for half the number of fully paid-up shares of the new co. of £10 each, & 6 per cent debentures to an amount equal to the amount paid up upon their shares in the old co., credited with one-half thereof as paid thereon, leaving the remaining half to be paid by instalments extending over a period of two years. The shareholders were requested to assent to the proposal by signing a form of approval containing the terms of the plan, & the plan was carried out by resolutions passed at an extraordinary meeting of the co. duly confirmed at a subsequent meeting, & by a deed to which the liquidators of the old co. & the two cos. were parties:—**Held:** as the creditors of the old co. were not parties to the arrangement, a shareholder who had signed the circular, expressing his assent to the arrangement, & exchanged his shares, was not entitled to treat the instalments paid upon his debentures as being in reduction of his liability to the old co.—*Re IMPERIAL LAND CO. OF MARSEILLES, Ex p. JEAFFRESON* (1870), L. R. 11 Eq. 109; 23 L. T. 645; 19 W. R. 57; *sub nom. Re IMPERIAL LAND CO. OF MARSEILLES, VINING'S CASE, JEAFFRESON'S CASE*, 40 L. J. Ch. 3.

7131. ———.]—Where a co., in accordance with the provisions of its deed of settlement, transfers its business & liabilities to another co., such a transfer, however it may affect the rights of particular creditors, cannot prejudice the claims of the creditors generally of the transferor co.

Such a transfer, therefore, however it may affect to extinguish the shares in the transferor co., cannot as against creditors, affect the liability of shareholders to contribute to its assets in the event of its being wound up.

The deed of settlement of the B. L. Asscn. empowered its directors to purchase shares in the asscn. & provided that upon the completion of such purchase, such shares were to be extinguished for the benefit of the asscn. The deed of settlement also provided for the transfer of the business & liabilities of the asscn. to another co. as therein mentioned. A transfer was shortly afterwards effected in accordance with the terms of the deed of settlement, & in pursuance of an agreement to that effect, to the A. co. The agreement of transfer provided that, after its confirmation by the asscn. as therein mentioned, each proprietor of shares in the asscn. should be entitled either to be paid in money, the amount of all sums paid up by him upon his shares, or, at his option, in shares in the A. co., but subject to the approval of the A. co. P., the owner of 1,370 shares in the B. L. Association parted with 620 of them in manner provided for by the agreement of transfer, & was paid for the same partly in cash & partly in shares in the A. co. Both cos. were subsequently placed under liquidation:—**Held:** P. remained liable as a contributory of the asscn.

PART III. SECT. 37, SUB-SECT. 13.—
E. (c).

1. Whether bond-holders in old company bound.]—A statute gave the bondholders of the C. & P. Railway Co. an option to convert their bonds into stock, & enacted that this "converted bond stock," & any new subscribed stock, should be preferential to the

ordinary stock, & be entitled to dividends of 8 per cent. per annum in priority to any dividend to the ordinary shareholders. By a subsequent Act the co. was authorised to unite with another co., & it was declared that the two cos., & those who should become shareholders in the new co. under the Acts relating

to the C. & P. Railway Co. & under the deed of union, should constitute the new co.:—**Held:** the union did not extinguish the right of the bond-holders to object.—*CAYLEY v. COBBOURG, PETERBOROUGH & MARMORA RAILWAY & MINING CO.* (1868), 14 Gr. 571.—**CAN.**

m. Payment of creditors of old

in respect of the 620 shares.—*Re* BANK OF LONDON ASSURANCE ASSOCN., PART'S CASE (1870), L. R. 10 Eq. 622 ; 23 L. T. 305 ; 18 W. R. 977.

Annotation :—*Mentd.* *Re* Mutual Soc. (1881), 50 L. J. Ch. 400.

7132. Scheme under 1862 Act, s. 161.]

(1) An agreement entered into under 1862 Act, s. 161, by a co. about to be wound up voluntarily, for the sale & transfer of its business or property to another co., is binding upon the creditors of the transferring co., & the transaction, although it may be *ultra vires*, cannot be impeached by creditors after the expiration of the twelve months limited by the section.

(2) When a liquidator in a voluntary winding up wishes to appeal against an order of a judge he must first obtain leave from the judge, otherwise, in the event of his appeal failing, as a general rule, he will have his costs disallowed.

(3) The remedy of a creditor of a co. in voluntary liquidation, who cannot get payment of his debt, is to obtain a winding-up order before the expiration of a year after the passing of the special resolution.—*Re* CITY & COUNTY INVESTMENT CO. (1879), 13 Ch. D. 475 ; 49 L. J. Ch. 195 ; 42 L. T. 303 ; 28 W. R. 933, C.A.

Annotations :—*As to* (2) *Re* *Id.* Dublin City Distillery v. Doherty, [1914] A. C. 823. *Generally*, *Mentd.* Nicholl v. Eberhardt Co. (1888), 59 L. T. 860 ; Postlethwaite v. Port Phillip & Colonial Gold Mining Co. (1889), 43 Ch. D. 452 ; Mason v. Motor Traction Co., [1905] 1 Ch. 419.

7133. Whether novation of debt.]—By a deed of amalgamation made between the A. co. & the B. co., a French co., the latter agreed to take over all liabilities of the A. co., which was then largely indebted to a banking co., & was also liable on current bills of exchange for a large amount accepted by the A. co., & payable at the bank of the banking co. These bills were paid by the banking co. at maturity.

All three cos. went into liquidation. The banking co. carried in a claim in France against the estate of the B. co. for the amount of the bills so paid by it. This claim having been disallowed by the French ct., the banking co. sought to prove for the amount under the winding up of the A. co. :—*Held* : there had been no novation of the debt, & the banking co. was therefore entitled to prove.

ST. NAZAIRE CO. (1877), 37 L. T. 52 ; W. R. 638, C. A.

7134. —.]—*Re* DOVE SPINNING CO., LTD. (1923), 155 L. T. Jo. 232.

—.]—*See*, generally, CONTRACT, Vol. XII, pp. 596 *et seq.*

7135. Transactions with old & new companies mixed up together in one account—Appropriation of payments.]—The T. co. had trade dealings with A. & Co., & in Dec. 1874, owed them £1,070, on the balance of their account. The T. co. then wound up voluntarily, & a new co. was formed with exactly the same name, which took over the business & assets & undertook to pay the debts of the old firm. A. & Co., without notice of these circumstances, continued dealing with the new co., believing them to be the old co., & made no alterations in their books of accounts, & in Nov. 1875, the new co. owed them £1,509. The payments from time to time made by the new co., if treated as appropriated to the payment of the

debt of the old co., were sufficient to pay such debts. In Nov. 1875, the new co. was wound up, & afterwards the old co. was wound up compulsorily on a creditor's petition. A. & Co. did not become aware that they had been dealing with the new co. until after the winding up of the new co. ; & then claimed to appropriate the payments made by the new co. to the debts of the new co., & to prove against the old co., for the £1,070 :—*Held* : (1) they could not do so, for that the payments made by the new co. must be treated as made in satisfaction of the debts of the old co. ; (3) A. & Co. were concluded by their books & accounts, which showed that, dealing as they thought with the old co., they had treated the payments from time to time made by the new co. as satisfaction *pro tanto* of the debt of the old co.—*Re* TAURINE CO., LTD., ANNING & COBB'S CLAIM (1877), 38 L. T. 53.

Appropriation of payments generally, *see* CONTRACT, Vol. I., pp. 474 *et seq.*

7136. Dissenting creditor—Petition for compulsory winding up—Power of court to summon creditors' meeting—To ascertain creditors' views.]—*Re* INVESTMENT BANK OF LONDON, LTD. (1910), 130 L. T. Jo. 149.

Debenture-holders of old company.]—*See* Part III., Sect. 34, sub-sect. 3, K., *ante*.

Policy-holders in insurance company.]—*See* Part V., Sect. 7, sub-sect. 2, *ante*.

(d) *As regards Executors and Trustees.*

7137. Executors—Not yet registered in respect of testator's shares—Right to dissent from reconstruction scheme—Effect of articles limiting executor's rights.]—Exors. of a deceased member of a co. who have not had his shares registered in their own names have the same right to dissent from a reconstruction scheme adopted under 1908 Act, s. 192, & to restrain the liquidator from carrying out the scheme without purchasing the shares as the deceased member would have had if living.

Arts. of assocn. forbidding exors. to exercise the rights of a member until they have been registered held to refer to the exercise of rights on their own behalf of their testator's estate.—LLEWELLYN v. KASINTOE RUBBER ESTATES, LTD., [1914] 2 Ch. 670 ; 84 L. J. Ch. 70 ; 112 L. T. 676 ; 30 T. L. R. 683 ; 58 Sol. Jo. 808 ; 21 Mans. 349, C. A.

7138. Trustees—No powers to accept new shares—Exchange & retention of shares sanctioned by court—For benefit of trust estate.]—Where in the administration or management of a trust estate by the trustees, especially where the estate consists of a business or of shares in a mercantile co., there arises an emergency or a state of circumstances which it may reasonably be supposed was not foreseen or anticipated by the author of the trust & is unprovided for by the trust instrument, & which renders it desirable & perhaps even essential, in the interests of the beneficiaries, that certain acts should be done by the trustees which they themselves have no power to do, & to which the consent of all the beneficiaries cannot be obtained by reason of some not being *sui juris*

company by officers of new company—Without express authority.]—A new co., formed for the purpose of carrying out a scheme for the amalgamation of two old cos., purchased their assets, there being no provision in the purchase & sale agreements as to the payment of their liabilities. The officers of the new co., without specific

instructions from their directors, paid the liabilities of the old cos. with the assets of the new, carrying out what they believed was the real intent of the parties at the time the amalgamation scheme was entered into :—*Held* : upon the evidence, all interested, except possibly pltf., who was a shareholder, intended that the

liabilities of the dissolving cos. were to be assumed & paid by deft. co. ; there was no wrong in the scheme of amalgamation or in carrying it out, & therefore, there was no fraud on the part of defts.—JOHNSON v. THOMPSON (1913), 19 B. C. R. 105 ; 20 B. C. R. 520.—CAN.

or not yet in existence, the ct. will exercise its general administrative jurisdiction by sanctioning, on behalf of all parties interested, those acts being done by the trustees.

Annotations:—*Refd.* *Re T.* (1903), 72 L. J. Ch. 225; *Re Tollemache*, [1903] 1 Ch. 955; *Re Wells*, *Boyer v. Maclean*, [1903] 1 Ch. 848. **Mentd.** *Re Willis*, *Willis v. Willis* (1901), 71 L. J. Ch. 73; *Re Houghton*, *Hawley v. Blake*, [1904] 1 Ch. 622.

Annotation:—*Distd. Re Anson's Settlement, Lovelace v. Anson*, [1907] 2 Ch. 424.

7140. Must be in accordance with shareholders legal rights.]—In the case of a limited co., consisting of two or more classes of members having

n. On liability of shareholder in old company.—The D. T. Co. was incorporated in 1912 by Dominion statute for the purpose of taking over the assets & assuming the liabilities of the D. T. Co. Ltd., incorporated under the Provincial Cos. Act. The two cos. entered into an agreement whereby the old co. assigned its assets to the new co. & the new co. assumed the liabilities of the old co., provision being made for shareholders in the old co. to exchange their shares for an equal number of shares in the new co. The agreement was subsequently ratified by an Act of the Provincial Legislature. The new co. then continued the business until ordered to be wound up in Oct. 1914. In 1916, on the petition of a shareholder in the old co., the old co. was ordered to be wound up. On an application for directions by the liquidator of the old co.:—*Held*: the agreement made

o. On contract.—A railway co., by the bond of its provisional directors, in consideration of a bonus in aid of the co., agreed to erect & maintain workshops during the operation of the

Annotations:—*Consd.* Postlethwaite v. Port Phillip & Colonial Gold Mining Co. (1889), 43 Ch. D. 452; *Simpson v. Palace Theatre* (1893), 69 L. T. 70; *Burdett-Coutts v. True Blue (Hannan's) Gold Mine* (1899), 81 L. T. 29. **Refd.** *Re Beeston Pneumatic Tyre Co.* (1898), 14 T. L. R. 338; *Wall v. London & Northern Assets Corpn.*, [1898] 2 Ch. 469; *Re Guardian Assee.*, [1917] 1 Ch. 431; *Re Anglo-Continental Supply Co.*, [1922] 2 Ch. 723. **Mentd.** *Allen v. Gold Reefs of West Africa, Same v. Same*, [1900] 1 Ch. 656.

7141. Distribution of proceeds of shares not taken up but sold by liquidator.]—*Re* LAKE VIEW EXTENDED GOLD MINE (WESTERN AUSTRALIA), LTD., [1900] W. N. 44.

7142. On liability of shareholder in old company
—Transfer to nominee of amalgamating company
—Transfer not registered.]—Where a holder of shares in a co. transfers his shares to the nominee of another co., as part of a scheme for the amalgamation of the two cos., the second co. having no power to buy shares, & the transfer is not registered, but the transferror's name remains on the register:—*Held*: he must be placed on the list of contributories of the first co.—*Re ROLLING STOCK CO. OF IRELAND, LTD., CLACK'S CASE* (1866), 14 W. R. 986.

7143. On right to inspect books—Effect of article limiting inspection to books produced at general meeting.]—Arts. of assocn. provided that no shareholder should be at liberty to inspect the books, except such as should be produced at a general meeting. The co. being wound up in order to reconstruct it with reduced capital:—*Held*: a shareholder who had accepted shares in the reconstructed co. was bound by the original contract & was not entitled to inspect the books of the winding-up co.—*Re METROPOLITAN & PROVINCIAL BANK, Ex p. DAVIS* (1868), 16 W. R. 668.

railway. The co., after certain changes of name, amalgamated with other cos., & formed a larger one, which ceased to maintain the workshops. That co. subsequently amalgamated with & became part of defts.' co. :—*Held*: the bond of the provisional directors of the first co. was a corporate one binding on its successors, & by consequence on defts., who had acquired the road; the road, though it formed part of a larger railway connection represented by defts., was still in operation, &, as the contract was to maintain the workshops during the operation of the railway, it remained a binding engagement; & a reference to ascertain the damages, if any, for breach of the covenant, was directed.—*WHITBY CORPN. v. GRAND TRUNK RY. Co.* (1900), 32 O. R. 99; 20 C. L. T. 379.—*CAN.*

p. —.]—By agreement, which was to be in force for ten years, C. Telephone Co. & A. Telephone Co. were to have the use of each other's lines &

7144. On lease—Liquidation operates as forfeiture.]—A lease of premises to an individual & a joint-stock co. contained a covenant by the "lessees," which expression was by the terms of the lease to include assigns where the context so required or admitted, to keep the premises in repair, & a proviso for re-entry for breach of covenant, or if the lessees should become bkpt., or enter into liquidation for the benefit of, or compound with their creditors, or, being a co., should enter into liquidation, whether compulsory or voluntary.

The reversion on the lease was conveyed to pltf. & the lease was assigned by the lessees with pltf.'s consent to defts., an individual & a joint-stock co. Def. co. subsequently passed a resolution for a voluntary winding up, not by reason of insolvency, but for the purpose of reconstruction with additional capital. Pltfs. served upon defts. a notice alleging as grounds of forfeiture under the proviso the liquidation, & also breaches of the covenant to repair of an extensive character, & requiring defts. to remedy & make compensation for the same. Two days after service of the notice & within a year from the passing of the resolution for winding up, pltfs. commenced an action against defts. for recovery of the premises as upon a forfeiture. It was admitted by pltfs. at the trial that they could not rely on any of the alleged breaches of the covenant to repair:—*Held*: the def. co. had entered into liquidation within the meaning of the condition contained in the lease.—*HORSEY ESTATE, LTD. v. STEIGER*, [1899] 2 Q. B. 79; 68 L. J. Q. B. 743; 80 L. T. 887; 47 W. R. 644; 15 T. L. R. 367, C. A.

Annotations:—*Consd.* Fryer v. Ewart, [1902] A. C. 187. *Refd.* Gentle v. Faulkner (1899), 68 L. J. Q. B. 848; *Re Riggs, Ex p. Lovell*, [1901] 2 K. B. 16; *Civil Service Co-Op. Soc. v. McGrigor's Trustee*, [1923] 2 Ch. 347. *Mentd.* Jacob v. Down, [1900] 2 Ch. 156; Pannell v. City of London Brewery Co., [1900] 1 Ch. 496; Woodall v. Clifton, [1905] 2 Ch. 257; Fox v. Jolly, [1916] 1 A. C. 1; Davenport v. Smith (1921), 91 L. J. Ch. 225.

7145. ———.]—Resps. by lease demised a public-house to C. & co., a firm of brewers, for a term of thirty years. The lease reserved a power of re-entry to the lessors if the lessees or their assigns, being a co., should enter into liquidation, whether compulsory or voluntary.

During the continuance of the term C. & co. being then solvent, went into voluntary liquidation solely for the purpose of amalgamating with two other firms of brewers:—*Held*: the liquidation operated as a forfeiture of the lease, & was within Conveyancing & Law of Property Act, 1881 (c. 41), s. 14, sub-s. 6.—*FRYER v. EWART*, [1902] A. C. 187; 71 L. J. Ch. 433; 9 Mans. 281; *sub nom.* WATNEY, COMBE, REID & CO. v. EWART, 86 L. T. 242; 18 T. L. R. 426, H. L.; *affg.* S. C. *sub nom.* EWART v. FRYER, [1901] 1 Ch. 499, C. A.

Annotations:—*Refd.* Civil Service Co-Op. Soc. v. McGrigor's Trustee, [1923] 2 Ch. 347. *Mentd.* Hurd v. Whaley (1918), 118 L. T. 593.

7146. On contract—To supply old company with goods.]—The owner of land contracted with a co. to supply them for fifty years with at least 750 tons of chalk per week, & so much more as they might require for their manufacture of cement upon their land, the chalk to be delivered in convenient

daily quantities as required by the co. by written notice given on the preceding day. The co., which had a small capital & was doing a comparatively small business, went into voluntary liquidation & transferred all its business & property, & purported to assign this contract to a second co., which had an extensive business, carried on at various places, & a large capital:—*Held*: the contract was a subsisting one between the original parties to it, & had not been put an end to by the liquidation of the original co. or the assignment to the second co., or by both those facts together.—*TOLHURST v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS* (1900), *TOLHURST v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS* (1900) & *IMPERIAL PORTLAND CEMENT Co.*, [1903] A. C. 414; 72 L. J. K. B. 834; 89 L. T. 196; 52 W. R. 143; 19 T. L. R. 677, H. L.

Annotations:—*Refd.* Kemp v. Baerselman, [1906] 2 K. B. 604. *Mentd.* Dawson v. G. N. & City Ry., [1905] 1 K. B. 260; Fitzroy v. Cave (1905), 93 L. T. 499; Hubbard v. Weldon (1909), 25 T. L. R. 356; Bennett v. White, [1910] 2 K. B. 643; Cooper v. Micklefield Coal & Lime Co., Cooper v. Rayner (1912), 107 L. T. 457; Fratelli Sorrentino v. Buerger, [1915] 1 K. B. 307; County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251; Whiteley v. Hilt, [1918] 2 K. B. 808; Ellis v. Torrington, [1920] 1 K. B. 399.

7147. On injunction against old company—Whether enforceable against new company—Breach by new company.]—An injunction was obtained by pltf. against a co., restraining them, their servants & agents, from soliciting the custom of persons who before the sale of a certain part of their business to pltf. were their customers. Thereafter the co. went into voluntary liquidation, & a new co. was formed under the same name, to which were transferred the assets & business of the old co.:—*Held*: as the reconstruction of the old co. had been regularly carried out for the sake of obtaining new capital & not colourably for the sake of evading the order, the new co. became an independent co. & was in no sense the servant or agent of the old, & therefore in soliciting a customer of pltf. the new co. committed no breach of the injunction which had been obtained.—*BOSCH v. SIMMS MANUFACTURING Co., LTD.* (1909), 25 T. L. R. 419.

F. Avoidance.

7148. How validity of amalgamation decided—Whether on petition by shareholder of transferor company—To have voluntary winding up superseded—By compulsory winding up or by winding up under supervision.]—*Re IMPERIAL BANK OF CHINA, INDIA & JAPAN, No. 7259, post.*

7149. ——— Whether by action to which purchasing company not parties.]—*DOUGHTY v. LOMAGUNDA REEFS, LTD.*, No. 7077, *ante*.

7150. When amalgamation set aside—Misrepresentation—Between terms of arrangement contained in "circular" & articles of association of companies amalgamating.]—*CLINCH v. FINANCIAL CORPN.*, No. 7067, *ante*.

Unfairness—To minority.]—*Re CONSOLIDATED SOUTH RAND MINES DEEP, LTD.*, No. 7098, *ante*.

7152. ——— ——— ——— No mala fides or fraud.]—

of any connections they either then had or might thereafter acquire over the lines of any other co. Shortly after the making of the agreement A. Co. sold their property to B. Telephone Co. By their charter A. Co. had power to amalgamate with any other co., & the Act of incorporation of B. Co. empowered them to acquire other telephone lines. The agree-

ment of sale provided that C. Co. should have, by virtue of their agreement with A. Co., the use of so much of B. Co.'s lines as were acquired from A. Co. C. Co. sought to restrain the sale unless provision were made in the agreement of sale that they should have the use of the whole system of B. Co.:—*Held*: the bill should be dismissed; the sale & purchase being

within the powers of the cos., could not be objected to, & even if it were *ultra vires*, pltfs. had no status entitling them to raise the question. *Semble*: the sale should not have been enjoined, even if B. Co. had not assumed the contract of A. Co. with C. Co.—*NEW CUMBERLAND TELEPHONE Co. v. CENTRAL TELEPHONE Co.* (1906), 2 E. L. R. 101; 3 N. B. Eq. Rep. 385.—*CAN.*

Sect. 37.—Voluntary winding up: Sub-sect. 13, F. G.; sub-sect. 14, A. (a) & (b).]

Where there was no *mala fides* or fraud in a proposed scheme of reconstruction of a co., nor was it a sham or device, although the result would be that the majority of the shareholders would obtain control of the undertaking of the co. & compel the minority to accept a cash payment in lieu of shares in a new co. to which that undertaking was to be sold:—*Held*: the scheme was one that ought not to be interfered with by the ct.—*CASTELLO v. LONDON GENERAL OMNIBUS CO., LTD.* (1912), 107 L. T. 575, C. A.

7153. Practice on applications to set aside amalgamations—Evidence—Admissions by liquidator insufficient.]—In an application to set aside the amalgamation of two cos., mere admissions by the liquidators are not sufficient, but the facts must be regularly proved & brought before the ct. by affidavit.—*Re EMPIRE CORPN., LTD., Re CITY & COUNTY ASSURANCE CO., LTD.* (1869), 20 L. T. 103; 17 W. R. 431.

G. Stamp Duties.

7154. Purchase in consideration of shares—Estimate of value for purposes of stamp duty—Market value.]—A railway co. purchased the whole property of another co., & with this view created new preference stock, which was given to the shareholders of the second co. in place of the stock they had held in their own co.:—*Held*: such stock formed part of the purchase-money, & might be estimated at the value it was at the time selling for in the market.—*ULVERSTONE & LANCASTER RY. CO. v. INLAND REVENUE COMRS.* (1864), 2 H. & C. 855; 159 E. R. 354; *sub nom.* *INLAND REVENUE COMRS. v. FURNESS RY. CO.*, 5 New Rep. 92; *sub nom.* *FURNESS RY. CO. v. INLAND REVENUE COMRS.*, 33 L. J. Ex. 173; 10 L. T. 161; 10 Jur. N. S. 1133; 13 W. R. 10.

Annotation:—*Refd.* *G. W. Ry. v. I. R. Comrs.*, [1894] 1 Q. B. 507.

7155. Exchange of shares—Declaration of trust of shares by shareholders—“Conveyance on sale” of equitable interest—Stamp Act, 1891 (c. 39), s. 59.]—The shareholders of the A. co., which was then in course of being voluntarily wound up, entered into an agreement in writing with the B. co. whereby it was agreed that the shareholders of the A. co. should respectively exchange their shares in the A. co. for shares in the B. co., & that upon the B. co. allotting to them the shares to which they were respectively entitled they should thenceforth hold their respective shares in the A. co. in trust for the B. co.:—*Held*: (1) the agreement amounted to a declaration of trust, & as such to a “conveyance on sale” to the B. co. of an equitable interest in the shares of the A. co. within sect. 4 of above Act, & was chargeable with an *ad valorem* duty accordingly; (2) it was an agreement for the sale of an equitable interest in property within the meaning of above sect.—*CHESTERFIELD BREWERY CO. v. INLAND REVENUE COMRS.*, [1899] 2 Q. B. 7; 68 L. J. Q. B. 204; 79 L. T. 559; 47 W. R. 320; 15 T. L. R. 123; 43 Sol. Jo. 128.

SUB-SECT. 14.—DISSOLUTION OF COMPANY.

A. Effect.

(a) On Jurisdiction of Court.

7156. To make order in winding up—On application made within three months of dissolution.]—The ct. has jurisdiction to make an order in the

matter of the voluntary winding up of a co. under 1862 Act, after the expiration of three months from the date of the registration of a return by the liquidators of a meeting having been held in pursuance of 1862 Act, s. 142, if the application for such order is made before the expiration of the three months. *Semble*: the dissolution of a co. under sect. 143 does not deprive the ct. of its jurisdiction over such co. under the Act.—*Re CROOKHAVEN MINING CO.* (1866), L. R. 3 Eq. 69; 36 L. J. Ch. 226; 12 Jur. N. S. 872; 15 W. R. 28; *sub nom.* *Re CRINKHAVEN CO.*, 15 L. T. 169.

Annotations:—*Consd.* *Re Pinto Silver Mining Co.* (1878), 8 Ch. D. 273. *Dbtd.* *Coxon v. Gorst*, [1891] 2 Ch. 73. *Folld.* *Whiteley Exerciser v. Gamage*, [1898] 2 Ch. 405. *Consd.* *Re Eastern Investment Co.*, [1905] 1 Ch. 352. *Refd.* *Re Westbourne Grove Drapery Co.* (1878), 39 L. T. 30; *Sheppard v. Scinde, Punjab & Delhi Ry. & Abbott* (1887), 56 L. J. Ch. 558; *Re Watchmakers' Alliance & Goode's Stores* (1905), 5 Tax Cas. 117.

7157. Admission of claim of creditor with notice.]—Where the three months within which liquidators are to make the return required by 1862 Act, s. 143, has expired, the co. is dissolved from that date, & the ct. has no jurisdiction to admit the claim of a creditor who had notice of the winding-up proceedings.—*Re WESTBOURNE GROVE DRAPERY CO., LTD.* (1878), 39 L. T. 30; 27 W. R. 37.

7158. To make compulsory winding-up order.]—After the completion of the voluntary winding up of a co. under 1862 Act, & the expiration of the three months mentioned in sect. 143, from the date of the registration of the return made by the liquidators to the Registrar of Joint-Stock Companies of the holding of the final meeting under the liquidation, on the expiration of which period of three months, sect. 143 provides that the co. shall be deemed to be dissolved, a creditor, whose debt had not been paid, presented a petition for a compulsory winding-up order:—*Held*: (1) petitioner had assented to what had been done in the voluntary winding up, & it was not necessary in this particular case to decide whether the ct. had any jurisdiction to make a compulsory winding-up order; (2) after the expiration of the three months, the ct. had, in the absence of fraud, no jurisdiction to make a winding-up order. *Semble*: a voluntary winding up has a statutory force equally with a winding up by the ct.—*Re PINTO SILVER MINING CO.* (1878), 8 Ch. D. 273; 47 L. J. Ch. 591; 38 L. T. 336; 26 W. R. 622, C. A.

Annotations:—*As to* (2) *Apprvd. & Apld.* *Re London & Caledonian Marine Insce.* (1879), 11 Ch. D. 140. *Refd.* *Re Schooner Pond Coal Co.* (1888), 4 T. L. R. 411; *Coxon & Gorst*, [1891] 2 Ch. 73; *Whiteley Exerciser v. Gamage* (1898), 79 L. T. 20.

7159. —.]—The ct. has no jurisdiction to make an order for winding up a co. which has been voluntarily wound up & dissolved under 1862 Act, ss. 142, 143, unless the dissolution can be impeached on ground of fraud.—*Re LONDON & CALEDONIAN MARINE INSURANCE CO.* (1879), 11 Ch. D. 140; 40 L. T. 666; 27 W. R. 713, C. A.

Annotations:—*Consd.* *Pulsford v. Devenish*, [1903] 2 Ch. 625. *Refd.* *Re Schooner Pond Coal Co.* (1888), 4 T. L. R. 411; *Coxon v. Gorst*, [1891] 2 Ch. 73; *Argylls v. Coxeter* (1913), 29 T. L. R. 355. *Mentd.* *Knowles v. Scott*, [1891] 1 Ch. 717; *Whiteley Exerciser v. Gamage* (1898), 67 L. J. Ch. 560.

7160. — Allegation of existence of outstanding assets—Claims for misfeasance.]—*Re SCHOONER POND COAL CO., LTD.* (1888), 4 T. L. R. 411.

7161. To make order in proceedings against company—Begun within three months of dissolution.]—Notwithstanding the dissolution of a co. by reason of the expiration of three months from the registration of the return made by voluntary liquidators to the Registrar of Joint-Stock

Companies under 1862 Act, s. 143, the ct. has jurisdiction against the co. in a proceeding commenced after the date of the registration, but before the end of the three months, even though the hearing does not take place till after the end of the three months.—*WHITELEY EXERCISER, LTD. v. GAMAGE*, [1898] 2 Ch. 405; 67 L. J. Ch. 560; 79 L. T. 20; 47 W. R. 296; 5 Mans. 249.

Annotation:—*Expld. & Distd. Salton v. New Beeston Cycle Co.*, [1900] 1 Ch. 43.

7162. ———.]—A solr. had originally authority to defend an action in the name of a co., but his authority was revoked by the dissolution of the co. shortly before the trial. The trial of the action was delayed owing partly to the state of the business of the ct. & partly to the pleadings being amended. The action was tried on the assumption that the co. was in existence, & judgment was given for pltf. Neither the solr. nor pltf. knew till after the trial that the co. had been dissolved; but on the day of the trial the solr. was informed that the co. had held its final meeting, & he took no steps to ascertain whether or not it had been dissolved. Upon motion by pltf. that the solr. might be ordered to pay his costs of the action as from the date of the dissolution of the co.:—*Held*: (1) the judgment was invalid against the co. for want of jurisdiction; (2) the solr. having originally authority to represent the co. was not liable for acting on that authority after it had been revoked by the dissolution of the co. until he knew or, by the exercise of due diligence, might have known of the dissolution; (3) on the day of the trial the solr. did not use due diligence in ascertaining whether or not the co. had been dissolved, & he ought to pay the pltf.'s costs of the action after that date as between solr. & client.—*SALTON v. NEW BEESTON CYCLE CO.*, [1900] 1 Ch. 43; 69 L. J. Ch. 20; 81 L. T. 437; 48 W. R. 92; 7 Mans. 74.

Annotation:—*As to (2) Consd. Yonge v. Toynbee*, [1910] 1 K. B. 215.

(b) *On Property.*

7163. Contracted to be sold—Whether vesting order made—Leaseholds—Subject to mortgage.—When a limited liability co. goes into voluntary liquidation for the purpose of carrying out a sale of its property & receives the full purchase consideration, & afterwards becomes automatically dissolved by 1862 Act, s. 143, before the property has been legally conveyed to the purchaser, the ct. will in a proper case make an order under the Trustee Act, 1893 (c. 53), vesting the property in the purchaser for all the estate of the co. therein at the date of its dissolution.—*Re GENERAL ACCIDENT ASSURANCE CORPN., LTD.*, [1904] 1 Ch. 147; 73 L. J. Ch. 84; 89 L. T. 699; 52 W. R. 332.

Annotations:—*N.F. Re Niger Patent Elastic Enamel Co.* (1904), 48 Sol. Jo. 476; *Re Taylor's Agreement Trusts*, [1904] 2 Ch. 737. *Folld. Re Mills (Brierly Hill), Smith v. Mills (Brierly Hill)*, [1905] W. N. 36. *Refd. Re No. 9 Bomore Road*, [1906] 1 Ch. 359. *Mentd. Hastings Corpn. v. Letton*, [1908] 1 K. B. 378.

7164. ———.]—By an assignment, Sept. 1890, leaseholds became vested in a limited co. for the residue of a term of ninety-nine years. In 1896 this co. went into voluntary liquidation, & its assets were transferred to a new co.; the purchase-money was paid, the new co. was let into possession, but by inadvertence no assignment of the leaseholds was executed. The old co. having become automatically dissolved under 1862 Act, s. 143, a petition was now presented by the new co. under the Trustee Act, 1893 (c. 53), asking for the appointment of a named person, pursuant to s. 25, to be a trustee of the leaseholds in the place

of the old co., & for a vesting order:—*Held*: as it was clearly expedient to appoint a new trustee, the ct. was justified in making the order asked for by the petition.—*Re No. 9 BOMORE ROAD*, [1906] 1 Ch. 359; 75 L. J. Ch. 157; 94 L. T. 403; 54 W. R. 312; 13 Mans. 69.

7165. ——— *Patent.*—The liquidators of a co. had agreed to sell to a purchaser letters patent, of which the co. was the registered owner, but the co. was dissolved without any assignment having been executed. The purchaser, who was unable to get himself registered as proprietor of the letters patent, presented a petition asking for an order under Trustee Act, 1893 (c. 53), s. 35, vesting them in him:—*Held*: when the co. was dissolved the legal interest in the letters patent, if it vested anywhere, vested in the Crown, & in that case, although the Crown did not act as trustee, it could not be said within Trustee Act, 1893 (c. 53), s. 35, that the trustee "could not be found"; if the legal interest did not vest in the Crown there was no trustee, & again it could not be said that the trustee "could not be found," because there being no trustee it could not be predicated of him that he "could not be found"; therefore a vesting order could not be made under s. 35.—*Re TAYLOR'S AGREEMENT TRUSTS*, [1904] 2 Ch. 737; 73 L. J. Ch. 557; 52 W. R. 602; 48 Sol. Jo. 560; *sub nom. Re NIGER PATENT ELASTIC ENAMEL CO.*, 48 Sol. Jo. 476.

Annotations:—*Distd. Re No. 9 Bomore Road*, [1906] 1 Ch. 359. *N.F. Re Dutton's Patents* (1923), 67 Sol. Jo. 403. *Mentd. Hastings Corpn. v. Letton*, [1908] 1 K. B. 378.

7166. ———.]—A dissolved co. is a "trustee who cannot be found," & a patent inadvertently overlooked & not assigned, & of which the dissolved co. still appeared on the register of patents as the proprietor, can be dealt with by a vesting order made on petition under Trustee Act, 1893 (c. 53), ss. 25, 35 & 36, & Patents & Designs Act, 1907 (c. 29), s. 72, & does not merge in the Crown.—*Re DUTTON'S PATENTS* (1923), 67 Sol. Jo. 403; 40 R. P. C. 84.

7167. ——— *Freeholds & copyholds.*—*Re MILLS (RICHARD) & CO. (BRIERLY HILL), LTD., SMITH v. MILLS (RICHARD) & CO. (BRIERLY HILL), LTD.*, [1905] W. N. 36.

Annotation:—*Folld. Re No. 9 Bomore Road*, [1906] 1 Ch. 359.

7168. Ordered to be assigned under foreclosure order—Whether vesting order made—Leaseholds.—In 1912 premises were demised for a term of 99 years to a limited co. & its assigns at a yearly rent of £7 10s. The co. became dissolved in July, 1915, under 1908 Act, s. 195, without having assigned the premises in compliance with a foreclosure order obtained by the equitable mtgee. of the co.

Upon the petition of the mtgee. for a declaration that the co. at the date of its dissolution was a trustee of the premises for him within Trustees Act, 1893 (c. 53), the appointment of a new trustee, & a vesting order:—*Held*: the declaration asked for should be made.—*Re ALBERT ROAD*, (Nos. 56 & 58) NORWOOD, [1916] 1 Ch. 289; 85 L. J. Ch. 187; 114 L. T. 357.

7169. Lease—To company.—A lease to a corpn. for a term of years determines if the corpn. is dissolved without having assigned the lease. On dissolution of the corpn. the lease does not vest in the Crown as *bona vacantia*, but the reversion is accelerated & the land reverts to the lessor.

Therefore, where a lease was made to a limited co. & payment of the rent during the term was guaranteed by sureties, on dissolution of the co. under 1862 Act, ss. 142, 143:—*Held*: the lease, not having been assigned, had determined & with

Sect. 37.—Voluntary winding up: Sub-sect. 14, A. (b) & (c) & B.; sub-sect. 15, A. (a), (b) i. & ii.] it the liability of the sureties.—**HASTINGS CORPN. v. LETTON**, [1908] 1 K. B. 378; 77 L. J. K. B. 149; 97 L. T. 582; 23 T. L. R. 456; 15 Mans. 58. *Annotation*:—**Refd. Re Woking U. D. C. (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300.**

(c) *Other Cases.*

7170. On action—Against directors.]—BENTINCK v. CAPE BRETON CO., LTD. (1892), 36 Sol. Jo. 328.

7171. On liability of company's solicitor—To pay costs—Action continued after dissolution—Failure of solicitor to exercise due diligence.]—SALTON v. NEW BEESTON CYCLE CO., No. 7162, ante.

7172. On liability of liquidator—For breach of duty in regard to creditors.]—PULSFORD v. DEVENISH, No. 6943, ante.

B. Postponement and Avoidance.

7173. Postponement—Jurisdiction of court to stay winding-up proceedings—Within three months of dissolution—To enable completion of transfer of assets under amalgamation scheme.]—Where a co. went into voluntary liquidation with a view to amalgamation with another co., & it was subsequently discovered that certain assets of the old co., consisting of mining claims in the Transvaal, which were to be transferred to the new co., could not be transferred within the period of three months, at the expiration of which time the old co. would, under 1862 Act, s. 143, automatically cease to exist, & a contributory before the expiration of the three months applied under sect. 138 for an order to stay the proceedings in the winding up, the ct., exercising the power conferred upon it by sect. 89 in a compulsory winding up, made an order staying all proceedings in relation to the winding up of the old co., with liberty to apply.—**Re EASTERN INVESTMENT CO., LTD.**, [1905] 1 Ch. 352; 74 L. J. Ch. 281; 92 L. T. 359; 53 W. R. 186; 49 Sol. Jo. 119; 12 Mans. 27.

7174. Avoidance—Who may apply for order—Person "interested"—Who is.]—The S. co. went into liquidation for the purpose of reconstruction, & by an agreement dated Mar. 31, 1909, between the S. co. & its liquidator, & a new co. with the same name the new co. agreed to take over all the assets & liabilities of the old co. & to indemnify the old co. against such liabilities. The old co. held certain shares in A. S., Ltd., upon which there was a liability for uncalled capital, but these shares were not transferred to the new co. Meetings of creditors were held, but no notice was sent to A. S., Ltd. The final meeting in the voluntary winding up of the old co. was filed in compliance with 1908 Act, s. 195, on June 26, 1910. The old co. became dissolved, therefore, at the expiration of three months from that date. In Mar. 1911, A. S., Ltd., discovered the facts as to the winding up. In Apr. they made a further call of 1s. per share upon the shares originally held by the old co. They made persistent attempts to induce the new co. to pay the call or admit their liability, but the

new co. refused. On Dec. 9, 1911, A. S., Ltd., gave notice of this motion under 1908 Act, s. 223, that the dissolution of the old co. might be declared to have been void:—**Held**: (1) A. S., Ltd., were persons interested within s. 223 of the Act; (2) they had not been guilty of any such laches as would disentitle them to proceed; (3) the dissolution must be declared to have been void.—**Re SPOTTISWOODE, DIXON & HUNTING, LTD.**, [1912] 1 Ch. 410; 81 L. J. Ch. 446; 106 L. T. 23; 28 T. L. R. 214; 56 Sol. Jo. 272; 19 Mans. 240.

7175. — When ordered.]—BENTINCK v. CAPE BRETON CO., LTD., No. 7170, ante.

7176. — Realisation of further assets—Liquidator enabled to distribute such assets.]—After the automatic dissolution of a co. in accordance with 1908 Act, s. 195, certain assets were realised by the liquidator. Upon motion by the liquidator to declare the dissolution void, the ct. ordered that the A.-G. be served with notice of the motion in order that the rights of the Crown to the money as *bona vacantia* might be considered. At the adjourned hearing the Crown waived its claim, & leave was given to the liquidator, after payment of the costs of all parties, to distribute the residue of the money in the usual way, submitting his accounts to the Board of Trade for approval.—**Re HENDERSON'S NIGEL CO., LTD.** (1911), 105 L. T. 370.

7177. — Reconstruction—Refusal by company to take over all assets.]—Re SPOTTISWOODE, DIXON & HUNTING, LTD., No. 7174, ante.

SUB-SECT. 15.—SUPERSEDING VOLUNTARY WINDING UP.

A. By Winding up by Court.

(a) *In General.*

7178. Right of shareholder to apply for winding up to be superseded—After assenting to voluntary liquidation.]—A partner in a joint-stock co., which has become embarrassed & ceased its operations, & is being wound up by a committee of the directors & shareholders, is not precluded from his right to have the co. wound up, under the provisions of the joint-stock companies' winding-up Acts, by the circumstance that he has assented to the appointment of the committee to wind up the affairs of the co., & also that there is no more serious charge raised against the directors than that of carelessness.—**Re CHELTENHAM & GLOUCESTERSHIRE JOINT STOCK BANK** (1856), 4 W. R. 624.

7179. — — —.]—BANK OF GIBRALTAR & MALTA, No. 7307, post.

7180. Compulsory winding-up order abroad—Whether voluntary winding up in England superseded.]—Where a co., having its registered office in England, but having a branch office & the bulk of its business in Australia, resolved to wind up voluntarily, & shortly afterwards an order was made in Australia for the compulsory winding up of the co.:—**Held**: the compulsory order in Australia did not supersede, or interfere with, the

PART III. SECT. 37, SUB-SECT. 15.—
A. (a).

q. Jurisdiction of court.]—An order for compulsory winding up may be made under 41 Vict. c. 5, s. 5, notwithstanding a resolution has been passed by the shareholders of the co., providing for the voluntary winding up of the affairs thereof under the supervision of the directors of the co., & a committee of shareholders ap-

pointed by them for that purpose:—**Held**: the discretion of the judge appealed from had not been improperly exercised.—**Re UNION FIRE INSURANCE CO.** (1882), 7 A. R. 783.—**CAN.**

r. Effect of compulsory order.]—A compulsory winding-up order under Dominion Act does not render a voluntary winding-up order void *ab initio*.—**IMPERIAL CANADIAN TRUST CO. v. POTTER**, [1917] 2 W. W. R. 128.—**CAN.**

s. Right of liquidator to lodge answer—Craving supervision order.]—It is competent for the liquidator appointed by resolution of a co. for its voluntary winding up to lodge, in answer to a petition by creditors for a winding-up order by the cts., a note craving a supervision order.—**PATRICKS, LTD. v. KINNEAR** (1899), 1 F. (Ct. of Sess.) 551; 36 Sc. L. R. 402; 6 S. L. T. 304.—**SCOT.**

voluntary winding up in this country, any order made by the Australian cts. for winding up in Australia being merely ancillary to any winding up taking place in this country.—*NORTH AUSTRALIAN TERRITORY CO., LTD. v. GOLDSBROUGH, MORT & CO., LTD.* (1889), 61 L. T. 716.

(b) *Grounds for Superseding Winding up.*

i. *In General.*

7181. General rule—Shareholder's petition.]—The existence of a voluntary winding up of a co. is not a bar to a compulsory order being subsequently made on a petition of a fully paid-up shareholder, if the ct. is satisfied that the voluntary liquidation is existing under such circumstances as are likely to prejudice the shareholders. The jurisdiction to make a compulsory order notwithstanding a voluntary winding up is not confined to cases where it is shown that the resolution for voluntary winding up was passed fraudulently & not *bonâ fide*, or where the petition is supported by creditors. The ct., however, will not make such an order unless it is satisfied that the shareholders will obtain some benefit by it.—*Re NATIONAL DISTRIBUTION OF ELECTRICITY CO., LTD.*, [1902] 2 Ch. 34; 71 L. J. Ch. 702; 9 Mans. 314; *sub nom. Re NATIONAL CO. FOR DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS, LTD.*, *Ex p. SCOTT*, 87 L. T. 6, C. A.

7182. ———.]—*Re GOLDFIELDS OF MATABELELAND, LTD.* (1906), 50 Sol. Jo. 773.

7183. Petitioner in arrear of payment of calls.]—After the shareholders of a co. had passed a resolution for a voluntary winding up the only dissentient shareholder presented a petition for a winding up by the ct. alleging that the object of the last call was to pay the directors their fees, & that in contemplation of such calls the directors transferred the whole of their shares, except the number required to qualify them as directors, to P., who thereby acquired a preponderating influence in the co. & was in fact a trustee for them. Petitioner did not pay the call on the shares held by him, but P. paid the call on all the shares that had been transferred to him:—*Held*: (1) the petition was demurrable; (2) the petition could not be sustained, by the only dissentient shareholder against the wish of all the other shareholders, on mere suggestions of fraud.—*Re PETERSBURGH & VIBORG GAS CO., Ex p. HARTMONT* (1875), 33 L. T. 637; 24 W. R. 230.

7184. Petition presented day before resolution passed for winding up.]—A shareholder presented a petition the day before a meeting, at which a resolution for a voluntary winding up was passed:—*Held*: there was no reasonable ground for presentation of the petition, & it must be dismissed, with costs.—*Re CAB CO. OF GRAHAM & CO., LTD.* (1884), 1 T. L. R. 46.

7185. Failure of substratum.]—A petition was

presented by two shareholders for the winding up of the co. by the ct., on the ground that its substratum had ceased to exist. Subsequently the co. passed a resolution for a voluntary liquidation, with the secretary as liquidator. At the meeting, when the resolution was passed, 4,061 votes were recorded. Of these, 3,916 were given in favour of a voluntary liquidation, & 145 against. Of the 3,916 votes, 3,702 were given in respect of shares held by the vendor & his nominees. Circulars in favour of a compulsory & against a voluntary liquidation had been signed by the holders of 847 shares. Certain transactions had passed between the directors & the vendor which, *primâ facie*, required investigation:—*Held*: the ct. was not bound to consider the wishes of the shareholders who merely expressed the wish of the vendor the person most interested in having a voluntary liquidation; & it appearing to be in the interest of the independent shareholders that there should be a compulsory liquidation, an order ought to be made.—*Re VARIETIES, LTD.*, [1893] 2 Ch. 235; 62 L. J. Ch. 526; 68 L. T. 214; 41 W. R. 296; 9 T. L. R. 259; 37 Sol. Jo. 250; 3 R. 324.

Annotation:—*Refd. Re Bishop*, [1900] 2 Ch. 254.

—*See, generally, Sect. 36, sub-sect. 2, D. (b), ante.*

ii. *Wishes of Creditors and Shareholders.*

7186. Wishes of creditors—Opposed to compulsory winding up.]—Where the creditors generally agree that a co. shall be wound up voluntarily, & special resolutions to that effect have been made by the shareholders, the ct. will adjourn a petition presented by a dissentient creditor, for winding up the co. for a reasonable time, to enable the arrangements for a voluntary winding up to be carried into effect.—*Re AUSTRALIAN AUXILIARY STEAM CLIPPER CO., LTD., Ex p. BANK OF SCOTLAND (GOVERNOR & CO.)* (1858), 30 L. T. O. S. 354.

7187. ———. Petition by unpaid creditor.]—Where a co. is in voluntary liquidation, an unpaid creditor is not entitled to an order to a compulsory winding up *ex debito justitiæ*, if it appears that he will be paid in full, & the majority of other creditors oppose the application.—*Re UNIVERSAL DRUG SUPPLY ASSOCN.* (1874), 22 W. R. 675.

7188. ———.]—Where a co. is in voluntary liquidation & the majority of creditors wish that the voluntary winding up shall be continued, the ct. will not make a compulsory order on a creditor's petition.—*Re BRIXTON CYCLE CO.* (1885), 1 T. L. R. 254.

7189. ———. No assets.]—The ct. can in its discretion dismiss the petition of a creditor for an order compulsorily to wind up a co. already in voluntary liquidation, where there are no assets & the petition is unsupported by the rest of the creditors, & where the claim of the petition creditor to such an order is grounded upon a possible right

PART III. SECT. 37, SUB-SECT. 15.—
A. (b) i.

t. *General rule—Petitioner must be prejudiced.]*—The ct. will not interfere with a voluntary winding up of a co. by its shareholders, & order a compulsory liquidation, unless it is shown that the rights of petitioner will be prejudiced by the voluntary winding up.—*Re ORO FINO MINES, LTD.* (1900), 7 B. C. R. 388.—CAN.

a. *Company incorporated & wound up in London—Assets in New Zealand—Whether Companies Act, 1908, applies.]*—A foreign co., incorporated in London but carrying on

business in New Zealand & having all its assets here, was in course of being wound up in England under a voluntary liquidation. A New Zealand creditor presented a petition under Cos. Act, 1908, ss. 310, 311, that the co. should be wound up by the ct.:—*Held*: it was not necessary for the petitioner to allege or for petitioner to prove that the rights of such petitioning creditor would be prejudiced by the voluntary winding up & Cos. Act, 1908, s. 233, applies to a voluntary liquidation in New Zealand but not to a voluntary liquidation outside New Zealand.—*Re WESTLAND GOLDMINING SYNDICATE, LTD.*, [1916] N. Z. L. R. 169.—N.Z.

PART III. SECT. 37, SUB-SECT. 15.—
A. (b) ii.

b. *Wishes of creditors—Majority opposed to compulsory winding up—Carry less weight if also shareholders.]*—Under Cos. Act, 1893, W. A., s. 152, it is required that regard should be had to wishes of creditor members & contributories of a co. in the appointment of a liquidator. A large majority of the creditors of applt. co. desired that voluntary liquidation should continue but nearly all were in some degree holders of shares in respect of which liability was asserted; on other hand a substantial body of creditors desired compulsory winding-up order:—*Held*:

Sect. 37.—Voluntary winding up: Sub-sect. 15, A.
(b) ii. & iii.]

to indemnify the co. might establish against third parties at his instance alone.—*Re GREENWOOD & Co.*, [1900] 2 Q. B. 306; 69 L. J. Q. B. 751; 82 L. T. 843; 48 W. R. 607; 7 Mans. 456, D. C.

Annotation:—*Reid. Re Ilfracombe Permanent Mutual Benefit Bldg. Soc.*, [1901] 1 Ch. 102.

7190. — In favour of compulsory winding up.]
 —After a resolution has been passed for winding up a co. voluntarily, a shareholder cannot, as a general rule, obtain a compulsory order for winding up, or an order for continuing the voluntary winding up under supervision. The only exceptions to the rule are where the resolution has been passed fraudulently, or where creditors appear to support the petition.

By the arts. of assocn. of a limited co., the directors were authorised, when it should appear to them that the capital for the time being subscribed was sufficient for the purposes of the co., to allot the remaining unallotted shares among the shareholders in proportion to the number of shares then held by them, without receiving any money for them. When shares to the amount of one-fourth of the nominal capital had been allotted & paid up, the directors allotted the remaining three-fourths, as fully paid-up shares, among the existing shareholders without further consideration; & petitioner became a purchaser of some of the shares in the market. The co. passed a resolution for a voluntary winding up, & afterwards petitioner presented a petition for a compulsory winding up:—*Held*: the provision in the arts. was highly improper; but if it amounted to a fraud it was a fraud upon petitioner in his individual capacity of purchaser of the shares, & was not committed by or upon the co., & therefore, it was not within the scope of winding-up Acts to give relief in respect thereof. The petition for winding up was accordingly dismissed.—*Re GOLD Co.* (1879), 11 Ch. D. 701; 48 L. J. Ch. 281; 40 L. T. 5; 43 J. P. 652; 27 W. R. 341, C. A.; *subsequent proceedings*, 12 Ch. D. 77, C. A.

Annotations:—*Consd. Re Bishop*, [1900] 2 Ch. 254. **Expld. & Foll.** *Re Hadleigh Castle Gold Mines*, [1900] 2 Ch. 419. **Consd.** *Re National Distribution of Electricity Co.*, [1902] 2 Ch. 34. **Reid.** *London Trust Co. v. Mackenzie* (1893), 62 L. J. Ch. 870; *Re Varieties*, [1893] 2 Ch. 235; *Re Haycraft Gold Reduction & Mining Co.*, [1900] 2 Ch. 230. **Mentd.** *Re Ambrose Lake Tin & Copper Mining Co.*, *Ex p. Taylor*, *Ex p. Moss* (1880), 14 Ch. D. 390; *Re British Seamless Paper Box Co.* (1881), 50 L. J. Ch. 497; *Re Phoenix Electric Light & Power Co.* (1883), 48 L. T. 260; *Arnot v. United African Lands*, [1901] 1 Ch. 518.

the discretion of the judge in ordering compulsory winding up was properly exercised & should not be disturbed.—*GREAT FINGALL ASSOCIATED GOLD MINING Co. v. HARNESS* (1906), 4 C. L. R. 223.—AUS.

c. Necessity for proof that voluntary winding up illegally conducted.]
 When a voluntary winding up of a co. has been decided upon, the ct. will not order a winding up by the ct. at the instance of any creditor whose rights would not be prejudiced by such voluntary winding up, nor at the instance of any shareholders, in the absence of proof that the proceedings in connection with the resolution for a voluntary winding up have been conducted illegally or in such a manner as to constitute a fraud on such shareholder.—*RUSSELL'S ESTATE v. FALSE BAY FISH Co., LTD. (IN LIQUIDATION)* (1904), 21 S. C. 615.—S. AF.

PART III. SECT. 37, SUB-SECT. 15.—
A. (b) iii.]

d. General rule.]—Where a co. is in voluntary liquidation, the ct. does not make a compulsory winding-

up order to provide machinery for eliciting facts. Such machinery exists in a voluntary liquidation. But if the circumstances be such that a creditor may be prejudiced either because the machinery is not being put into operation or because it is being operated by some one who may not operate it properly, *e.g.*, where he is the nominee of persons against whom it is to be used, the ct. will grant a compulsory winding-up order, even though other creditors may oppose.—*SOUTH AFRICA MILK PRODUCTS v. FURNESS, LTD.*, [1921] W. L. D. 81.—S. AF.

e. —.]—Where a joint-stock co. is being wound up voluntarily an order *ex debito justitiæ* will not be granted even to a petitioning creditor unless it appears on the face of his petition that his rights will be injuriously affected by the voluntary winding up.—*Re SUTHERLAND MANURE Co., LTD.* (1893), 11 N. Z. L. R. 460.—N.Z.

f. Petitioning creditor must show prejudice—Lapse of time in presenting petition—Irregularities in conduct of

7191. —.]—The voluntary winding up of a co. is no bar to a compulsory order if the general body of the creditors desire it, although no individual creditor proves in accordance with 1862 Act, s. 145, that his rights will be prejudiced by a voluntary winding up.

In such a case the right of the general body of the creditors to have effect given to their wishes under sects. 91 & 149 is untouched by sect. 145, although the *prima facie* right of an individual creditor to a compulsory order, *ex debito justitiæ*, is restricted by that sect.—*Re BISHOP (E.) & SONS, LTD.*, [1900] 2 Ch. 254; 69 L. J. Ch. 513; 82 L. T. 756; 7 Mans. 342.

Annotations:—*Foll.* *Re A. B. Cycle Co.* (1902), 19 T. L. R. 84; *Re Hermann Lichtenstein* (1907), 23 T. L. R. 424.

7192. Wishes of shareholders—Opposed to compulsory winding up.]—A petition was presented by a member of a joint-stock co. that the co. might be wound up, on the ground that a judgment had been obtained against it under which any member of it might at any time be called upon to pay £15,000. It appeared in opposition to the petition, that a great majority of shareholders was opposed to it; that the assets of the co., when realised, would be greater than their debts; that arrangements had been entered into with the judgment creditor relative to the debt; that the co. had ceased to carry on business; & that they were trying to wind it up themselves. The ct., in the exercise of its discretion under these circumstances declined to make the order.—*Re BRITISH ALKALI Co., Ex p. GUEST* (1852), 5 De G. & Sm. 458; 22 L. J. Ch. 241; 19 L. T. O. S. 83; 16 Jur. 944; 64 E. R. 1198.

7193. —.]—*Re IRRIGATION Co. OF FRANCE, Ex p. FOX*, No. 7107, *ante*.

7194. —.]—*Re PETERSBURGH & VIBORG GAS Co., Ex p. HARTMONT*, No. 7183, *ante*.

7195. —.]—*Re DORÉ GALLERY, LTD.*, [1891] W. N. 98.

7196. —.]—*Re BRITISH ASAHAN PLANTATIONS Co., LTD.* (1892), 36 Sol. Jo. 363.

iii. Prejudice to Creditors.

7197. Assignment of company's effects to director.]—A creditor had presented a petition for winding up the co., which was for hearing on May 11, but at the request of the co. he allowed it to stand over.

He was then unaware, but afterwards discovered, that the co. on Apr. 16 had executed, & on May 7

company's business do not constitute prejudice.]—A creditor who seeks to have a co. which is in voluntary liquidation wound up by the ct., must allege & prove that his rights will be prejudiced by a voluntary winding up, & the facts that go to make such a case must be clearly alleged in the petition. Where, in such case, a creditor's petition charged that he was being prejudiced by the voluntary winding up, evidence tendered of facts not alleged in the petition in support of the charge of prejudice was rejected.

Upon a creditor's—H.'s—petition to wind up "L. Ltd.," a co. then in voluntary liquidation, J., its governing director, was the holder of debentures duly registered over the whole of its assets.

In 1915, J., on behalf of "L. Ltd.," at a time when he must have known that "L. Ltd." might not be able to meet its obligations, ordered goods from H. & accepted bills for the same. Subsequently "L. Ltd." was unable to meet its bills. J. then appointed a receiver of the assets when realised proved insufficient to satisfy the debentures. There was no evidence

had registered, a bill of sale of the effects of the co. to one of the directors :—*Held* : he was entitled to an order for a compulsory winding up.—*Re LONDON & PROVINCIAL STARCH CO., Ex p. ADAMS* (1867), 16 L. T. 474.

7198. Dissipation of assets—Assets originally sufficient to pay creditors—Retainer by liquidator of money due to him personally—Composition offered to creditors.]—A co. under the powers contained in their arts., issued debenture bonds to the extent of £3,500 which were made a first charge on the property of the co. A. became the holder of four of these bonds. Afterwards the shareholders duly passed resolutions that the co. should be wound up voluntarily, & two liquidators were appointed. One of the liquidators paid some of the bonds in full ; on others he paid a composition, retaining the difference between the composition & the full amount due on the bonds in satisfaction of moneys due to him in respect of business transactions between himself & such bondholders.

A. applied for payment of the amount due on his bonds, but was offered a composition of 12s. in the pound. The realised assets of the co. had, at the first, been quite sufficient to pay in full the bonds issued.

On a petition by A., under 1862 Act, s. 145 :—*Held* : A.'s interests were being prejudiced by the manner in which the voluntary winding up was being carried on, & a compulsory order was made.—*Re CAERPHILLY COLLIERY CO., Ex p. DOLLING* (1875), 32 L. T. 15.

7199. Voluntary winding up begun after presentation of petition for compulsory winding up.]—1862 Act, s. 145, enacting that a voluntary winding up shall not be a bar to a creditor's right to have a compulsory winding-up order if the ct. is of opinion that his rights will be prejudiced by a voluntary winding up, applies not only where the voluntary winding up was commenced before, but also where it was commenced after, the presentation of a petition for a compulsory winding up. Therefore the *onus* lies on a creditor to show that the continuance of a voluntary winding up, which is proceeding when he asks for a compulsory order, will prejudice him, notwithstanding his petition was presented before the commencement of the voluntary winding up.

A petition for the compulsory winding up of a co. was on Dec. 17, 1887, presented by M., who was a creditor of the co. in respect of a debt of £1,319 10s. 2d. When the petition first came on to be heard on Jan. 14, 1888, it was adjourned till Jan. 21, & afterwards to Jan. 28, 1888. On Jan. 26, the co. passed an extraordinary resolution for winding up voluntarily. At the hearing of the petition on Jan. 28, it was resisted by the co. on the ground that the contracts or bargains under which the alleged debt had arisen were gaming

contracts. The ct. was of opinion that there was a *bonâ fide* dispute, & ordered the petition to stand over generally with liberty to apply, the liquidator undertaking not to part with assets except with leave of the ct., to be obtained on notice to M., who undertook to bring an action forthwith to establish his claim. An action was thereupon brought by M., but not defended by the co., & judgment was given establishing the debt. The petition then came on again for hearing. The liabilities of the co. were £5,125 13s., & the assets £2,611 5s. 2d. There was no suggestion that the liquidator appointed in the voluntary winding up would not do his duty ; but M. contended that he was entitled *ex debito justitiæ* to a compulsory winding up :—*Held* : the ct. had a discretion which it would exercise in favour of the creditors & in their interest, & in order that costs should not be incurred unnecessarily, ordered that the voluntary winding up should be continued under supervision. On appeal :—*Held* : the ct. would not make a compulsory winding-up order unless it was quite satisfied, that that would be the only means of obtaining payment of petitioner's debt ; there was nothing in the present case that would benefit petitioner if the ct. did make a compulsory winding-up order ; & petitioner had not shown that he would be prejudiced by the order of the ct. below.—*Re NEW YORK EXCHANGE, LTD.* (1888), 39 Ch. D. 415 ; 58 L. J. Ch. 111 ; 60 L. T. 66 ; 1 Meg. 78 ; *sub nom. Re NEW YORK EXCHANGE, LTD., Ex p. MILLINGTON*, 4 T. L. R. 721, C. A.

Annotations :—*Apld. Re Electrical Engineering Co.* (1891), 64 L. T. 658. *Consd. Re Bishop*, [1900] 2 Ch. 254.

7200. Effect of 1890 (Winding up) Act.]—Notwithstanding the powers conferred upon the ct. by 1890 (Winding-up) Act, a creditor is not entitled to an order for the compulsory winding up of a co. which has resolved to wind up voluntarily, unless he can show, as provided by 1862 Act, s. 145, that his rights will be prejudiced by the voluntary winding up.—*Re RUSSELL, CORDNER & CO., [1891]* 3 Ch. 171 ; 60 L. J. Ch. 805 ; 65 L. T. 740 ; 39 W. R. 635. *Annotation* :—*Consd. Re Bishop*, [1900] 2 Ch. 254.

7201. —.]—*Re EVANS (J. H.) & CO., LTD.* (1892), 36 Sol. Jo. 648.

7202. Company under control of one man—Whose nominee appointed liquidator.]—Where the control of the business & debentures was substantially in the hands of one man & his immediate family, & their nominee had been appointed both receiver & voluntary liquidator :—*Held* : it was desirable in the interests of the creditors that the voluntary liquidation should not continue, & an order for compulsory winding up must be made.—*Re MEDICAL BATTERY CO., [1894]* 1 Ch. 444 ; 63 L. J. Ch. 189 ; 69 L. T. 799 ; 42 W. R. 191 ; 38 Sol. Jo. 81 ; 1 Mans. 104 ; 8 R. 46.

Annotation :—*Folld. Re Bishop*, [1900] 2 Ch. 254.

that J. ordered the goods with the intention of adding to the assets for his own benefit or with any other motive than that of an endeavour to keep "L. Ltd." going. On Apr. 5, 1916, a resolution for voluntary winding up was passed & a liquidator was appointed. The petition which was based upon a charge of fraud was not filed until Jan. 20, 1921 :—*Held* : in the absence of any evidence of misrepresentation or deceit or of a deliberate intention to defraud there was nothing in the circumstances of the case justifying a charge of legal fraud ; in the absence of fraud petitioner had no rights arising out of the method of doing business complained of & therefore could not rely upon that for the purpose of establishing a case of prejudice ; as H. had failed to

establish a case of prejudice & in view of the lapse of nearly 5 years after the co. went into voluntary liquidation before the petition was presented & as no definite indication was given of any specific benefit that the creditors were likely to gain by a compulsory order petitioner was too late in coming to the ct. to ask for such an order.—*Re LONDONDERRY, LTD. (IN LIQUIDATION), [1921]* 21 S. R. N. S. W. 263.—*AUS.*

*g. Locus standi of petitioner—Shares purchased through agent—& not allotted.]—*A duly registered co. issued & published a statement & report, which notified that 610 £1 shares were available to subscribers. S. applied to the agents of the co. for 300 shares of £1 each, paid the purchase price

& obtained a receipt from the agents for the amount on a printed form supplied by the co. The co. soon after went into voluntary liquidation & no shares had been delivered to S. On an application by S. under Cos. Act, No. 25 of 1892, s. 193, to have the voluntary liquidation changed into a compulsory one by the ct. the co. set out that S. was not a creditor, inasmuch as the agents had no authority to sell shares in the co. & that there was no just ground for disturbing the voluntary liquidation :—*Held* : S. must be regarded as a creditor, & it was to his interests that a compulsory liquidation should take place.—*SMITH v. FISHER'S BIOSCOPIES & FILMS, LTD. (IN LIQUIDATION), [1917]* 8 C. P. D. 35.—*S. AF.*

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(b) iii., iv., v.*

7203. Irregularities in management.]—*Re* DAVID JONES & Co., LTD. (1897), 41 Sol. Jo. 748.

iv. Circumstances requiring Investigation.

7204. General rule.]—Notwithstanding a co. is in course of being wound up voluntarily with the assent of a large majority of its creditors, an order for winding up by the ct. will be directed where there is danger of want of efficient supervision under the voluntary winding up.—*Re* LITTLEHAMPTON, ETC. CO., LTD. (1865), 2 De G. J. & Sm. 521; 12 L. T. 8; 11 Jur. N. S. 211; 13 W. R. 420; 46 E. R. 476; *sub nom. Re* LITTLEHAMPTON, HAVRE & HONFLEUR S.S. CO., LTD., *Ex p. Ellis*, 34 L. J. Ch. 237, L. J.J.

Annotation:—Consd. Re Gold Co. (1879), 11 Ch. D. 701.

7205. —.]—A joint-stock co. duly passed a resolution at a general meeting for a voluntary winding up, & a petition was presented accordingly. The liabilities of the concern were enormous; & another petition was presented, before the hearing of the former one, by a creditor for upwards of £300,000, praying an order to wind up the co. compulsorily.—*Held: the ct. must be wound up compulsorily.*—*Re* BARNED'S BANKING CO., LTD. (1866), 14 L. T. 451; 14 W. R. 722.

Annotation:—Distd. Re Imperial Mercantile Credit Assn., *Coleman's, M'Andrew's, Figdor's, & Doyle's Cases* (1866), 12 Jur. N. S. 739.

7206. —.]—*Re* VARIETIES, LTD., No. 7185, *ante*.

7207. —.]—*Re* GUTTA PERCHA CORPN., No. 7235, *post*.

7208. —.]—(1) The existence of a voluntary winding up is not a bar to a compulsory order being made even on the petition of a fully paid-up shareholder unsupported by creditors, if the circumstances are such as require the investigation of the ct.

(2) The consent, separately obtained by the secretary, of directors sufficient in number to form a quorum, to the sending out of notices for an extraordinary general meeting of the co. is not equivalent to a resolution for the holding of such a meeting passed at a board meeting.

(3) Fraud is a ground, but not the only ground, on which the jurisdiction is exercisable.—*Re* HAYCRAFT GOLD REDUCTION & MINING CO., [1900] 2 Ch. 230; 69 L. J. Ch. 497; 83 L. T. 166; 16 T. L. R. 350; 7 Mans. 243.

Annotations:—As to (1) Apprvd. Re National Distribution of Electricity Co., [1902] 2 Ch. 34. *As to (2) Follid. Re* State of Wyoming Syndicate, [1901] 2 Ch. 431. *Refd. Re* National Distribution of Electricity Co., [1902] 2 Ch. 34. *As to (3) Refd. Transport v. Schonberg* (1905), 21 T. L. R. 305; *Boschoek Proprietary Co. v. Fuke*, [1906] 1 Ch. 148.

7209. —.]—*Re* A. B. CYCLE CO., LTD., No. 7227, *post*.

PART III. SECT. 37, SUB-SECT. 15.— A. (b) iv.

*h. Shareholders' interests in conflict with creditors'—Serious disputes as to validity of creditors' claims.]—*Where there were serious disputes between a co. & certain of its creditors as to the validity of their debts, & litigation in connection therewith had resulted, & it was clear that shareholders' interests were in conflict with those of creditors, the ct., although steps were being taken to wind up the co. voluntarily, ordered the co. to be placed under compulsory liquidation, & appointed an official liquidator.—*COOMER v. YORKSHIRE ESTATE SYNDICATE* (1911), 28 S. A. L. J. 384.—S. AF.

k. "Tricks & malpractices"]—

Where there have been "tricks & malpractices" which might have affected shareholders & creditors the winding up should be compulsory.—*Re* GILBERT MACHINERY CO. (No. 2) (1906), 26 N. Z. L. R. 53.—N.Z.

*l. Suspicious sale of assets by voluntary liquidator.]—*A co. which had been nearly six years in existence & carrying on the manufactures for which it was formed for about a year went into voluntary liquidation. The co. had then spent about £400,000 of which more than half was borrowed money. The assets of the co. which was valued at its last statement at £390,000 were sold by the liquidator to the receiver for the debenture-holders for £137,750, & if the sale was valid the whole of the paid-up capital

7210. —.]—*Re* SELKIRK (J. H.), LTD., ASSOCIATED NEWSPAPERS, LTD.'S PETITION (1906), 50 Sol. Jo. 802.

7211. —.]—The ct. made a compulsory winding-up order, there being already a voluntary winding-up order, the petitioning creditor not showing that he would be prejudiced by a voluntary winding up, but showing a case for inquiry.—*Re* HERMANN LICHTENSTEIN & Co., LTD. (1907), 23 T. L. R. 424.

7212. Preponderating influence of single shareholder.]—Where investigation of the affairs of the co. about to be wound up voluntarily seems proper, & there is an overwhelming influence on the part of a single shareholder, the ct. will, on the petition of a shareholder having a substantial interest in the co., order a compulsory winding up.—*Re* WEST SURREY TANNING CO. (1866), L. R. 2 Eq. 737; 14 W. R. 1009.

Annotations:—Consd. Re Gold Co. (1879), 11 Ch. D. 701. *Refd. Re* Brinsmead, [1897] 1 Ch. 45; *Re* National Distribution of Electricity Co., [1902] 2 Ch. 34. *Mentd. Re* Suburban Hotel Co. (1867), 2 Ch. App. 737.

7213. —.]—*Re* VARIETIES, LTD., No. 7185, *ante*.

7214. Mode in which company's business carried on—Vendor appointed liquidator.]—Circumstances in which the ct. made an order for the compulsory winding up of a co. where by reason of the way in which the business had been carried on & the position of the vendor, who had been appointed liquidator in the voluntary winding up, the fullest investigation was necessary by a liquidator other than the vendor.—*Re* PERUVIAN AMAZON CO., LTD. (1913), 29 T. L. R. 384.

7215. Petition by creditor whose claim not admitted in winding up.]—An order made by the Registrar in the voluntary winding up of a co. that a claim in respect of a judgment should not be admitted to proof does not estop the claimant from presenting a compulsory winding-up petition if after the date of the order he ascertains facts which show that the transactions of the co. ought to be investigated by the Official Receiver.—*Re* INECTO, LTD. (1922), 38 T. L. R. 797.

v. Resolutions for Winding up Irregular or Fraudulent.

7216. Resolution obtained by fraud—Or by improper influence.]—The ct. will not at the instance of contributories interfere with a voluntary winding up by ordering a winding up by or under the supervision of the ct., except where the resolution for winding up voluntarily has been obtained by fraud or by an inequitable, overbearing of the rights of a dissentient minority by improper influence.—*Re* LONDON & MERCANTILE DISCOUNT CO. (1865), L. R. 1 Eq. 277; 35 L. J. Ch. 229; 13 L. T. 665; 14 W. R. 219.

Annotations:—Follid. Re Imperial Mercantile Credit Assn.,

of the shareholders amounting to nearly £200,000 was lost. On a petition by certain fully paid-up shareholders, some of whom were also creditors of the co. for its compulsory winding up by the ct.:—*Held: there was jurisdiction to make an order at the instance of the other creditors or paid-up shareholders; there were special circumstances justifying the interference of the ct., as the circumstances both of the sale & of the business of the co. required investigation & were not likely to get it unless the liquidator was brought under the control of the ct.; but an order that the winding up should continue under the supervision of the ct. would meet the case.*—*Re* DOMINION PORTLAND CEMENT CO., LTD., [1918] N. Z. L. R. 979.—N.Z.

Coleman's, M'Andrew's, Figdor's & Doyle's Cases (1866), 12 Jur. N. S. 739. *Apld.* *Re* St. David's Gold Mining Co. (1866), 14 L. T. 539. *Consd.* *Re* Beaujolais Wine Co. (1867), 3 Ch. App. 15. *Apld.* *Re* Irrigation Co. of France, Fox's Case (1870), 23 L. T. 453. *Refd.* *Re* United Merthyr Collieries Co. (1867), 16 L. T. 170.

7217. ———.]—The ct. will not, on the application of a minority of shareholders, interfere with a resolution of a co. to wind up voluntarily, unless the resolution was obtained by fraud, or by overbearing conduct, or by improper influence.—*Re* IMPERIAL MERCANTILE CREDIT ASSOCN., COLEMAN'S M'ANDREW'S, FIGDOR'S & DOYLE'S CASES (1866), 12 Jur. N. S. 739.

Annotation :—*Refd.* *Re* Oriental Commercial Bank (1866), 15 L. T. 8.

7218. ———.]—*Re* BEAUJOLAIS WINE CO., No. 7256, *post*.

7219. ———.]—*Re* LONDON FLOUR CO., LTD., No. 6838, *ante*.

7220. ———.]—The ct. will not, in general, at the instance of a creditor or contributory, interfere with the voluntary winding up of a co. where a *bonâ fide* resolution to that effect has been carried by a majority of shareholders.

Where a petition for winding up a co. is presented with undue haste, the ct. will take that circumstance into account in granting or refusing the petition.

On Feb. 4, 1869, resolutions were passed by the shareholders of the M. C. co. for a voluntary winding up, & for other purposes. These resolutions were challenged as illegal, & R., a contributory of the co., & also an alleged creditor, took proceedings in Chancery to restrain the co. from acting upon them. On Feb. 22 notice was given for further resolutions to be proposed at a meeting of the co. to be held on Mar. 3. On Mar. 1 a petition was presented by H. & others, together with R. for a compulsory winding up :—*Held* : petition refused, principally on the ground that petitioners had been guilty of undue haste in presenting it.—*Re* MADRAS COFFEE CO., LTD. (1869), 17 W. R. 643.

7221. ———.]—*Re* GOLD CO., No. 7190, *ante*.

7222. Resolution passed owing to preponderating influence of single shareholder.]—*Re* WEST SURREY TANNING CO., No. 7212, *ante*.

7223. ———.]—*Re* VARIETIES, LTD., No. 7185, *ante*.

7224. Irregularity.]—*Re* UNION HILL SILVER CO., LTD., No. 6839, *ante*.

7225. — Issue of notices of meetings not authorised by directors.]—*Re* HAYCRAFT GOLD REDUCTION & MINING CO., No. 7208, *ante*.

7226. — Chairman's declaration of passing of resolution conclusive.]—An extraordinary resolution to wind up the H. C. Gold Mines, Limited, voluntarily was proposed at a general meeting of the company duly convened on Jan. 31, 1900. At the meeting the chairman declared the resolution to be carried on a show of hands, & no poll was demanded.

This was a petition by two fully-paid shareholders asking for a compulsory order on the ground, first, that the extraordinary resolution was not passed by the requisite majority, the chairman's declaration having been founded on a mistake ; & secondly, on the ground that there were charges against the directors & promoters which could be better investigated by means of a compulsory order :—*Held* : (1) as under 1862 Act, s. 51, the chairman's declaration that the resolution had been carried was conclusive unless challenged by means of a poll demanded by five members, the voluntary winding up was valid & not capable of being impeached ; (2) petitioners

had made out no case that a compulsory order was necessary for enforcing any right they might have as against the directors or promoters.—*Re* HADLEIGH CASTLE GOLD MINES, LTD., [1900] 2 Ch. 419 ; 69 L. J. Ch. 631 ; 83 L. T. 400 ; 16 T. L. R. 468 ; 44 Sol. Jo. 575 ; 8 Mans. 419.

Annotations :—As to (1) *Apprvd.* *Arnot v. United African Lands*, [1901] 1 Ch. 518. *Distd.* *Re* Caratal (New) Mines, [1902] 2 Ch. 498.

7227. Resolutions passed in bad faith.]—The ct. after a voluntary winding up resolution, made an order for the compulsory winding up of the co. upon a creditors' petition, the voluntary winding up resolution not having been passed in good faith, a large majority of the creditors asking for a compulsory order & there being circumstances in the carrying on of the co. which required investigation.—*Re* A. B. CYCLE CO., LTD. (1902), 19 T. L. R. 84.

vi. Voluntary Winding up Unsatisfactory.

7228. General rule.]—*Re* NATIONAL DISTRIBUTION OF ELECTRICITY CO., LTD., No. 7181, *ante*.

7229. Dilatoriness—Winding up not completed after five years.]—Where the proceedings in a voluntary winding up, under 1856 Act, were dilatory & unsatisfactory, & had not come to a conclusion at the end of five years, the ct. upon the petition of a shareholder, directed a winding up under the ct.—*Re* FIRE ANNIHILATOR CO. (1863), 32 Beav. 561 ; 2 New Rep. 99 ; 8 L. T. 412 ; 9 Jur. N. S. 633 ; 11 W. R. 654 ; 55 E. R. 220.

Annotations :—*Consd.* *Re* Gold Co. (1879), 11 Ch. D. 701. *Refd.* *Re* Haycraft Gold Reduction & Mining Co., [1900] 2 Ch. 230 ; *Re* National Distribution of Electricity Co., [1902] 2 Ch. 34.

7230. Neglect of duty—Liquidator not acting in interests of creditors—But in interest of promoters & shareholders—Piecemeal sale of assets.]—*Re* TRAMWAY WHEEL PLANT & GENERAL FOUNDRY CO., [1873] W. N. 160.

———.]—*See, also*, No. 7198, *ante*.

7231. Directors appointed liquidators—Improper payments to solicitors—Inaccurate accounts—Winding up complete.]—*Re* STAR & GARTER, LTD., No. 6996, *ante*.

7232. Powers of liquidator insufficient.]—1890 (Winding up) Act, s. 14, which enacts that, where a co. is being wound up voluntarily or subject to supervision, the ct. may, if satisfied that such winding up cannot be continued with due regard to the interests of the creditors or contributories, order that the co. be wound up by the ct., ought to have a reasonably wide construction given to it, in accordance with its language without straining it ; & so construed, it includes all cases where the powers of the liquidator in a voluntary winding up, or winding up under supervision, prove insufficient for the purposes of the winding up so far as they affect the interests of the creditors or contributories ; & if the official receiver under a compulsory order would possess powers which the liquidator in a voluntary winding up or winding up under supervision would not, & which in the opinion of the ct. are necessary for an efficient winding up, then the sect. applies ; but an order under the sect. will not be made as a matter of course, & a strong case should be made to show that it is required.—*Re* 1897 JUBILEE SITES SYNDICATE, [1899] 2 Ch. 204 ; 68 L. J. Ch. 427 ; 80 L. T. 869 ; 47 W. R. 606 ; 15 T. L. R. 391 ; 43 Sol. Jo. 552 ; 6 Mans. 331.

7233. Vendor appointed liquidator.]—*Re* PERUVIAN AMAZON CO., LTD., No. 7214, *ante*.

Sect. 37.—Voluntary winding up: Sub-sect. 15, A. (b) vii., (c), & B. Sect. 38: Sub-sects. 1 & 2.]

vii. Winding up for Purpose of Reconstruction or Amalgamation.

7234. Validity of amalgamation scheme disputed.]—*Re FINANCIAL CORPN.*, [1866] W. N. 162. *Annotation:—Reid. Re International Life Assee. Soc.* (1869), 20 L. T. 433.

7235. Failure of reconstruction scheme—Matters requiring investigation—Petition supported by majority of shareholders.]—Petition for a compulsory winding up order was presented by a fully paid shareholder who was supported by a considerable number of the other shareholders. Resolutions for voluntary winding up had been passed with a view to a reconstruction, which had, however, proved abortive at the time of the hearing of the petition. There were also matters which appeared to require investigation:—*Held*: a compulsory winding up order must be made & in arriving at that conclusion, the fact that the voluntary winding up was not an ordinary one, but was resolved upon with the view to a specific object which had failed, was a reason for strongly influencing the ct.—*Re GUTTA PERCHA CORPN.*, [1900] 2 Ch. 665; 69 L. J. Ch. 769; 83 L. T. 401; 44 Sol. Jo. 628; 8 Mans. 67.

Annotations:—Apprvd. Re National Distribution of Electricity Co., [1902] 2 Ch. 34. *Consd. Thomson v. Henderson's Transvaal Estates*, [1908] 1 Ch. 765.

See, also, Nos. 7097, 7098, ante.

Resolution for winding up irregular or fraudulent.]—*See Sub-sect. 15, A. (b) v., an c.*

(c) Effect.

7236. Adoption of proceedings under voluntary winding up—Jurisdiction of court to order—Company not registered under 1862 Act.]—It is doubtful whether the ct. has jurisdiction to adopt the proceedings in a voluntary winding up, when the co. is not registered under 1862 Act, & the resolution for winding up was passed after the Act came into operation.—*Re MINIMA ORGAN CO., LTD.* (1863), 8 L. T. 109; 11 W. R. 530.

7237. — When ordered.]—*Re BRIDPORT OLD BREWERY CO.*, No. 6835, *ante*.

7238. Avoidance of proceedings under voluntary winding up.]—In May, 1865, resolutions were passed for amalgamating the F. Co. with the O. Bank, & to wind up the F. Co. voluntarily for enabling the amalgamation to be carried out. The two pltfs., who had recently purchased shares in the F. co., the one the day before the resolutions for amalgamation were confirmed, the other shortly after, in the same month of May contracted to sell their shares & executed transfers thereof. On June 2 following, & before the transfers were sent in for registration, the liquidators under the voluntary winding up passed a resolution that they would not register any more transfers, except upon the terms of the transferors executing a deed by which they should guarantee the payment of all calls by their transferees. Pltfs. not being able to obtain transfers otherwise executed the deeds in Apr. 1866. In 1866 the voluntary winding up was superseded by a compulsory winding up. In July, 1868, actions were com-

menced against pltfs. on their deeds to recover the amounts due from them for calls & for damages, & thereupon pltfs. filed bills, alleging that the liquidation was invalid, & that the deeds were obtained from them without consideration, by misrepresentation & concealment, & praying that they might be cancelled, & the actions stayed. In another suit against the same co. it had been decided, & confirmed on appeal, that the amalgamation was *ultra vires* & void:—*Held*: (1) the liquidation proceedings were valid & could not be set aside because the amalgamation, for which they had been instituted, had been declared void; (2) there was ample consideration for the deeds, & there was no evidence of misrepresentation or concealment, & the liquidators were justified in refusing to sanction the transfers except upon such terms as they thought were for the benefit of the co.

It is not the effect of a compulsory winding-up order to nullify proceedings which have been taken under a previous voluntary winding up.—*CLEVE v. FINANCIAL CORPN.*, *WILLIAMS v. SAME* (1873), L. R. 16 Eq. 363; 43 L. J. Ch. 54; 29 L. T. 89; 21 W. R. 839.

Annotations:—As to (1) Apprvd. Thomson v. Henderson's Transvaal Estates, [1908] 1 Ch. 765. *Reid. Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250.

7239. — Whether distress after voluntary liquidation validated.]—Jud. Act, 1875 (c. 77), s. 10, does not import into a winding-up Bkpcy. Act, 1869, s. 34, so as to enable a landlord to distrain after the commencement of a winding up for rent due to him from the co. The appointment of a voluntary liquidator is not necessary to give effect to a voluntary winding up for the purposes of 1862 Act, s. 163. A compulsory order, which "supersedes" a voluntary winding up as from the date of such order, does not thereby entirely put an end to everything previously done under the voluntary winding up.

Where, therefore, landlords, after the commencement of the voluntary winding up of the co., but before the date of the compulsory order, distrained for rent due to them prior to the commencement of the voluntary winding up:—*Held*: the distress was invalid, no special grounds being shown why the judicial discretion vested in the ct. under 1862 Act, s. 87, should be exercised in their favour.—*THOMAS v. PATENT LIONITE CO.* (1881), 17 Ch. D. 250; 50 L. J. Ch. 544; 44 L. T. 392; 29 W. R. 596, C. A.

Annotations:—Consd. Re Taurine Co. (1883), 25 Ch. D. 118. *Reid. Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322.

7240. Appearance of liquidator on petition for compulsory winding up—Whether liquidator entitled to costs.]—*Re MONTE DE PIETE OF ENGLAND, LTD.* (1892), 37 Sol. Jo. 48.

B. By Winding up under Supervision of Court.
See Sect. 38, sub-sect. 2, post.

SECT. 38.—WINDING UP UNDER SUPERVISION OF COURT.

SUB-SECT. 1.—IN GENERAL.

See 1908 Act, s. 199.

7241. Necessity for previous valid resolution for

PART III. SECT. 37, SUB-SECT. 15.—
A. (c).

*m. Handing over of assets by voluntary to compulsory liquidator—Set-off of disbursements by voluntary liquidator.]—*An order having been made for the winding up of a co. under the Dominion Winding-up Act, & a liqui-

dator appointed, the voluntary winding up of the co. ceased, & the voluntary liquidator was superseded. Upon the application of the new liquidator for an order requiring the voluntary liquidator to hand over the assets in his hands, a statement was given by the voluntary liquidator showing charges for moneys disbursed, etc.;

& a reference was directed for the purpose of having the accounts taken.—*Re COLONIAL INVESTMENT CO. OF WINNIPEG* (1914), 27 W. L. R. 134.—CAN.

PART III. SECT. 38, SUB-SECT. 1.
*n. Nature of—Degree of control by court.]—*Although, under Cos. Act, VI

voluntary winding up.]—Where an order to continue a voluntary winding up under supervision had been made on the assumption that the voluntary winding up had been regular, but which it appeared had not been regular, the proper advertisements not having been inserted, & the official liquidator having sold property, to the title to which the purchaser had objected this irregularity, by consent, it was ordered that the order for continuing the voluntary winding up should be discharged, & the petition reheard, & order made, without the insertion of the necessary advertisements.—*Re PATENT FLOOR-CLOTH Co.* (1869), L. R. 8 Eq. 664 ; 21 L. T. 199.

7242. —.]—*Re SHEFFIELD MORTGAGE & ESTATES Co.*, [1887] W. N. 218.

7243. Statutory winding up.]—A railway co. was ordered by Act of Parliament to be wound up in the same manner & with the same incidents as if it were a co. registered under Cos. Acts. After resolutions had been passed for a voluntary winding up a petition was presented asking for a supervision order. The ct. made the order as prayed.—*Re BRISTOL & NORTH SOMERSET RY. Co.* (1884), 1 T. L. R. 22.

SUB-SECT. 2.—GROUNDS FOR GRANTING OR REFUSING SUPERVISION ORDER.

See, also, Nos. 7307, 7309, *post*.

7244. Wishes of shareholders & creditors.]—Upon two petitions of shareholders of a co., one praying for a voluntary winding up under the supervision of the ct., & the other for a compulsory winding up, the ct., being unable to ascertain the wishes of the shareholders, ordered a voluntary winding up under the supervision of the ct., but directed that any shareholder should be at liberty to inspect the books & accounts, & have liberty to apply to the ct. touching the matter.

Under a petition to wind up the co., a provisional liquidator was appointed prior to its being heard :—*Held* : the provisional liquidator was not entitled to appear at the hearing, though served, & his costs were refused.—*Re GENERAL INTERNATIONAL AGENCY Co., LTD.* (1865), 36 Beav. 1; 5 New Rep. 265 ; 34 L. J. Ch. 337 ; 11 L. T. 700 ; 13 W. R. 363 ; 55 E. R. 1056.

7245. —.]—A petition was presented in July, 1866, by the directors of the O. C. bank, praying that the bank might be wound up compulsorily, but at the hearing it was asked that it might be wound up voluntarily under the supervision of the ct. The A. bank, a creditor for £9,200, objected, & a majority of the creditors not having opposed, a compulsory winding up was ordered. Subsequently a majority of the creditors were in favour of a voluntary winding up, & on appeal, it was decreed accordingly.—*Re ORIENTAL COMMERCIAL BANK* (1866), 15 L. T. 8, L. C.

7246. —.]—A co. having failed for want of means to carry out its objects, a petition to wind up

compulsorily was presented by a judgment creditor, a part of whose claim, not the subject of the action, was disputed. After the presentation of the petition a resolution was passed to wind up voluntarily, & a person, who happened to be a solr., was appointed liquidator. The great majority of the creditors & shareholders, all the shares being fully paid-up, opposed the petition, & asked for a voluntary winding up under the supervision of the ct. An order was made on the petition, but for a voluntary winding up under the supervision of the ct.—*Re TROWBRIDGE WATER SUPPLY Co., LTD.* (1868), 18 L. T. 115.

7247. —.]—*Re IRRIGATION Co. OF FRANCE, Ex p. FOX*, No. 7107, *ante*.

7248. —.]—1862 Act, s. 147, empowers the ct., notwithstanding the opposition of unpaid creditors, to order a voluntary winding up to be continued under supervision. Where, therefore, the creditors of a co., in the course of voluntary liquidation, presented petitions for winding up the co., the ct. declined to make a compulsory order, but directed the voluntary winding up to be continued under supervision.

Where successive petitions were presented for winding up a co., in ignorance of prior petitions, the ct. in making the order, allowed one set of costs on all petitions.—*Re OWEN'S PATENT WHEEL, TIRE & AXLE Co., LTD.* (1873), 29 L. T. 672 ; *sub nom. Re OWEN'S WHEEL & TIRE Co., LTD., Ex p. BROWN & Co., Ex p. MITCHELL & Co., Ex p. NORTHFIELD Co., LTD., Ex p. DERBYSHIRE SILKSTONE COAL Co., LTD.*, 22 W. R. 151.

Annotation :—**Consd.** *Re Simon's Reef Consolidated Gold Mining Co.* (1882), 31 W. R. 238.

7249. —.]—After a petition by a creditor for winding up a co. had been presented the co. duly passed a resolution for voluntarily winding up. At the hearing a majority in number & value of the creditors appeared, & asked to have the voluntary winding up continued under supervision, & no creditor except petitioner asked for a winding-up order. An order for compulsory winding up was made. From this order a number of the creditors, being a majority of the unsecured creditors, appealed ; other creditors supported the same view, & no one but petitioner asked for a compulsory winding up :—*Held* : it sufficiently appeared, without calling a meeting of creditors, that the majority of the creditors desired the voluntary winding up to be continued under supervision, & as it was not shown that this would do any injustice to the petitioning creditor, a supervision order ought to be made, a creditor not being entitled *ex debito justitiæ* to a winding-up order as between himself & other creditors, though he is so entitled as between himself & the co.—*Re WEST HARTLEPOOL IRONWORKS Co.* (1875), 10 Ch. App. 618 ; 44 L. J. Ch. 668 ; 33 L. T. 149 ; 23 W. R. 938, L. JJ.

Annotations :—**Consd.** *Re New York Exchange Co.* (1888), 58 L. T. 915 ; *Re Bishop*, [1900] 2 Ch. 254. **Refd.** *Re St. Thomas Dock Co.* (1875), 24 W. R. 544.

of 1882, s. 195, the ct. has power to make an order dissolving a co. in the course of winding up, subject to its supervision, such cases must be exceptional & can only occur when the ct. has deemed it proper to carry on the winding up under supervision in a manner such as clearly to approximate to a winding up by the ct. The ordinary rule is the other way, & it is reasonable that it should be so ; as, generally, a winding up under supervision is not conducted under so intimate a control of the ct. as to put the ct. in a position to judge of the correctness of the liquidator's action

& the completeness of the winding up. So far as the ct. does not interfere, a winding up under supervision remains essentially a voluntary winding up ; but the ct. in a winding up under supervision has full authority to interfere & to exercise to any extent the power which it might have exercised if an order had been made for winding up the co. by the ct.—*Re CARWAR Co., LTD.* (1882), 1 L. R. 6 Bom. 640.—**IND.**

o. Adoption of proceedings in voluntary winding up.]—There are no provision in the Cos. Acts for the

adoption of proceedings which have taken place in a voluntary liquidation previously to its having been brought under the supervision of the ct. similar to that contained in 1862 Act, s. 146, in regard to judicial winding up. This interlocutor was, however, pronounced in this case in such circumstances : " Approve of the liquidators adopting the proceedings in the voluntary winding up of M. & Co. before the supervision order in terms of the prayer of the said note & decern."—*MOLLINSON & Co., LTD. (LIQUIDATORS)* (1882), 9 R. (Ct. of Sess.) 509 ; 19 Sc. L. R. 399.—**SCOT.**

**Sect. 38.—Winding up under supervision of court :
Sub-sect. 2.]**

7250. .]—*Re* GOLD CO., No. 7190, *ante*.

7251. .]—A petition was presented by a creditor for the compulsory winding up of a co. At the hearing petitioner only asked for a supervision order :—*Semble* : the ct. had no jurisdiction, under 1862 Act, s. 149, even at the instance of a majority of creditors, to force on petitioner a compulsory order. In such a case the creditors asking for a compulsory order will be entitled to costs as supporting the petition.—*Re* CHEPSTOW BOBBIN MILLS CO. (1887), 36 Ch. D. 563 ; 57 L. J. Ch. 168 ; 57 L. T. 752 ; 36 W. R. 180.

7252. .]—A petition was presented by creditors to wind up the co. compulsorily. Previously to the presentation of the petition, an order was made in a debenture-holder's action for the appointment of a receiver & manager of the co.'s undertaking & property. The debentures comprised the whole of the assets of the co., including the uncalled capital. After the presentation of the petition the co. passed resolutions for a voluntary winding up. The co. now asked for a supervision order :—*Held* : as petitioners would not be prejudiced within 1862 Act, s. 145, there must be an order that the voluntary winding up of the co. should be continued under the supervision of the ct.—*Re* ELECTRICAL ENGINEERING CO., LTD. (1891), 64 L. T. 658 ; 7 T. L. R. 493.

7253. .]—Petitions were presented by an insolvent co. & by one of its creditors, asking that the co. might be ordered to be wound up by the ct. Before the petitions were heard an extraordinary resolution was passed for a voluntary winding up, & at the hearing petitioners, who were supported by a large majority of the creditors & shareholders, asked that the voluntary winding up might be continued under the supervision of the ct. :—*Held* : the hearing must be adjourned in order that fresh advertisements might be issued stating that only a supervision order was about to be asked for.

On the petition again coming on for hearing a supervision order was reluctantly granted, the advantages of a compulsory order being pointed out by the ct.—*Re* NEW ORIENTAL BANK CORPN., [1892] 2 Ch. 563 ; 62 L. J. Ch. 63 ; 67 L. T. 87 ; 41 W. R. 16 ; 36 Sol. Jo. 628 ; 3 R. 6.

Annotation :—*Folld. Re* Civil Service Brewery Co., [1893] W. N. 5.

PART III. SECT. 38, SUB-SECT. 2.

7259 i. Allegation of misconduct by liquidator.]—Where liquidators misbehave, supervision order must be made by ct. on the motion of creditors.—*KESAVALOO NAIDU v. MURUGAPPA MUDALI* (1906), 1 L. R. 30 Mad. 22.—**IND.**

p. Circumstances requiring investigation.]—Where creditor who petitions for compulsory winding up of a co. was unable to show that his rights would be prejudiced by voluntary winding up but succeeded in showing *prima facie* case of circumstances requiring investigation, the ct. made an order that voluntary winding up should be continued under supervision of the ct.—*Re* ACETYLENE GAS CO. OF AUSTRALASIA, LTD. (1901), 1 S. R. N. S. W. 102.—**AUS.**

q. Scheme by minority to acquire company's estate.]—At an extraordinary meeting of a limited co. resolutions were carried by the statutory majority to the effect that it had been proved to the co.'s satisfaction, that it could not, by reason of its liabilities, continue its business, & it was advisable to wind it up, & that the co. should be wound up voluntarily. A petition to

have the winding up brought under the ct.'s supervision was presented, certain shareholders lodged answers objecting to the winding up on the ground that the adoption of the resolution in question had been arranged as part of a scheme, by certain shareholders to acquire the co.'s estate for their own purpose ; & that the co. was not unable to carry on its business :—*Held* : these were not relevant answers to the petition, & supervision order granted.—*MONKLAND IRON CO., LTD. v. DUN, ETC.* (1886), 14 R. (Ct. of Sess.) 242 ; 24 Sc. L. R. 198.—**SCOT.**

r. Loss of capital.—Payment of dividends out of capital.]—The shareholders of a co. resolved that it should be wound up voluntarily, & that the liquidation should be placed under the ct.'s supervision. These resolutions were adopted in conformity with the expressed wish of an overwhelming majority of the co.'s creditors. A small minority of the creditors presented a petition for the winding up to be by the ct. In this petition the co. & liquidators appointed by the shareholders lodged a note craving a supervision order. This was opposed by petitioners, on the grounds that there was a case for inquiry by an

7254. Resolution for winding up obtained by fraud or undue influence.]—*Re* LONDON & MERCANTILE DISCOUNT CO., No. 7216, *ante*.

7255. .]—(1) Where a joint-stock co. has deliberately determined upon a voluntary winding up, the ct. will not interfere by ordering a winding up under its supervision, unless the resolution to voluntarily wind up has been obtained by fraud or undue influence. A deliberate determination of a co. voluntarily to wind up cannot be upset by a few dissentient shareholders.

(2) General Ord., Nov. 11, 1862, r. 4, does not prescribe that the ordinary affidavits verifying a winding up petition is in all cases sufficient, but only that it is in all cases necessary.—*Re* ST. DAVID'S GOLD MINING CO., LTD. (1866), 14 L. T. 539 ; 14 W. R. 755.

Annotations :—*As to* (1) *Appl. Re* Irrigation Co. of France, Fox's Case (1870), 23 L. T. 453. *Refd. Re* Imperial Mercantile Credit Assocn., Coleman's, M'Andrew's, Figdor's, & Doyle's Cases (1866), 12 Jur. N. S. 739. *As to* (2) *Refd. Re* South Staffordshire Tram. Co. (1894), 1 Mans. 292 ; *Re* Charterland Stores & Trading Co. (1900), 69 L. J. Ch. 861.

7256. .]—The ct. will not, in general, at the instance of a contributory, interfere with a voluntary winding up by ordering it to continue under supervision, unless there has been fraud or undue influence in passing the resolution.

The discretion as to continuing a voluntary winding up under supervision is one that the Ct. of Appeal will exercise.—*Re* BEAUJOLAIS WINE CO. (1867), 3 Ch. App. 15 ; 17 L. T. 399 ; 32 J. P. 195 ; 16 W. R. 177 ; *sub nom. Re* BEAUJOLAIS WINE CO., *Ex p.* WRAGGE, 37 L. J. Ch. 220, L. J.J.

Annotations :—*Appl. Re* Madras Coffee Co. (1869), 17 W. R. 643 ; *Re* Irrigation Co. of France, Fox's Case (1870), 23 L. T. 453. *Folld. Re* Union Hill Silver Co. (1870), 22 L. T. 400. *Refd. Re* County Marine Insee., Rance's Case (1870), 6 Ch. App. 104 ; *Re* Star & Garter (1873), 42 L. J. Ch. 374.

7257. .]—*Re* GOLD CO., No. 7190, *ante*.

7258. Resolution improperly obtained.]—*Re* SIR JOHN MOORE GOLD MINING CO., No. 6913, *ante*.

7259. Allegation of misconduct by liquidator.]—At a general meeting of the shareholders of a banking co. resolutions were passed for the voluntary winding up of the co., & appointment of liquidators, & for confirming an agreement for the amalgamation of the co. with the H. bank upon certain terms therein specified. The liquidators proceeded to wind up the co. upon the footing of the amalgamation, & in conformity with

independent liquidator, in respect that the co. had lost £286,000 in 2½ years trading, & that the directors had declared profits & distributed dividends although instead of profits losses had accrued ; & that there was a danger in a voluntary liquidation of the interests of the minority be sacrificed in a reconstruction of the co. to those of the creditors with the largest voting power :—*Held* : the minority having failed to show that there was any real conflict between their interests & those of the majority, the wishes of the majority should receive effect, & a supervision order granted, but the liquidators should not take any steps towards the reconstruction of the co. except with leave of the ct.—*PATRISONS, LTD. v. KINNEAR* (1899), 1 F. (Ct. of Sess.) 551 ; 36 Sc. L. R. 402 ; 6 S. L. T. 304.—**SCOT.**

s. To enable application to be made to the court to restrain executions.]—A petition for continuing the voluntary winding up of a co. subject to the supervision of the ct., in order that the liquidator might be in a position to apply to the ct. for orders to restrain creditors from using diligence against the co. was presented by the directors of the co. with the

1862 Act, s. 161. Two dissentient shareholders, who were abroad at the time of the meeting, presented a petition impeaching the amalgamation on the ground of the insufficiency of the notice convening the meeting, & for other reasons; & praying, first, that the co. might be wound up by an order of the ct.; secondly, that if not, the voluntary winding up might be continued under the supervision of the ct.; thirdly, that the rights of petitioners as against their co-contributories & the liquidators might be declared; or, fourthly, that they might be at liberty to use the names of the co. & the liquidators in any proceedings they might be advised to take in reference to the winding up:—*Held*: the order of the Master of the Rolls dismissing the petition would be discharged; & (1) in the absence of any distinct allegations in the petition of misconduct on the part of the liquidators, the ct. would make no order for continuing the voluntary winding up under the supervision of the ct.; (2) inasmuch as the voluntary winding up & the amalgamation were all one transaction, & the amalgamation

could not be impeached in that jurisdiction, & in the absence of the H. bank, the petition must stand over to permit petitioners to take proceedings to set aside the amalgamation; (3) petitioners might be at liberty to use the names of the co. & the liquidators in such proceedings, on giving an undertaking to abide by such order as to costs as this ct. might make.—*Re IMPERIAL BANK OF CHINA, INDIA & JAPAN* (1866), 1 Ch. App. 339; 35 L. J. Ch. 445; 14 L. T. 211; 12 Jur. N. S. 422; 14 W. R. 594, L. JJ.

Annotations:—As to (2) *Folld. Re International Life Assce. Soc.* (1869), 20 L. T. 433. *Distd. Re Irrigation Co. of France, Ex p. Fox* (1871), 6 Ch. App. 176. *Consd. Thomson v. Henderson's Transvaal Estates*, [1908] 1 Ch. 765. *Reid. Re Hester* (1875), 44 L. J. Ch. 757. As to (3) *Consd. Re Gold Co.* (1879), 11 Ch. D. 701. *Reid. Silber Light Co. v. Silber* (1879), 12 Ch. D. 717; *Cape Breton Co. v. Fenn* (1881), 50 L. J. Ch. 321. *Generally, Reid. Cleve v. Financial Corpn., Williams v. Same* (1873), L. R. 16 Eq. 363.

7260. —.]—*Re STAR & GARTER, LTD.*, No. 6996, *ante*.

7261. Small number of shareholders—No debts incurred.—The provisions of 1862 Act as to winding up under the supervision of the ct. do not

liquidators concurrence & was granted.—*CHRISTIE, ETC.* (1876), 3 R. (Ct. of Sess.) 623; 13 Sc. L. R. 399.—**SCOT.**

t. —.]—After a resolution to wind up a limited co. voluntarily had been passed & confirmed certain creditors obtained decrees in actions previously raised by them against the co. Upon these decrees charges were given, poindings executed, & warrants of sale obtained. After the execution of the poindings, but before the goods were sold, a petition was presented to the ct. by a shareholder & an unsecured creditor, in which the liquidator & a majority of the creditors concurred, to have the winding up continued under the supervision of the ct., & to restrain the poinding creditors from carrying out their diligences. It was alleged that the goods poinded were the whole, or nearly the whole, assets of the co. The ct. thinking it just that diligence should be stayed, ordered *simpliciter* that the winding up should continue under supervision.—*GARDNER v. HUGHES* (1883), 10 R. (Ct. of Sess.) 1138; 20 Sc. L. R. 768.—**SCOT.**

a. *Wishes of creditors.*—The ct. will in the case of an opposed application to continue a voluntary winding up under supervision have regard to the wishes of the creditors primarily in a case in which all the shares are fully paid. The ct. in this case, after having directed a meeting of creditors accordingly made an order in accordance with the sense of that meeting & in spite of the opposition of certain shareholders.—*WILSON v. HADLEY, DOUGLAS v. HADLEY* (1879), 7 R. (Ct. of Sess.) 178.—**SCOT.**

b. —.]—A person alleging himself to be the principal ordinary creditor of a co. which had gone into voluntary liquidation, presented a petition for a supervision order, & for the appointment of an additional liquidator. The co. had, prior to the liquidation, disputed petitioner's claim against the co., & the co. & its liquidator in their answers did not admit the claim. If established petitioner's claim amounted to about four-fifths of the whole debts of the co. Resps. averred that, apart from uncalled capital, the assets would on realisation be sufficient to meet the entire claims against the co., including that of petitioner. Petitioner denied this. The ct. granted a supervision order, but refused an additional liquidator.—*MACQUISITEN v. ADAM SONS & CO., LTD.* (1896), 23 R. (Ct. of Sess.) 910; 33 Sc. L. R. 689; 4 S. L. T. 62.—**SCOT.**

c. —.]—After a petition by a creditor for the compulsory winding up of a co. had been presented, the co.

duly passed a resolution for a voluntary winding up subject to the supervision of the ct. & appointed a liquidator. Thereafter the co. & the liquidator presented a note craving the ct. to continue the liquidation under supervision & to confirm the appointment of the liquidator. A majority in value of the co.'s creditors lodged mandates in process concurring in the co.'s application. The petitioning creditor objected to the prayer of the co.'s note being granted, on the ground that the creditors lodging mandates were, or had been, officially connected with the co. & that it was inexpedient that the liquidator should be appointed on their nomination:—*Held*: as the majority of the creditors desired a voluntary liquidation subject to the supervision of the ct., & as it would not appear that any prejudice thereby would be caused to the co. or to the minority of the creditors, a supervision order should be pronounced & the appointment of the liquidator confirmed.—*ELSMIE & SON v. TOMATIN SPEY DISTILLERY, LTD.* (1906), 8 F. (Ct. of Sess.) 434; 43 Sc. L. R. 324; 13 S. L. T. 722.—**SCOT.**

d. —.]—After a co. had been placed in voluntary liquidation an application was made to supersede such liquidation by a compulsory liquidation under supervision of the ct. *Qu.*: whether the secured creditor's should be taken into consideration in ascertaining the views of the majority of creditors, but, *semble*, in the exercise of its discretion the ct. will not disregard the interests of such creditors.—*MYER v. AFRICAN STARCH CO.*, [1920] T. P. D. 202.—**S. AF.**

e. *Suspicious sale—Voluntary liquidator relative of directors.*—On Nov. 1, 1888, a coal co. went into voluntary liquidation, & on the same day the liquidator issued a circular to the shareholders intimating that it was proposed to form a new co., & to advertise the colliery for sale at the upset price of £3,000, & requesting answers before Nov. 12. On Nov. 3 one of the shareholders presented a petition to have the liquidation put under the supervision of the ct., & to have an additional liquidator appointed, stating, *inter alia*, that the coal was rising in value, & that the present was an unfavourable time to sell the colliery. On Nov. 12, no answers to the circular having been returned, the liquidator advertised the colliery for sale on Nov. 21 at the upset price of £3,000. The case was put out for hearing in the summer role of Nov. 20. On Nov. 19, a minute was lodged for petitioner & certain con-

curing shareholders stating that the upset price was too low, & that the notice of sale was too short, & that the liquidator was a relative of certain directors who had formed the design of starting a new co., & were anxious to acquire the colliery for an inadequate consideration. The ct. refused the supervision order.—*MITCHELL v. RAW-YARDS COAL CO.* (1888), 16 R. (Ct. of Sess.) 117; 26 Sc. L. R. 88.—**SCOT.**

f. —.]—*Person controlling voluntary liquidation also controlling new company about to purchase assets.*—On a petition of a shareholder of a co. in voluntary liquidation, the ct. ordered the liquidation to be continued subject to the supervision of the ct. on the ground that the persons controlling the liquidation had also control of a new co. to which it was proposed to sell the assets of the co. in liquidation.—*DONALD v. EGLINTON CHEMICAL CO.* (1900), 2 F. (Ct. of Sess.) 402; 37 Sc. L. R. 304; 7 S. L. T. 325.—**SCOT.**

g. *Petition for compulsory order pending—Resolution for voluntary winding up passed in meantime.*—A petition was presented for the winding up of a co. by the ct. & was duly intimated, served & advertised in terms of an interlocutor, by which also a provisional appointment of a liquidator was made. Thereafter at an extraordinary meeting of the co. an extraordinary resolution was passed for winding up the co. voluntarily & a liquidator was nominated. He thereupon presented a note in the process under the petition craving that the voluntary winding up of the co. might be continued subject to the supervision of the ct. & that the appointment of the provisional liquidator might be recalled & his own appointment as liquidator confirmed. The ct. granted the prayer of this note.—*AITKEN PETITIONERS* (1888), 26 Sc. L. R. 129.—**SCOT.**

h. *Action of reduction pending against voluntary winding-up resolution.*—*SOLANA MINING CO., LTD. & LIQUIDATOR v. CUNNINGHAM* (1891), 29 Sc. L. R. 290.—**SCOT.**

k. *Creditor not entitled as of right.*—A creditor of a public co. which is being wound up voluntarily is not entitled as matter of right to obtain a supervision order, but must show cause why such an order should be granted.—*CRAWFORD v. COWPER (A. R.), LTD.* (1902), 4 F. (Ct. of Sess.) 849.—**SCOT.**

l. *Honesty of directors in question.*—Where a private co. consisted of three shareholders & three directors, &

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Sub-sects. 2 & 3, A. (a), (b) & (c), B. & C.]**

apply to a small co., where there are no special difficulties in the way. Therefore, where a co. consisted of only eight shareholders, & had incurred no debts, the ct. refused to interfere with the voluntary winding up.—*Re SEA & RIVER MARINE INSURANCE CO.* (1866), L. R. 2 Eq. 545; 35 L. J. Ch. 820; 12 Jur. N. S. 779.

Annotations :—*N.F. Re Sanderson's Patents Assocn.* (1871), L. R. 12 Eq. 188. **Refd.** *Re Second Commercial Benefit Bldg. Soc.* (1879), 48 L. J. Ch. 753.

Compare Nos. 5303, 5319, *ante*.

7262. Insolvency of company.]—Where the affairs of a co. are in a hopeless state of insolvency, although the voluntary winding up thereof may be opposed by a section of the shareholders who would have wished a meeting of the shareholders to have been convened for the purpose of ascertaining the sense of the shareholders upon the subject, the ct. will continue the winding up under supervision, & appoint liquidators.—*Re PRINCE OF WALES SLATE QUARRY CO.* (1868), 18 L. T. 77.

7263. Expense of compulsory order.]—*Re NEW YORK EXCHANGE, LTD.*, No. 7199, *ante*.

SUB-SECT. 3.—LIQUIDATORS.

A. Appointment of Liquidator.

(a) In General.

7264. Where liquidator not appointed by company—Duty of court to appoint.]—A co. passed a resolution for a voluntary winding up, but did not appoint a liquidator. The winding up was ordered to be continued, but subject to the supervision of the ct., & a liquidator was appointed by the judge :—*Held* : (1) under these circumstances the ct. had the jurisdiction & the obligation to appoint a liquidator, & the appointment became a question for the discretion of the judge in the same manner as it would have been for his discretion if there had been a winding up by the ct. ; (2) as the shareholders had omitted to appoint a liquidator, they had lost the influence which the Act gives to their wishes in the case of a voluntary winding up ; & therefore, although there was a very large majority of shareholders in favour of removing the liquidator, the ct. refused to interfere with the discretion as exercised by the Master of the Rolls.

fifteen days prior to the passing of an extraordinary resolution placing the co. in voluntary liquidation, a bond was passed in favour of one of the shareholders, which was a partnership, & a partner was appointed a member of an advisory board to aid the liquidator in the winding up, in an application by a creditor in which the validity of the said bond was impeached :—*Held* : as the honesty of the directors was in question, the voluntary liquidation should be superseded by a winding up by the ct.—*Re UNION SOAP WORKS CO., LTD.*, *Ex p. ARKELL & DOUGLAS, LTD.*, [1914] T. P. D. 74.—**S. AF.**

**PART III. SECT. 38, SUB-SECT. 3.—
A. (a).**

m. Voluntary liquidator adopted—Automatically becomes officer of court.]—*BELHAVEN ENGINEERING & MOTORS, LTD.*, PETITIONERS (1912), 50 Sc. L. R. 19.—**SCOT.**

**PART III. SECT. 38, SUB-SECT. 3.—
A. (b).**

n. Bond of caution by approved guarantee company.]—In a note presented by the liquidator of a limited co. which was being wound up under

the supervision of the ct., the ct. having fixed the amount for which the liquidator should find caution, authorised the acceptance of a bond for the amount by a guarantee co. approved by the accountant of the ct.—*MCLEOD (LIQUIDATOR OF ALEXANDER FORRESTER, LTD.)*, [1907] S. C. 552; 44 Sc. L. R. 393; 14 S. L. T. 789.—**SCOT.**

**PART III. SECT. 38, SUB-SECT. 3.—
A. (c).**

o. To act conjointly with or in place of acting liquidator—Jurisdiction of court.]—The ct. has power to appoint one of the official liquidators of the ct. either to act conjointly with or in place of the liquidator already acting in a liquidation carried on under the supervision of the ct.—*Re FEDERAL BANK OF AUSTRALIA, LTD.* (1894), 20 V. L. R. 199.—**AUS.**

p. ———.]—The ct., while of consent directing the voluntary winding up of a co. to be continued, but subject to the ct.'s supervision, refused to appoint, on the motion of a section of the creditors, an accountant in London, as an additional liquidator to act along with, or in substitution for one or more of the liquidators in

But in order to afford protection to the shareholders, the ct., in continuing the liquidator's appointment, directed that he should be subject to the same restrictions as would apply to an official liquidator in a winding up by the ct.—*Re LONDON QUAYS & WAREHOUSES CO.* (1868), 3 Ch. App. 394; 18 L. T. 195; 16 W. R. 530; *sub nom. Re LONDON QUAYS & WAREHOUSES CO.*, *Ex p. HAIGH*, 37 L. J. Ch. 397, L. JJ.

Annotations :—*As to (2) Consd. Re Owen's Wheel & Tire Co.*, *Ex p. Brown*, *Ex p. Mitchell*, *Ex p. Northfield Co.*, *Ex p. Derbyshire Silkstone Coal Co.* (1873), 22 W. R. 151. **Apld.** *Re Watson*, [1891] 2 Ch. 55.

7265. Where appointed by company.]—*Re KENT, SUSSEX & GENERAL LAND SOCIETY, LTD.* (1894), 38 Sol. Jo. 724.

(b) Security.

7266. Security not required from voluntary liquidator—Whether required from substituted liquidator.]—In a voluntary winding up, where the shareholders have not required security from the liquidators appointed by them, the ct. will not require security from a substituted liquidator appointed by the ct. after a supervision order.—*Re EUROPEAN BANK*, *Ex p. PAUL* (1870), 19 W. R. 268.

7267. ——— Whether required from additional liquidator.]—In the case of a supervision order a creditors' representative, appointed to act as co-liquidator with a voluntary liquidator, was not required to give security, it appearing that no security had been required from the voluntary liquidator.—*Re ABERAVON TIN PLATE CO.* (1888), 57 L. J. Ch. 761; 59 L. T. 498.

7268. ———.]—*Re PRIVATE INVESTORS' ASSOCN.* (1892), *Palmer's Winding up Forms*, 2nd ed., p. 624.

7269. ———.]—Where a co. is being voluntarily wound up & the winding up is continued under a supervision order & the voluntary liquidator has not given security, if an additional liquidator is appointed by the ct. he will be required to give security.—*Re HAMPSHIRE LAND CO.*, [1894] 2 Ch. 632; 63 L. J. Ch. 677; 42 W. R. 601; 38 Sol. Jo. 492; 1 Mans. 428; 8 R. 578.

(c) Appointment of More than One Liquidator.

7270. Conduct of particular matter—May be given by court to particular liquidator.]—*Re MIDLAND LAND & INVESTMENT CORPN.*, [1887] W. N. 58.

Scotland already appointed by the shareholders of the co., & also to appoint a "creditors' representative" in accordance with the English practice under rule 61 of the rules framed by the Ct. of Ch. in terms of 1862 Act, s. 170.—*BRIGHTWEN & CO. v. CITY OF GLASGOW BANK* (1878), 6 R. (Ct. of Sess.) 244; 16 Sc. L. R. 131.—**SCOT.**

q. Two original liquidators—Another appointed on decease of one.]—*ECUADORIAN ASSOCN., LTD. (IN LIQUIDATION) v. FOX* (1906), 14 S. L. T. 47.—**SCOT.**

r. Where two liquidators to be appointed—Should not both be associated with company.]—Where it is desirable that one of the liquidators of a co. should be versed in the affairs of the co. it is not desirable that both liquidators, if more than one appointed, should be men who were clearly associated with the co. the ct. in making a supervision order appointed an independent chartered accountant to be liquidator jointly with the co.'s auditor & superseded the appointment of the managing director who had been appointed liquidator by a voluntary winding-up resolution.—*ARGYLLS, LTD. v. RITCHIE & WHITEMAN*, [1914] S. C. 915; 2 S. L. T. 136.—**SCOT.**

B. Powers and Duties of Liquidator.

See 1908 Act, s. 203.

7271. To realise assets.]—*Re* COLONIAL & GENERAL GAS CO., [1867] W. N. 42.

7272. ——A limited colliery co. resolved to enlarge its capital, & that 6d. per ton of coal should be retained to repay the persons advancing the additional capital, with powers of distress & entry; & in conformity therewith, by a deed to which the co. & the lenders were parties, in consideration of the advance, the co. covenanted to repay the sums advanced, & to retain 6d. per ton to pay for such advances, with power for a majority of the lenders irrevocably to appoint a receiver; also that if default should be made by the co. in retaining & paying the rate, or if a majority of the lenders should be of opinion that the co. could not in any half-year pay such rate, it should be lawful for such majority to enter & distrain upon the collieries & business of the co. The co. being in liquidation under supervision, the liquidators contracted to sell one of the collieries:—*Held*: the lenders were not necessary parties to the conveyance by the liquidators to the purchaser.—*Re* SANKEY BROOK COAL CO., *Re* RADLEY & BRAMALL (1871), L. R. 12 Eq. 472; 41 L. J. Ch. 119.

7273. To bring in accounts.]—A voluntary winding up, afterwards continued under supervision, was resolved upon by the A. co., in order to transfer its business to the B. co. The liquidator, after some disputes had occurred, agreed with the B. co. that each shareholder in the A. co. should receive paid-up shares in the B. co. corresponding to the paid-up shares held by him in the A. co., & that a sum of £6,239 should be paid by the liquidator to the B. co. W., a holder of twenty fully paid-up shares in the A. co., handed his certificate to the liquidator, & received from him twenty fully paid-up shares in the B. co., & at the same time bought from the liquidator some shares of the B. co. which had been put at the disposal of the liquidator for the benefit of the A. co. The liquidator contended that, according to the arrangement under which this transaction was done, W. was to cease to have any interest in the A. co. The whole transaction was made known to the other shareholders of the A. co. & formally approved of by them at a meeting held for the purpose:—*Held*: as the evidence failed to show that W. had agreed to give up his interest in the A. co., he was entitled to call for & have an account from the liquidator. *Semble*: had the agreement been that W. was to give up to the liquidator for the benefit of the other contributories all his interest in the A. co., such an agreement, if sanctioned by a general meeting, would not have been *ultra vires* on the part of the liquidator, even though it did not receive the sanction of the ct.

PART III. SECT. 38, SUB-SECT. 3.—B.

s. To sell growing timber — By private bargain.]—The liquidator of a co. in liquidation under supervision was authorised to sell growing timber belonging to the co. by private bargain.—*BRITISH CANADIAN LUMBERING & TIMBER CO., LTD.* (1886), 14 R. (Ct. of Sess.) 160; 24 Sc. L. R. 151.—**SCOT.**

t. To sue contributories for calls.]—Liquidators, in a voluntary winding up under a supervision order, in addition to their power to enforce calls by summons as in a compulsory winding up, may sue the contributories for the same.—*SOUTH CANTERBURY BUILDING SOCIETY (LIQUIDATORS) v. STUMBLES* (No. 2) (1894), 12 N. Z. L. R. 205.—**N.Z.**

a. To employ law agent.]—It is the duty of a liquidator to perform the business of the liquidation himself & only to employ a law agent in such matters as bring him into contact with the ct., in such matters as involved conveyancing, & in such other matters as justify him in obtaining legal advice for his guidance.—*REEKIE v. LEITH & EAST COAST SHIPPING CO. (LIQUIDATOR)*, [1911] S. C. 808.—**SCOT.**

PART III. SECT. 38, SUB-SECT. 3.—C.

7277 i. Jurisdiction of court.]—The ct. may, in making a supervision order, remove liquidators appointed by shareholders in the voluntary winding up, & appoint others selected by the creditors, disregarding official liquidators.—*Re* PROVINCIAL & SUBURBAN BANK, LTD. (1879), 5 V. L. R. 159.—**AUS.**

7277 ii. ——An order made by a judge of the Supreme Ct. for the winding up of the co. under the supervision of the ct. pursuant to Dominion Winding-up Act, & removing the liquidators appointed in a voluntary liquidation, was upheld as an order made in the discretion of the judge properly exercised.—*Re* HATZIO PRAIRIE CO., LTD. (1914), 26 W. L. R. 950.—**CAN.**

b. Grounds for — “Due cause” — Adverse interest to company.]—Where liquidators of a co. appointed under a voluntary winding up have claims adverse to the co., so that their duty conflicts with their interest, the ct. will

Liquidators ought, of all people, to be most ready to bring in & pass their accounts, & as a general rule no liquidator is justified in resisting a summons which merely calls on him to bring them in; it being the province of the ct. then to determine how far, & in what way, those accounts shall be gone into & verified.—*Re* ANGLO-ROMANO WATER CO., *WRIGHT'S CASE* (1870), 5 Ch. App. 437; 39 L. J. Ch. 771; 23 L. T. 130; 18 W. R. 777, L. J.

Annotation:—*Consd.* Cyclemakers' Co-op. Supply Co. v. Sims, [1903] 1 K. B. 477.

7274. To reconstruct.]—*Re* IMPERIAL MERCANTILE CREDIT ASSOCN., No. 7093, *ante*.

7275. To release debts.]—When a co. is being voluntarily wound up under the authority of the ct., the liquidators cannot recognise the release of one of its contributories, declared by a deed of the directors, without first obtaining the sanction of the ct.—*JAMES v. MAY* (1873), L. R. 6 H. L. 328; 42 L. J. Ch. 802, H. L.

Annotations:—*Consd.* *Heritage v. Paine* (1876), 2 Ch. D. 594. *Refd.* *Cyclemakers' Co-op. Supply Co. v. Sims*, [1903] 1 K. B. 477. *Mentd.* *Hardoon v. Belillos*, [1901] A. C. 118.

7276. To render half-yearly reports.]—*Re* STOCK & SHARE AUCTION & BANKING CO., *Re* SPIRAL WOOD CUTTING CO., *Re* HULL LAND & PROPERTY INVESTMENT CO., No. 6871, *ante*.

C. Removal and Appointment of New Liquidator.

7277. Jurisdiction of court.]—Where a voluntary winding up is continued under the supervision of the ct., the ct. has power to remove a liquidator previously appointed by the shareholders.—*Re* OLD WHEAL NEPTUNE MINING CO. (1864), 2 De G. J. & Sm. 348; 46 E. R. 410; *sub nom.* *Re* OLD WHEAL NEPTUNE MINING CO., LTD., *Ex p.* PULBROOK, *Ex p.* RAWLINGS, 10 L. T. 828; 13 W. R. 3, L. J.J.

Annotations:—*Appld.* *Re* Marseilles Extension Ry. & Land Co. (1867), L. R. 4 Eq. 692. *Refd.* *Re* British Nation Life Assce. Asscn. (1872), L. R. 14 Eq. 492.

7278. ——*Re* UNITED MERTHYR COLLIERIES CO., LTD., No. 6881, *ante*.

7279. Grounds for—Conducting to more effective winding up.]—When a co. is being wound up voluntarily under the supervision of the ct., the ct. has a discretionary power to remove the liquidators appointed by the co. without any proof of misconduct or unfitness on their part, if, having regard to all the circumstances, it is of opinion that their removal will conduce to the more efficient winding up of the co.—*Re* MARSEILLES EXTENSION RAILWAY & LAND CO. (1867), L. R. 4 Eq. 692; 17 L. T. 61; 15 W. R. 1167.

Annotation:—*Follid.* *Re* British Nation Life Assce. Asscn. (1872), L. R. 14 Eq. 492.

7280. — Absence of liquidator abroad.]—A co., being ordered to be wound up voluntarily under the supervision of the ct., & two liquidators

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appointed, one of them went abroad & delegated his office to other persons. On petition to remove him, & appoint another under 1862 Act, s. 141, an order was made.—*Re SCOTCH GRANITE CO.* (1867), 17 L. T. 533.

7281. — Wishes of shareholders.]—*Re LONDON QUAYS & WAREHOUSES CO.*, No. 7264, *ante*.

7282. — Wishes of creditors.]—*Semble*: when a supervision order has been made, the fact that all the creditors of a co. desire the removal of the liquidator appointed by the shareholders, where it appears that the debts of the co. will absorb the whole of its assets, is "due cause" for his removal within 1862 Act, s. 141.—*Re OXFORD BUILDING & INVESTMENT CO.* (1883), 49 L. T. 495. *Annotations:—**Apld. Re Rubber & Produce Investment Trust*, [1915] 1 Ch. 382. *Refd. Re Eyton* (1887), 57 L. J. Ch. 127.

7283. — Disputes between existing liquidators.]—The voluntary winding up of a co. was ordered to be continued under the supervision of the ct. in July, 1873. C. was appointed by the ct. in Aug. 1873, as an additional liquidator in conjunction with B., the original liquidator. C. quarrelled with B. as to what solrs. should be employed in the winding up, & matters having come to a dead-lock, the shareholders of the co. met & by resolution appointed a third liquidator in order to obtain a casting vote in the disputes. A notice of motion on behalf of C. for an injunction to restrain the third liquidator from acting, was served upon B. & the third liquidator, whereupon the third liquidator offered to submit to an injunction with costs up to that date. A summons was also taken out on behalf of certain shareholders, asking that the appointment of the third liquidator might be confirmed, either in conjunction with or in substitution for B. or C., or both of them:—*Held*: C. must be removed from being liquidator; the appointment of the third liquidator must be confirmed & he should act as liquidator in conjunction with B.—*Re MONTROTIER ASPHALTE & CEMENT CONCRETE PAVING CO., LTD.* (1874), 22 W. R. 895.

7284. Form of order.]—*Re PRIVATE INVESTORS' ASSOCN.* (1892), Palmer's Winding up Forms, 2nd ed. p. 624.

Annotation:—Folld. Re Hampshire Land Co., [1894] 2 Ch. 632.

—.]—*See, also*, No. 7269, *ante*.

SUB-SECT. 4.—PROCEDURE ON PETITION.

A. In General.

7285. Who may apply—Company creditor or contributory.]—An order continuing the voluntary winding up of a co. under the supervision of the ct. can only be obtained on a petition by the co., a creditor, or a contributory.

remove them after continuing the winding up under its supervision. The words "due cause shown" in Cos. Statute, 1864, s. 124, do not necessitate any misconduct on the part of the liquidator to be shown to warrant his removal.—*Re FEDERAL HAT CO., LTD.* (1887), 13 V. L. R. 88.—**AUS.**

c. — Liquidator shareholder & former director.]—The shareholders of a public co. whose liability was limited by shares unanimously resolved that the co. should be wound up voluntarily on the ground of its inability to carry on business owing to its liabilities, & appointed as liquidator one of their own number, who had formerly been a director. Subse-

quently a petition was presented for a supervision order, & for confirmation of the liquidator's appointment. A creditor of the co. lodged answers objecting to the confirmation of the liquidator's appointment, on the ground of his connection with the co. as a shareholder & a former director. It appeared that his shares were fully paid up, & also that all the creditors of the co., except the objector, had expressed their approval of the appointment, holding that "due cause" in the sense of 1862 Act, s. 141, had not been shown for the removal of the liquidator.—*M'KNIGHT & CO., LTD. v. MONTGOMERIE* (1892), 19 R. (Ct. of Sess.) 501; 29 Sc. L. R. 433.—**SCOT.**

A claim against a co. for unliquidated damages on account of alleged fraudulent representation does not constitute claimant a creditor, so as to entitle him to petition either for a winding up order or a supervision order; before he can so petition he must make himself a creditor by changing his claim for damages into a judgment.—*Re PEN-Y-VAN COLLIERY CO.* (1877), 6 Ch. D. 477; 46 L. J. Ch. 390.

Annotation:—Refd. Re Bank of South Australia, [1894] 3 Ch. 722.

7286. — Liquidator.]—A co. passed a resolution for voluntary winding up, & a liquidator was appointed. The voluntary liquidator now petitioned in the name of the co. for a supervision order, with the consent of certain creditors & contributories. The usual supervision order was made.—*Re HOOKER'S CREAM & MILK CO.* (1879), 23 Sol. Jo. 231.

7287. — —.]—During a voluntary winding up, the liquidator received notice of a claim by certain purchasers from the co. impeaching a sale made by the co. to them, but in respect of which no actual proceedings were yet taken. The liquidator presented a petition for a supervision order, which was opposed by the majority of shareholders:—*Held*: the claim being one arising outside the winding up, the provisions of 1862 Act, s. 138, applicable to a voluntary winding up did not meet the case, & the liquidator was therefore entitled to a supervision order, so as to obtain the benefit of the provisions of sect. 151.—*Re ZOEDONE CO., LTD.* (No. 1) (1883), 53 L. J. Ch. 465; 49 L. T. 654; 32 W. R. 312.

7288. Grounds for application—Unliquidated claim.]—When a co. is in voluntary liquidation a creditor with an unliquidated claim may obtain a supervision order for the purpose of having his claim estimated in chambers.—*Re YNISCEDWYN IRON CO., LTD.* (1870), 19 W. R. 194.

7289. — —.]—*Re PEN-Y-VAN COLLIERY CO.*, No. 7285, *ante*.

7290. — Debt incurred after winding up.]—*Re BANK OF SOUTH AUSTRALIA* (2), No. 6861, *ante*.

7291. Service—On company—Application by liquidator.]—After a voluntary winding up had commenced, a petition was presented by the liquidator & three of four directors for a winding up under the supervision of the ct. An order was obtained without any attempt to comply with General Ord., Nov. 1862, r. 3, as to service on the co. The registrar, under these circumstances, refused to draw up the order. The ct. ordered that upon production to the registrar of a consent brief for the other directors, & three or four of the principal shareholders, the order might be passed & entered as if the co. had been served.—*Re PANONIA LEATHER CLOTH CO., LTD.* (1865), 13 W. R. 1015, n.

Annotation:—Apprvd. & Folld. Re Inventors' Assocn. (1865), 12 L. T. 840.

7292. — On liquidator—Application by com-

d. — Must be tangible.]—In a petition for winding up a co. subject to the supervision of the ct. certain creditors appeared & craved the removal of the liquidators, already appointed by the ct., without showing any ground for the removal except that they would prefer some one else:—*Held*: the creditors must show a tangible ground for the removal of liquidators.—*LOCHFINE GUNPOWDER CO., LTD.'S CREDITORS* (1868), 5 Sc. L. R. 398.—**SCOT.**

PART III. SECT. 38, SUB-SECT. 4.—A.

7286 i. Who may apply—Voluntary liquidator.]—*Re MAITLAND COAL MINING CO.* (1892), 18 V. L. R. 722.—**AUS.**

pany.]—In 1890 (Winding-up) Rules, r. 35, the words “unless presented by the co.” govern the rule throughout, & not merely the first paragraph, & therefore, where a co. in course of voluntary winding up presents a petition for a supervision order, it is not necessary to serve the petition upon the liquidator, & the costs of doing so will not be allowed.—*Re CHESTER (EDWARD) & Co., LTD.* (1903), 52 W. R. 189; 48 Sol. Jo. 100.

7293. Evidence—Statutory affidavits.]—*Re ST. DAVID'S GOLD MINING CO., LTD., No. 7255, ante.*

7294. — As to assets & liabilities of company.]—*Re AVILL & SMART, LTD., MILWARD'S PETITION* (1892), 36 Sol. Jo. 593.

B. Advertisement of Petition.

7295. Advertisement of petition—Sufficiency of publication.]—*Re WORTHING ROYAL SEA HOUSE HOTEL CO., [1872] W. N. 74.*

7296. — Power of court to shorten period of advertisement.]—*Re MCLEAN & Co., [1881] W. N. 8.*

7297. — Omission to advertise in local papers.]—*Re NEW BRITISH IRON CO., LTD. (1892), 36 Sol. Jo. 610.*

7298. Re-advertisement of petition—Irregularity in resolution to wind up.]—*Re PATENT FLOOR-CLOTH CO., No. 7241, ante.*

7299. — Power to dispense with—Resolution to wind up passed after filing petition.]—Where a co. has passed resolutions to wind up voluntarily after the presentation of a petition for a compulsory winding up, but before the same comes on for hearing, & a supervision order is granted, the ct. has jurisdiction to dispense with the amendment of the petition by stating the resolutions to wind up voluntarily, & also with re-advertisements. The ct. will exercise this jurisdiction where the resolutions to wind up voluntarily appear in the affidavits filed in support of the petition.—*Re MARINE & GENERAL LAND, BUILDING & INVESTMENT CO., LTD. (1890), 62 L. T. 723.*

7300. —]—*Re UNITED BACON CURING CO., [1890] W. N. 74.*

*Annotation:—***Refd.** *Re National Whole Meal Bread & Biscuit Co., [1891] 2 Ch. 151.*

7301. — Supervision order asked for instead of compulsory order.]—*Re NEW ORIENTAL BANK CORPN., No. 7253, ante.*

7302. —]—*Re NEW MORGAN GOLD MINING CO., LTD. (1893), 37 Sol. Jo. 441.*

7303. —]—*Re CIVIL SERVICE BREWERY CO., LTD. (1893), 37 Sol. Jo. 194.*

7304. —]—*Re DOMBEY & SONS, LTD. (1895), 40 Sol. Jo. 85.*

7305. —]—Where a petition for a compulsory order has been advertised, & at the hearing petitioner asks for a supervision order only, the petition ought, as a general rule, to be re-advertised.—**PRACTICE NOTE, [1902] W. N. 77.**

7306. Advertisement of order—Order post-dated to allow requisite advertisement.]—*Re WARLAND COMMERCIAL CO., [1876] W. N. 279.*

C. Hearing of Petition.

(a) In General.

7307. Discretion of court.]—Resolutions for a voluntary winding up of a co. & the appointment

of liquidators were duly passed, & winding up proceeded with & almost completed. Shareholders then petitioned for a winding up either by or under the supervision of the ct., & for an order that directors, against whom breaches of trust & acts *ultra vires* were alleged, might be ordered to refund moneys misapplied by them:—**Held:** in determining whether an order for supervisory winding up should be made or not under 1862 Act, s. 147, the ct. will consider whether the facts presented show that, in consequence of such an order, provisions of the Act which could not be put in force under a mere voluntary winding up will become available. Allegations of breaches of trust & misfeasance on the part of the directors do not present such a case, inasmuch as they can be as effectually reached under sect. 138 of the Act, when a voluntary winding up has been resolved on.

When a voluntary winding up has been carried, the right to petition for a winding up by the ct. is given to creditors only under sect. 145, & not to contributories, who are bound by the resolutions which the co. has adopted.

A resolution for a voluntary winding up is, in the absence of proof to the contrary, to be taken as the expression of the wishes of the majority of the members within sect. 149.

Qu.: whether sect. 165 has any application at all to the case of a voluntary winding up; but if it has, there is still an absolute discretion in the ct. to put it in force or not.—**BANK OF GIBRALTAR & MALTA (1865), 1 Ch. App. 69; 35 L. J. Ch. 49; 13 L. T. 386; 11 Jur. N. S. 916; 14 W. R. 69, L. J.J.**

*Annotations:—***Consd.** *Re Royal Hotel Co. of Great Yarmouth (1867), L. R. 4 Eq. 244. Expld. & Apld.* *Re Brighton Brewery Co., Hunt's Case (1868), 37 L. J. Ch. 278. Consd.* *Re County Marine Insee., Rance's Case (1870), 6 Ch. App. 104. Refd.* *Re Beaujolais Wine Co. (1867), 3 Ch. App. 15; Re Irrigation Co. of France, Fox's Case (1870), 23 L. T. 453; Re Gold Co. (1879), 11 Ch. D. 701. Mentd.* *Re Imperial Bank of China, India, & Japan (1866), 1 Ch. App. 339; Re St. David's Gold Mining Co. (1866), 14 L. T. 539; Re Mercantile Trading Co., Stringer's Case (1869), 4 Ch. App. 475; Silber Light Co. v. Silber (1879), 12 Ch. D. 717; Cape Breton Co. v. Fenn (1881), 50 L. J. Ch. 321.*

7308. — Exercise by Court of Appeal.]—*Re BEAUJOLAIS WINE CO., No. 7256, ante.*

7309. —]—When after the presentation, but before the hearing of a petition for the compulsory winding up of a co., the shareholders resolve on a voluntary winding up, the ct. is not bound to make a compulsory order, but can, in the exercise of its discretion, order the voluntary winding up to be continued subject to the supervision of the ct.—*Re SIMON'S REEF CONSOLIDATED GOLD MINING CO. (1882), 31 W. R. 238.*

(b) Directions to Liquidator.

7310. What directions may be given—Limiting exercise of powers without sanction of committee of inspection or court.]—A co., being insolvent, & its capital being probably lost, passed resolutions for a voluntary winding up & the appointment of a liquidator. Its creditors also held a meeting & appointed five of their number to act generally in the creditors' interests. A petition being presented for the winding up of the co., & a large majority of the creditors appearing with the

PART III. SECT. 38, SUB-SECT. 4.—B.

e. Advertisement of petition—Five days before court rose for vacation—Order made on last day of sittings.]—A petition for continuing the voluntary winding up of a co. subject to the supervision of the ct. in order that the liquidator might be in a position to apply to the

ct. for orders to restrain the creditors from using diligence against the co. was presented by the directors of the co. with the liquidator's concurrence five days before the ct. rose for the Spring Vacation. Intimation was ordered to be made on the walls & in the minute book for two days, & advertisement in the *Edinburgh Gazette*,

Glasgow Herald, & *Dail Mail* newspapers, & on the last day of session an order was pronounced continuing the voluntary winding up subject to the ct.'s supervision, “with liberty to creditors & contributors to apply to the ct. by motion.”—**CHRISTIE, ETC. (1876), 3 R. (Ct. of Sess.) 623; 13 Sc. L. R. 399.—SCOT.**

Sect. 38.—Winding up under supervision of court :
Sub-sect. 4, C. (b), D. & E. ; sub-sects. 5 & 6.]

committee & asking for a supervision order & for the appointment of the committee to assist & control the liquidator, the ct. made a supervision order, & acting under the jurisdiction conferred by 1862 Act, s. 151, & General Ord., Nov. 1862, r. 61, & following the analogy furnished by 1890 (Winding-up) Act, s. 12 (1), (4), imposed restrictions on the liquidator in his conduct of the voluntary winding up, restricting him from carrying on the business of the co., from bringing or defending legal proceedings, etc., from selling the business of the co., & from employing a solr. or agent without the sanction of the committee or the ct.—*Re WATSON & SONS, LTD.*, [1891] 2 Ch. 55 ; 60 L. J. Ch. 473 ; 65 L. T. 170 ; 39 W. R. 633 ; 7 T. L. R. 356.

Annotation :—Mentd. *Re New Terras Tin Mining Co.* (1894), 70 L. T. 625.

7311. To render report—Where petition alleges fraud.]—*Re ELECTRIC CONSTRUCTION CORPN., LTD.* (1893), 37 Sol. Jo. 683.

7312. — To file monthly report of progress.]—*Re PRITCHARD, OFFAR & Co., LTD.* (1893), 38 Sol. Jo. 25.

7313. — To file quarterly report of progress.]—In all future cases in which an order is made continuing a voluntary winding up under the supervision of the ct., the liquidator will be required to report to the ct., on each quarter-day, instead of monthly as now.—*Re HORNER & Co., LTD.* (1898), 5 Mans. 355.

7314. — To report whether examination of officers desirable.]—*Re LAND SECURITIES Co., LTD.* (1894), 42 W. R. 624 ; 38 Sol. Jo. 459 ; 1 Mans. 369 ; 8 R. 713.

7315. — To apply for examination of officers of company.]—*Re ENGLISH & SCOTTISH MERCANTILE INVESTMENT, LTD.* (1894), 38 Sol. Jo. 696.

D. Evidence.

7316. That resolution for voluntary winding up properly passed.]—*Re BRYNMAWR COAL & IRON Co.*, [1877] W. N. 45.

Annotation :—Consd. *Young v. South African & Australian Exploration & Development Syndicate*, [1896] 2 Ch. 268.

7317. —.]—*Re SHEFFIELD MORTGAGE & ESTATES Co.*, [1887] W. N. 218.

E. Costs.

7318. General rule.]—A supervision order *ipso facto* stays all actions against the co. whereas in a voluntary winding up application has to be made to stay each action.

The ct. will not allow the costs of a petition for a supervision order unless it can be shown that there is some sufficient reason for making the order.—**PRACTICE NOTE**, [1901] W. N. 14.

7319. Of provisional liquidator.]—*Re GENERAL INTERNATIONAL AGENCY Co., LTD.*, No. 7244, *ante*.

7320. Of voluntary liquidator—Appearing separately from company.]—Where, after the commencement of a voluntary winding up of a co., a petition is presented for the continuance of the winding up under the supervision of the ct., the co. ought to appear by the liquidator, & only one set of costs

between them will be allowed if they appear separately.—*Re HALL (A. W.) & Co., LTD.* (1885), 53 L. T. 633 ; 34 W. R. 56 ; 2 T. L. R. 61.

7321. — Taxation.]—*Re WATERPROOF MATERIALS Co., LTD.* (1893), 37 Sol. Jo. 231.

7322. —.]—*Re CIVIL SERVICE BREWERY Co., LTD.* (1893), 37 Sol. Jo. 194.

7323. Of creditors—One set allowed.]—*Re OWEN'S PATENT WHEEL, TIRE & AXLE Co., LTD.*, No. 7248, *ante*.

7324. —.]—*Re CHEPSTOW BOBBIN MILLS Co.*, No. 7251, *ante*.

7325. — Where no contest anticipated.]—*Re NEW BRITISH IRON Co., LTD.* (1892), 36 Sol. Jo. 610.

SUB-SECT. 5.—COMMENCEMENT OF WINDING UP

7326. Presented before resolution to wind up—Commencement date of petition.]—When a petition was presented for winding up a co. & afterwards a special resolution was passed for a voluntary winding up & finally an order was made by the ct. on the petition for continuing the winding up, under the supervision of the ct.:—**Held**: the winding up commenced with the presentation of the petition, & consequently the co. were not bound to register a transfer sent to them the same day.—*Re HYDRAULIC TUBE-DRAWING & STEEL ORDNANCE Co., LTD.* (1868), 18 L. T. 205 ; 16 W. R. 572.

7327. — Commencement date of confirmatory resolution.]—Where the voluntary winding up of a co. is ordered to be continued subject to the supervision of the ct., the winding up must be deemed to commence from the date of the resolution confirming the winding up, & not from the presentation of the petition on which the order is founded.—*Re SMITH, KNIGHT & Co., WESTON'S CASE* (1868), 4 Ch. App. 20 ; 38 L. J. Ch. 49 ; 19 L. T. 337 ; 17 W. R. 62, L. JJ.

Annotations :—Apld. *Re Imperial Land Co. of Marseilles, Ex p. Colborne & Strawbridge* (1871), L. R. 11 Eq. 478. **Refd.** *Re McColla, Ex p. McLaren* (1881), 16 Ch. D. 534 ; *Re Taurine Co.* (1883), 25 Ch. D. 118 ; *Re British Burmah Land Co.* (1888), 4 T. L. R. 631 ; *Re London Dry Docks Corpn.* (1888), 39 Ch. D. 306 ; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373. **Mentd.** *Re National Provincial Marine Insee., Gilbert's Case* (1870), 5 Ch. App. 559 ; *Moffatt v. Farquhar* (1878), 7 Ch. D. 591 ; *Re Discoverers Finance Corpn., Lindlar's Case*, [1910] 1 Ch. 312.

7328. Commencement date of confirmatory resolution.]—The winding up of a co., which commenced by resolution duly confirmed, was being continued under the supervision of the ct.:—**Held**: the supervision order related back for all purposes to the confirmatory resolution.—*Re IMPERIAL LAND Co. OF MARSEILLES, Ex p. COLBORNE & STRAWBRIDGE* (1871), L. R. 11 Eq. 478 ; 24 L. T. 255.

Annotations :—Mentd. *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374 ; *Re Hercules Insee., Brunton's Claim* (1874), L. R. 19 Eq. 302 ; *Re Imperial Land Co. of Marseilles, Ex p. Larking* (1877), 4 Ch. D. 566 ; *British India Steam Navigation Co. v. I. R. Comrs.* (1881), 7 Q. B. D. 165 ; *Re Western Counties Steam Bakeries & Milling Co.* (1897), 45 W. R. 418.

7329. Appointment of provisional liquidator—Commencement date of appointment.]—A co. was

PART III. SECT. 38, SUB-SECT. 4.—E.

1. Of petition for compulsory order—Presented before petition for supervision order.]—On July 20, 1910, a co. passed a resolution that it be wound up, & on July 21 the co. presented a petition for a supervision

order. On July 19 a shareholder had presented a petition for the winding up by the ct. Both petitions having come before the ct. together, the ct. pronounced a supervision order, in the shareholders' petition, & found him entitled to expenses ; & in the co.'s

petition, found the co. entitled to expenses, limited to those which would have been incurred had the co. presented a note, as it should have done, in the shareholders' petition.—*SEA-FIELD PRESERVE Co. PETITIONERS*, [1911] S. C. 3.—**SCOT**.

in liquidation, a provisional liquidator having been appointed on the petition of the co., & a resolution having been subsequently passed for a voluntary winding up, which was continued under supervision:—*Held*: the winding up must be taken to have commenced at the date of the appointment of the provisional liquidator.—*Re COLONIAL TRUSTS CORPN., Ex p. BRADSHAW* (1879), 15 Ch. D. 465.

Annotations:—*Distd. Re Emperor Life Assce. Soc., Ex p. Halliday* (1885), 55 L. J. Ch. 3. *Refd. Re London Dry Docks Corpn., Ex p. St. Anne, Limehouse, Overseers* (1888), 1 Meg. 86. *Mentd. Re Horne & Hellard* (1885), 29 Ch. D. 736; *Wheatley v. Silkstone & Haigh Moor Coal Co.* (1885), 29 Ch. D. 715; *Re Pyle Works* (1890), 44 Ch. D. 534; *Driver v. Broad* (1893), 63 L. J. Q. B. 12; *Government Stock Investment & Other Securities Co. v. Manila Ry.*, [1895] 2 Ch. 551; *Re Streatham & General Estates Co.*, [1897] 1 Ch. 15; *Re Hubbard, Hubbard v. Hubbard* (1898), 68 L. J. Ch. 54; *Cox Moore v. Peruvian Corpn.*, [1908] 1 Ch. 604; *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979; *Re Cope, Marshall v. Cope*, [1914] 1 Ch. 800.

7330. Commencement date of confirmatory resolution.]—On the day of the presentation of a creditor's petition for the compulsory winding up of a co. a provisional liquidator was appointed under that petition. A meeting of the co. was afterwards held, at which a resolution was passed for a voluntary winding up, & at a subsequent meeting this resolution was confirmed. A supervision order was then made on the petition:—*Held*: the winding up must be treated as having commenced at the date of the confirmatory resolution, & not at the date of the appointment of a provisional liquidator.—*Re EMPEROR LIFE ASSURANCE SOCIETY* (1885), 31 Ch. D. 78; 53 L. T. 591; *sub nom. Re EMPEROR LIFE ASSURANCE SOCIETY, Ex p. HALLIDAY*, 55 L. J. Ch. 3; *sub nom. Re EMPEROR LIFE ASSURANCE SOCIETY, Ex p. HOLLIDAY*, 34 W. R. 118.

7331. ———.]—A petition was presented for the compulsory winding up of a co., & the same day a provisional liquidator was appointed. Afterwards the co. passed an extraordinary resolution to wind up voluntarily. When the petition came on to be heard, an order was made to continue the voluntary winding up subject to the supervision of the ct.:—*Held*: the winding up commenced from the passing of the resolution, not from the appointment of the provisional liquidator, & the ct. had no power to alter the date of commencement.—*Re WEST CUMBERLAND IRON & STEEL Co.* (1889), 40 Ch. D. 361; 58 L. J. Ch. 373; 60 L. T. 627; 37 W. R. 317.

SUB-SECT. 6.—PROOF OF DEBTS.

7332. Amount of proof—Debt estimated at date of proof.]—In proof under a voluntary winding up under supervision the person seeking to prove must allege & show himself to be a creditor at the date of his proof for the amount he seeks to recover; & the date of the order for continuing the voluntary winding up under supervision does not affect the question.—*Re ORIENTAL COMMERCIAL BANK, Ex p. MAXOUDOFF* (1868), L. R. 6 Eq. 582; 37 L. J. Ch. 471; 18 L. T. 450; 16 W. R. 784.

7333. ——— Redeemable annuity.]—A deed made in June, 1860, contained a proviso that an annuity granted by the B. association should be repurchaseable by the association, its successors & assigns for £6,500, on giving six months' notice

to the grantees, & paying, at the expiration of such notice or the time of repurchase, if subsequent thereto, all arrears & a proportionate part of any then current payment to the grantees. In Jan. 1872, the B. association passed a resolution for a voluntary winding up, which was continued under the supervision of the ct. No notice to repurchase the annuity had been given. Upon the application of the grantees to prove for £10,480, the present value of the annuity, without regard to the proviso for repurchase:—*Held*: the value of the annuity must be taken to be £6,500, as being the sum which the grantees bound themselves to accept on a repurchase, & which repurchase might have been effected at any time since the date of the grant without the consent of the trustees, & notwithstanding their dissent.—*Re BRITISH NATION LIFE ASSURANCE ASSOCN., Ex p. YOUNG & GARRATT* (1879), 40 L. T. 83; 27 W. R. 443, C. A.

7334. Secured creditor—Mortgage of charges—Proof for moneys received under charges—Right of creditor to retain security.]—A co. mortgaged certain charges entitling the mtgors. to receive certain quarterly payments, & covenanted to pay to the mtgees. on the same quarter days, in discharge of principal & interest under the mtge., sums equal to those payments; the understanding being that so long as the instalments were regularly paid to the mtgees. the mtgors. should continue to receive the payments under the charges. The payments due under the mtge. having fallen into arrear, & the mtgors. being in course of being wound up:—*Held*: the mtgee. was entitled to keep the mtge. as a security for future payments payable thereunder, & to prove in the winding up, as for money had & received, for any payments received by the mtgors. in respect of the mortgaged property after the instalments due under the mtge. ceased to be paid.—*Re LAND SECURITIES Co., LTD.* (1896), 44 W. R. 611; 12 T. L. R. 372; 40 Sol. Jo. 479, C. A.; *previous proceedings, sub nom. Re LANDS SECURITIES Co., Ex p. NORWICH LIFE INSURANCE SOCIETY* (1894), 1 Mans. 526.

7335. Interest on secured debt—Proof to date of commencement of winding up.]—Where a voluntary winding up had been ordered to be continued under supervision:—*Held*: debenture-holders were entitled to prove for interest only up to the date of the confirmatory resolution to wind up the co. voluntarily, without prejudice to their right to prove for further interest, if there should be found to be surplus assets, payment of interest made since the above date to be brought into account by the debenture-holders.—*Re IMPERIAL LAND Co. OF MARSEILLES, Ex p. DEBENTURE HOLDERS* (No. 2) (1870), 40 L. J. Ch. 343.

Annotation:—*Mentd. Re Hercules Insce., Brunton's Claim* (1874), 44 L. J. Ch. 450.

7336. Salary of managing director—Whether debt due in character of member.]—Salary due to a managing director of a co. of which the directors were obliged to be shareholders, & damages claimed by such director for breach of a contract to pay him such salary for a number of years, are not debts due to such director in his character of member of the co. within 1862 Act, s. 38 (7), & may be proved in competition with the outside creditors in the winding up of the co.—*Re DALE & PLANT, LTD.* (1889), 43 Ch. D. 255; 59 L. J. Ch. 180; 62 L. T. 215; 38 W. R. 409; 6 T. L. R. 123; *sub nom. Re DALE & PLANT, LTD., PLANT'S CASE*, 2 Meg. 25.

Annotation:—*Appld. Re New British Iron Co., Ex p. Beckwith*, [1898] 1 Ch. 324.

Sect. 38.—Winding up under supervision of court :

SUB-SECT. 7.—DISTRIBUTION OF ASSETS.

A. In General.

7337. Priorities—Costs of successful defendant in action by company.]—The liquidator of a co. having sued S. in respect of an alleged guarantee, failed to establish the claim. The costs of S. having been taxed, execution was issued against the co. The co. then claimed to set off the costs *pro tanto*, against the amount of some calls upon shares which were due from S. :—*Held*: the set-off could not be allowed, & the benefit of the execution was given to the attorneys of S.—*Re BANK OF HINDUSTAN, CHINA & JAPAN, Ex p. SMITH* (1867), 3 Ch. App. 125 ; 37 L. J. Ch. 185 ; 17 L. T. 339 ; 16 W. R. 170, L. J.

Annotations:—*Apld.* *Re Trent & Humber Ship-Building Co., Bailey & Leatham's Case* (1869), L. R. 8 Eq. 94. *Folld.* *Re Home Investment Soc.* (1880), 14 Ch. D. 167. *Consd.* *Re Dominion of Canada Plumbago Co.* (1884), 27 Ch. D. 33 ; *Re Blundell, Blundell v. Blundell* (1890), 59 L. J. Ch. 269 ; *Re London Metallurgical Co.*, [1895] 1 Ch. 758.

7338. — Costs of realising assets subject to security—Costs of preservation of property.]—In a suit, which was instituted by a mtgee. & debenture-holder of a co. which was being wound up voluntarily, under supervision, for the purpose of realising his security, an order was made directing the liquidator, who was appointed receiver in the cause, to carry on the business of the co., & that all proper & necessary expenses in reference thereto should be allowed to him. Subsequently, upon a sale of the mortgaged property, pltf. obtained an order for the satisfaction of his claim out of the purchase-money. The liquidator, however, insisted that his costs of realising the property, of preserving it, & his general costs of the liquidation, had priority to all other charges on the purchase-money, & took out a summons to effect that object:—*Held*: the liquidator's costs of realising the property were payable in priority to pltf.'s claim, but pltf. was entitled to be paid his debt in priority to the general costs of the liquidation ; the costs of preserving the property must be paid by the co., but in the event of the co.'s assets proving insufficient to meet such payment, the liquidator might indemnify himself for such deficiency out of the purchase money.—*Re ORIENTAL HOTELS Co., PERRY v. ORIENTAL HOTELS Co.* (1871), L. R. 12 Eq. 126 ; 40 L. J. Ch. 420 ; 24 L. T. 495 ; 19 W. R. 767.

Annotations:—*Consd.* *Lathom v. Greenwich Ferry Co.* (1895), 72 L. T. 790. *Refd.* *Re Pound & Hutchins* (1889), 42 Ch. D. 402 ; *Re Glasdir Copper Mines, English Electro-Metallurgical Co. v. Glasdir Copper Mines*, [1906] 1 Ch. 365. *Mentd.* *Tottenham v. Swansea Zinc Ore Co.* (1884), 53 L. J. Ch. 776.

7339. — Of Crown debts.]—In the administration of assets under a winding up [under supervision] the Crown is entitled to be paid in priority to the other creditors.—*Re HENLEY & Co.* (1878), 9 Ch. D. 469 ; 48 L. J. Ch. 147 ; 39 L. T. 53 ; 26 W. R. 885 ; 1 Tax Cas. 209, C. A.

Annotations:—*Expld. & Folld.* *Re Oriental Bank Corp'n.* (No. 2) (1885), 54 L. J. Ch. 327. *Apld.* *New South Wales Taxation Comrs. v. Palmer*, [1907] A. C. 179. *Distd.* *Re Webb* (Smithfield, London), [1922] 2 Ch. 369. *Re Henley & Co.* ceased to be directly applicable to the case of a winding up after Preferential Payments in Bankruptcy Act of 1888 (c. 62) (LORD STERNDALE, M.R.) ; *Food Controller v. Cork*, [1923] A. C. 647. The decision in *Re Henley & Co.* is no authority upon the present case, because the statute law is not now that which it was when that case was decided (LORD WRENBURY).

7340. — Liquidator's costs prior to supervision order—Costs of petitioning creditor—Liquidator's costs under supervision order.]—Where on the petition of a creditor an order is made continuing the voluntary winding up of a co. under the supervision of the ct., the costs of the liquidator incurred previously to the order are payable in priority to petitioner's costs of obtaining the order ; but those costs are payable in priority to the costs of the liquidator incurred subsequently to the order.—*Re NEW YORK EXCHANGE Co.*, [1893] 1 Ch. 371 ; 68 L. T. 247 ; 3 R. 144.

Annotation:—*Distd.* *Re Sanitary Burial Assocn.*, [1900] 2 Ch. 289.

7341. — Costs of liquidator's solicitor—Liquidator's remuneration.]—*Re SANITARY BURIAL ASSOCN.*, No. 6950, *ante*.

7342. — Rates.]—On Nov. 9, 1898, holders of debentures of a co. commenced an action to enforce their security, & a receiver was appointed. The debentures were a charge on the undertaking of the co. & its property present & future. On Dec. 1, 1898, the co. went into liquidation. In Jan. 1899, the receiver paid poor rate & district rate made in Oct. 1898, & water rate, which was payable according to meter. He claimed to be recouped these payments as preferential payments under Preferential Payments in Bankruptcy Act, 1888 (c. 62), & Amendment Act, 1897 (c. 19):—*Held*: the question being one between mtgor. & mtgee., not between successive occupiers, & the poor rate & district rate being due from the co. at the date of the commencement of the winding up, the liquidators must pay the whole amounts out of the general assets of the co. ; but the water rate was not due until the water was supplied, & must be apportioned, the liquidators paying only so much as was due at the date of the commencement of the winding up.—*Re MANNESMANN TUBE Co., LTD., VON SIEMENS v. MANNESMANN TUBE Co., LTD.*, [1901] 2 Ch. 93 ; 70 L. J. Ch. 565 ; 84 L. T. 579 ; 65 J. P. 377 ; 8 Mans. 300.

7343. Costs of action continued by leave of court.]—While a co. was a going concern it commenced an action against B. The co. afterwards passed an extraordinary resolution for a voluntary winding up, which was continued under the supervision of the ct. The liquidators obtained the leave of the winding-up ct. to continue the action, but B. obtained judgment in the action against the co. with costs:—*Held*: as the liquidators had adopted the action *ab initio*, B. was entitled to be paid all his costs in full, & not merely the costs as from the commencement of the winding up with liberty to prove for the costs previously incurred.—*Re LONDON DRAPERY STORES*, [1898] 2 Ch. 684 ; 67 L. J. Ch. 690 ; 79 L. T. 592 ; 47 W. R. 118 ; 15 T. L. R. 4 ; 5 Mans. 338.

Annotation:—*Apld.* *Re Wenborn*, [1905] 1 Ch.

B. Set-off.

7344. By contributory against calls—Sums due for services rendered in winding up.]—C. went to Australia as the agent of a co. under an agreement by which he was to act as their agent for five years, at a fixed yearly salary, & was also to receive a commission on remittances. He was required to take fifty shares in the co., & to pay up a portion of their value ; & it was agreed that the balance which might become due on account of calls should be placed to his debit in

PART III. SECT. 38, SUB-SECT. 7.—A.

g. Priorities—Order in which assets applied.]—ROBERTSON (LIQUIDATOR OF R. & W. FALCONER, LTD.) *v.* DRUMMOND (1908), 45 Sc. L. R. 678.—SCOT.

his accounts. After he had carried on business as such agent for little more than a year the co. was wound up under supervision. For three-quarters of a year more he was employed by the liquidators in the winding up, & was then discharged:—*Held*: C. was entitled to his salary for five years, & having regard to the fact that liquidators were indebted to him for his services rendered in the winding up, in a sum nearly as large as the amount due from him in respect of calls upon his shares, they would not be allowed to enforce against him any claim for such calls until the amount due from them to him had been ascertained.—*Re LONDON & COLONIAL CO., Ex p. CLARK* (1869), L. R. 7 Eq. 550; 38 L. J. Ch. 562; 20 L. T. 774.

Annotation:—*Mentd. Re London & Scottish Bank, Ex p. Logan* (1870), L. R. 9 Eq. 149.

7345. —.]—In 1873 a call to the amount of £432 was made on a shareholder of a limited co. to whom the co. was indebted in £196. No part of the call was paid, & in 1874 the co. was wound up under supervision:—*Held*: the debt could not be set off against the call.—*Re STRANTON IRON & STEEL CO., BARNETT'S CASE* (1875), L. R. 19 Eq. 449; 44 L. J. Ch. 233; 23 W. R. 378.

Annotation:—*Apld. Re West Hartlepool Iron Co., Gunn's Case* (1878), 38 L. T. 139.

7346. —.]—A mere agreement with a shareholder to set off the amount of any calls which might at any time be made, against debts owing to him by the co., will not relieve the shareholder from being put on the list of contributories in respect of calls made before the winding up; but if it can be shown that before the winding up, accounts have been stated between the parties in which calls made have been treated as paid by their having been set off against the co.'s debt to the shareholder, 1867 Act, s. 25, has no application, because such stated accounts would support a plea, not of accord & satisfaction, but of payment.—*Re BRANKSEA ISLAND CO., LTD.* (1888), 4 T. L. R. 449; *sub nom. Re BRANKSEA ISLAND CO., Ex p. BENTINCK* (No. 1), 1 Meg. 12, C. A.

7347. —.]—Where the liquidator of a limited co. in liquidation under a supervision order has obtained judgment in an action against a shareholder for unpaid calls, the judgment debtor cannot, upon an application by him to set aside a bkpey. notice for payment of the judgment debt, claim to set off a debt alleged to have become due to him from the co. prior to the liquidation; for, until after a receiving order has been made against him, he cannot set off against his unpaid calls the debt due to him from the co.—*Re G. E. B.*, [1903] 2 K. B. 340; 72 L. J. K. B. 712; 89 L. T. 245; 10 Mans. 243, C. A.

Annotations:—*Consd. Re A Debtor, Ex p. Peak Hill Goldfield*, [1909] 1 K. B. 430. *Mentd. Lister v. Hooson* (1907), 77 L. J. K. B. 161; *Re Debtor* (No. 13 of 1922), *Ex p. Debtor*, [1923] B. & C. R. 54.

7348. Of mutual claims—Debt due before winding up.—Where a limited co., being solvent, passes a resolution to wind up voluntarily, & an order is afterwards made to continue the winding up under the supervision of the ct., in an action afterwards brought by the liquidator in the name of the co. against a member, a debt due from the co. to deft. previous to the resolution cannot be

set off against a debt incurred by deft. to the co. after the resolution.—*SANKEY BROOK COAL CO., LTD. v. MARSH* (1871), L. R. 6 Exch. 185; 40 L. J. Ex. 125; 24 L. T. 479; 19 W. R. 1012.

Annotations:—*Consd. Re G. E. B.*, [1903] 2 K. B. 340. *Refd. Mersey Steel Iron Co. v. Naylor* (1882), 9 Q. B. D. 648. *Mentd. Wiltshire Iron Co. v. G. W. Ry.* (1871), L. R. 6 Q. B. 776.

7349. —.]—*Re KIDSGROVE STEEL, IRON & COAL CO., LTD.* (1894), 38 Sol. Jo. 252.

SUB-SECT. 8.—APPLICATIONS TO COURT.

7350. By parties dissatisfied with proceeding—How made—By summons in chambers.—Where an order has been for the voluntary winding up of a co., under the supervision of the ct., the ct. has power, if it thinks fit, to discharge such order, & make one to wind up the co. compulsorily.

Where parties are dissatisfied with the course of proceedings taken in chambers, in obedience to an order for the voluntary winding up of a co. under the supervision of the ct., the proper step for such parties to take is to proceed by way of summons in chambers, to regulate the proceedings there, & not to present a petition for a compulsory winding-up order.—*Re LONDON & MEDITERRANEAN BANK, LTD.* (1866), 15 L. T. 153; 15 W. R. 33.

7351. — — — **By order on petition.**—Where a voluntary winding up under supervision had been ordered instead of a compulsory one, through the forbearance of creditors:—*Held*: a creditor objecting to proceedings in the winding up need not apply at chambers at his own cost, but might obtain an order on petition.—*Re ALDBOROUGH HOTEL CO.* (1867), 15 W. R. 390.

7352. By creditor for inspection of documents.—*Re IMPERIAL LAND CO. OF MARSEILLES*, [1882] W. N. 173.

7353. To Court of Appeal—Extending time for appeal.—The shareholders in a co. passed an extraordinary resolution to wind up the co. voluntarily, but the resolution was void, the majority of members who voted not being entitled to vote. A creditor filed a petition in the Ch. Ct. of the Duchy of Lancaster for a supervision order or for a compulsory winding-up order, & as the ct. & petitioner were ignorant of the fact that the resolution was invalid, a supervision order was made. Five months afterwards petitioner discovered the invalidity of the resolution, & then moved before the Vice-Chancellor that the supervision order might be discharged, & a compulsory winding-up order made. This motion having been refused on the ground of want of jurisdiction to rehear the petition, petitioner appealed from the refusal of the motion, & also applied to the Ct. of Appeal for leave to appeal against the original order notwithstanding the lapse of time. The application for leave to appeal was opposed by the exors. of a previous member who had transferred their testator's shares to escape liability less than twelve months before the presenting of the original petition, but more than twelve months before the case came before the Ct. of Appeal on the ground that if

PART III. SECT. 38, SUB-SECT. 8.

h. By liquidator—Against contributories—Should be by motion.—Where a supervision order has been made in respect of voluntary winding-up proceedings, the procedure is the same as in a compulsory winding-up, & proceedings between the liquidator & those alleged to be contributories

should be by motion.—*SOUTH CANTERBURY BUILDING SOCIETY (LIQUIDATORS) v. STUMBLES* (1894), 12 N. Z. L. R. 58.—N. Z.

k. By committee of shareholders—Against directors for alleged misfeasance—Use of names of liquidator & company allowed.—When a co. is in voluntary liquidation subject to the supervision

of the ct., & proceedings are instituted by a committee of shareholders against the directors for alleged misfeasance & breach of trust, the ct. has jurisdiction to order that plths. may use the names of the co. & the liquidator in such proceedings.—*Re DOMINION PORTLAND CEMENT CO., LTD.* (No. 2), [1919] N. Z. L. R. 478.—N. Z.

Sect. 38.—Winding up under supervision of court : Sub-sects. 8, 9 & 10. Sect. 39: Sub-sect. 1, A.]

an order was now made on the original petition they would be made liable under 1862 Act, s. 38 :—*Held* : leave to appeal, notwithstanding the lapse of time, ought to be given, the mistake as to the validity of the resolution forming a special ground for the application, and resps. having no equity to resist it.—*Re MANCHESTER ECONOMIC BUILDING SOCIETY* (1883), 24 Ch. D. 488 ; 53 L. J. Ch. 115 ; 49 L. T. 793 ; 32 W. R. 325, C. A.

Annotations :—*Consd.* *Reddaway v. Irwell & Eastern Rubber Co.* (1906), 24 R. P. C. 93 ; *Re Coles & Ravenshear*, [1907] 1 K. B. 1. *Apld.* *Re Wigfull's Trade Mks.*, [1919] 1 Ch. 52. *Refd.* *Re Bradshaw, Bradshaw v. Bradshaw*, [1906] W. N. 86 ; *Nicholson v. Piper* (1907), 24 T. L. R. 16.

SUB-SECT. 9.—RESTRAINT OF PROCEEDINGS.

7354. Effect of supervision order.]—PRACTICE NOTE, No. 7318, ante.

7355. Winding-up proceedings—Opposition of one shareholder.]—After an order had been made to continue a voluntary winding up under supervision, the shareholders in general meeting resolved that the further progress of the liquidation should be put an end to, with a view to the continuance of the co. & resumption of its business. A petition praying for an order accordingly, was presented by the chairman of directors, stating that all debts had been paid, & that there was money in the hands of the liquidators sufficient to meet arrears of current expenses. The ct. made an order as prayed. The prayer of the petition being resisted by one person only, the holder of not a large number of shares, upon which nothing was due, but upon which calls might be made, who insisted upon his right to have a sale, the ct. gave the shareholder an option, to be exercised within fourteen days, of retiring from the co., & in case of his electing to retire, directed an inquiry at chambers as to the value of his interest in the co.'s property ; such amount to be paid by petitioner.—*Re SOUTH BARRULE SLATE QUARRY CO.* (1869), L. R. 8 Eq. 688.

Annotations :—*Consd.* *Re Irrigation Co. of France, Fox's Case* (1870), 23 L. T. 453. *Folld.* *Re S.S. Chigwell* (1888), 4 T. L. R. 308.

7356. Action against company.]—A vendor's suit was instituted against a co. for specific performance, & an injunction obtained restraining an action to recover the deposit-money paid on the contract. Interrogatories were filed, but before the answer was put in deft. co. was in course of voluntary winding up under supervision. On a summons for leave to continue the suit,

notwithstanding the winding up, the ct. gave leave to enforce an answer, but directed that no further proceedings should be taken without leave of the ct.—*THAMES PLATE GLASS CO. v. LAND & SEA TELEGRAPH CO.* (1870), L. R. 11 Eq. 248 ; 40 L. J. Ch. 165 ; 19 W. R. 303 ; *subsequent proceedings* (1871), 6 Ch. App. 643 ; 24 L. T. 227, L. JJ.

7357. — When court will allow continuance.]—*Re PEACE (JOSEPH) & Co.*, [1873] W. N. 127.

7358. — Outside jurisdiction.]—A co. having its registered office in England, but having also assets in Scotland, passed a resolution for a voluntary winding up. Creditors in Scotland having commenced actions against the co., a petition was presented by certain others of the English creditors, asking that the winding up might be continued under the supervision of the ct. ; &, upon such petition coming on to be heard an application was made *ex p.* that the actions commenced by the creditors might be restrained. The ct. granted the petition, & also made an order restraining the actions in question.—*Re MIDDLESBROUGH FIREBRICK CO., LTD.* (1885), 52 L. T. 98 ; 33 W. R. 339.

Annotation :—*Consd.* *Re Thurso New Gas Co.* (1889), 61 L. T. 357.

7359. — —.]—*Re THURSO NEW GAS CO.*, No. 6952, *ante*.

7360. — —.]—Persons claiming to be creditors of an English co. commenced an action against the co. in Scotland, & attached or arrested assets of the co. in Scotland under a process of the Scottish cts., by which, without establishing their debt by a judgment of the Ct., they became, according to Scottish law, secured creditors of the co., subject to their obtaining a decree in the Scottish cts. establishing their debt. After the arrestments had been executed, the co. passed a resolution for a voluntary liquidation, which was continued under the supervision of the ct. :—*Held* : the creditors not being able to enforce their security by proceedings in the winding up, the action & arrestments in the Scottish ct. ought to be allowed to continue.—*Re WEST CUMBERLAND IRON & STEEL CO.*, [1893] 1 Ch. 713 ; 62 L. J. Ch. 367 ; 68 L. T. 751 ; 41 W. R. 265 ; 37 Sol. Jo. 213 ; 3 R. 260.

Annotation :—*Refd.* *Re Derwent Rolling Mills Co., York City & County Banking Co. v. Derwent Rolling Mills Co.* (1901), 21 T. L. R. 81.

7361. Of execution—Costs of action by liquidator.]—Where an action brought by liquidators appointed in a voluntary winding up under supervision fails, execution by deft. for costs will not be restrained. 1862 Act, s. 163, is qualified

PART III. SECT. 38, SUB-SECT. 9.

1. Jurisdiction—To restrain action in foreign court—To enforce lien—By British subjects.]—Petitioners in a winding up under supervision, instituted proceedings in the Superior Ct. of Massachusetts to attach certain sums, representing cargo freight, then in the hands of a third party in Boston, & the property of the co. for the purpose of acquiring, under the law of Massachusetts a lien on the freight, which would give petitioners priority over the other creditors. Petitioners were British subjects, carrying on business in London, & also, up to a short time before the matter came before the ct., in Ireland :—*Held* : they should be restrained from further prosecuting the proceedings in the American Ct.—*Re BELFAST SHIP-OWNERS' CO.*, [1894] 1 I. R. 321.—*IR.*

*partners of firm resident in Scotland.]—*In a liquidation

of a co. under the supervision of the ct., the liquidators applied to the ct. under Cos. Act, 1862, s. 27, for an order to restrain two persons, W. & H., from carrying on certain proceedings against the co., instituted by them in the Supreme Ct. of San Francisco. The proceedings sought to be restrained were an action raised by F. B. & Co., a co-partnership of which W. & H. were the sole partners, for payment of a bill of exchange, & certain steps of diligence in connection with that action. The partners of F. B. & Co. were on the co.'s register of shareholders & before the date of the liquidation that co-partnership had raised an action in the Ct. of Session against the co. for payment of a sum of £3,000. With that action had been co-joined another at the co.'s instance for suspension of a threatened charge upon a bill for £3,000. F. B. & Co. had presented a note in the liquidation for leave to proceed with these actions :—*Held* :

the ct. had jurisdiction to restrain resps. from carrying on the proceedings in San Francisco, & an order was made accordingly.—*PACIFIC COAST MINING CO., LTD. v. WALKER* (1886), 13 R. (Ct. of Sess.) 816 ; 23 Sc. L. R. 556.—*SCOT.*

*bank in London.]—*The liquidators of a Scottish co., which was being wound up under the supervision of the ct. on June 26, 1885, advertised for claims, & the M. Banking Co. of London on July 2, 1885, sent to the liquidators a document on these terms :—“ Take notice, that the M. Banking Co. of London claim to be creditors of the co. in liquidation for the sum of £14,600 & interest, & they so claim in respect of 73 bonds, mortgage-bonds or debentures of the said co., etc., & further take notice that these presents are without prejudice to the rights of the M. Banking Co. of London as owners of the bonds &

by sect. 87.—*Re* BANK OF HINDUSTAN, CHINA & JAPAN, *Ex p.* LEVICK (1867), L. R. 5 Eq. 69; 17 L. T. 237; 16 W. R. 102.

Annotation:—*Consd.* *Re* Poole Firebrick & Blue Clay Co. (1873), L. R. 17 Eq. 268.

7362. — Jurisdiction of vacation judge.]—*Re* SHINGLETON ICE CO., LTD., *BETT v.* SHINGLETON ICE CO., LTD. (1887), 31 Sol. Jo. 705.

7363. Of distress for rates.]—A co. was being wound up under supervision, the liquidation commencing in 1882. The liquidator did not keep the concern in full work, but remained in occupation of the business premises for the purpose of carrying out some pending contracts, finishing a quantity of unfinished articles, & storing & keeping in order a quantity of completed articles with a view to selling them. In Mar. 1883, a rating authority made a rate for 1883 on all property within the district. The liquidator allowed the time for appealing against the assessment to go by. The rating authority applied to the ct. for payment of the rate in full:—*Held*: as the liquidator had from the commencement of the winding up occupied the property for the purposes of the co., & with a view to acquiring gain or avoiding loss to the co., the rate ought to be paid in full. Where the liquidator, being in possession, does not appeal against the assessment, the ct. will not refuse to order payment of the rate in full on the ground of its being too high, except perhaps in extreme cases.—*Re* NATIONAL ARMS & AMMUNITION CO. (1885), 28 Ch. D. 474; 54 L. J. Ch. 673; 33 W. R. 585; 1 T. L. R. 240; 49 J. P. Jo. 90; *sub nom.* *Re* NATIONAL ARMS & AMMUNITION CO., LTD., *Ex p.* BIRMINGHAM CORPN., 52 L. T. 237, C. A.

Annotations:—*Refd.* *Re* Blazer Fire Lighter, [1895] 1 Ch. 402; *Re* Levi, [1919] 1 Ch. 416.

7364. Subject to payment by liquidator.]—A petition was presented for winding up a co. in Mar. 1888, & a provisional liquidator was appointed, with power to carry on the business of the co. No compulsory order was made on this petition, but a resolution was duly passed on June 22, 1888, for the voluntary winding up of the co., & on the following day an order was made continuing the winding up under the supervision of the ct. Rates were levied on the property of the co. between the time of possession being taken by the provisional liquidator & the supervision order, & these rates not having been paid, the overseers, knowing the provisional liquidator was in possession, & without obtaining the leave of the ct., proceeded to levy a distress for the sum a few days before the supervision order. On the application of the liquidator, an injunction was granted restraining the overseers from proceeding to enforce their distress by sale:—*Held*: an injunction ought only to have been granted on the terms of the liquidator paying the amount of the rates for which the distress was put in; the liquidation commenced on the date of the resolution for

voluntary winding up, & previously to that date, if there had been no provisional liquidator, the overseers could have distrained, but, knowing of the appointment of the provisional liquidator, they ought not to have distrained without asking the leave of the ct., which would probably have been given, but their omission to obtain the leave of the ct. did not deprive them of their right to the rates.—*Re* LONDON DRY DOCKS CORPN. (1888), 39 Ch. D. 306; 58 L. J. Ch. 33; 59 L. T. 763; 37 W. R. 18; *sub nom.* *Re* DRY DOCKS CORPN. OF LONDON, *Ex p.* ST. ANNE, LIMEHOUSE OVERSEERS, 4 T. L. R. 737; 1 Meg. 86, C. A.

Annotation:—*Consd.* *Re* Marriage, Neave, North of England Trustee, Debenture & Assets Corp'n. v. Marriage, Neave (1896), 75 L. T. 169.

SUB-SECT. 10.—SUPERSEDING ORDER.

7365. Jurisdiction of court to make compulsory order.]—*Re* LONDON & MEDITERRANEAN BANK, LTD., No. 7350, *ante*.

7366. — Powers of voluntary liquidator insufficient.]—*Re* 1897 JUBILEE SITES SYNDICATE, No. 7232, *ante*.

7367. Delay by voluntary liquidator in distribution of assets.]—A co. passed a resolution for a voluntary winding up under supervision. The liquidator called up all the remaining unpaid capital but declared no dividend, the only excuse given by him being that the co. was prosecuting a claim against their manager. On a petition by creditors, whose debt amounted to three-fourths of the whole debts, & which had remained unpaid for a year & a half:—*Held*: they were entitled to an order for a compulsory winding up.—*Re* MANCHESTER QUEENSLAND COTTON CO. (1867), 16 L. T. 583; *sub nom.* *Re* MANCHESTER QUEENSLAND COTTON CO., *Ex p.* BANK OF NEW SOUTH WALES, 15 W. R. 1070.

SECT. 39.—ARRANGEMENTS AND COMPROMISES.

SUB-SECT. 1.—SCHEMES OF ARRANGEMENT.

A. In General.

7368. What amounts to—Sale of assets & undertaking to new company—No provision for dissentient shareholders.]—A co. proposed to sell its assets & undertaking to a new co. to be formed for that purpose & to compel shareholders to accept shares in the new co. instead of their shares in the old co. The creditors were to be taken over by the new co. There was no provision for preserving the rights of dissentient shareholders. On a petition for the sanction of the ct.:—*Held*: the scheme was not a compromise or arrangement which could be sanctioned under 1908 Act, s. 120.—*Re* GENERAL MOTOR CAB CO., LTD., [1913]

their recourse in respect of the same in United States of America or elsewhere." In subsequent correspondence the M. Banking Co. & the liquidators described this as a claim & the former asked & the latter promised deliverance upon it.

The liquidators applied to the ct. by a note to determine the question touching the indebtedness of the co. or the disputed debentures & in the meantime to stay certain proceedings in the New York Supreme Ct. against a co. in New York. The M. Banking Co. of London pleaded no jurisdiction & stated that they had not made & did not make any claim in the liquidation:—*Held*: the notices of resp. of

July 22, were a claim in liquidation & in respect thereof sustained their jurisdiction & interdicted the M. Banking Co. *ad interim* from proceeding further with their suit in the New York Cts.—*CALIFORNIA REDWOOD CO. (IN LIQUIDATION) v. MERCHANT BANKING CO. OF LONDON* (1886), 13 R. (Ct. of Sess.) 1202; 23 Sc. L. R. 836.—SCOT.

PART III. SECT. 39, SUB-SECT. 1.—A.

*o. What amounts to—Between company & creditors—That voluntary winding up shall be on footing of a winding up under supervision—Ineffectual.]—*An arrangement between a co.

in the course of being wound up voluntarily & three-fourths of its creditors under Cos. Act, 1862 (c. 89), s. 136, bearing "that the rights of all parties under the voluntary liquidation should be settled on the same footing as if there had been a winding up by or subject to the supervision of the ct." is not competent or effectual, & therefore, in conformity, that the winding up being voluntary, a petition by the liquidators to restrain the diligence of a creditor falls to be refused.—*CLARK v. WILSON* (1878), 5 R. (Ct. of Sess.) 867; 15 Sc. L. R. 600.—SCOT.

p. Proposal of scheme of arrangement by shareholders—Conveyance of

39.—*Arrangements and compromises: Subsect. 1, A. & B.*

1 Ch. 377; 81 L. J. Ch. 505; 106 L. T. 709; 28 T. L. R. 352; 19 Mans. 272, C. A.

Annotations:—Distd. Re Sandwell Park Colliery Co., [1914] 1 Ch. 589; Re Guardian Assce., [1917] 1 Ch. 431. Consd. Re Anglo-Continental Supply Co., [1922] 2 Ch. 723.

7369. ———.]—If proper provision is made for dissentient members, a reconstruction of an existing co. by winding up & sale of the entire assets for shares in a new co. may be effected under 1908 Act, s. 120.—*Re SANDWELL PARK COLLIERY CO., LTD., [1914] 1 Ch. 589; 83 L. J. Ch. 549; 110 L. T. 706; 58 Sol. Jo. 432; 21 Mans. 212. Annotations:—Consd. Re Anglo-Continental Supply Co., [1922] 2 Ch. 723. Rejd. Re Guardian Assce., [1917] 1 Ch. 431.*

7370. ——— *Amalgamation.*]—An assurance co. presented a petition under 1908 Act, s. 120, for the sanction of the ct. to a proposed arrangement for the fusion of the co.'s interests with those of a marine insurance co., & for the subdivision of its shares in order to carry out the arrangement. The scheme involved that each of the petitioning co.'s shareholders should contribute a portion of his holding in the co. to be transferred to the marine insurance co. & its shareholders, & it had been approved by the requisite majority of the shareholders in general meeting:—*Held:* the scheme, though not a "compromise" was an "arrangement" within the sect., & there was no ground for limiting the meaning of the word "arrangement" to something analogous to a compromise.—*Re GUARDIAN ASSURANCE CO., [1917] 1 Ch. 431; 86 L. J. Ch. 214; 116 L. T. 193; 33 T. L. R. 169; 61 Sol. Jo. 232; [1917] H. B. R. 113, C. A.*

Annotations:—Folld. Re Barclay's Bank (1918), 62 Sol. Jo. 752. Consd. Re Anglo-Continental Supply Co., [1922] 2 Ch. 723.

7371. ———.]—Two banks decided to amalgamate, & the purchasing bank agreed to transfer certain of its "B" share capital as part of the purchase price. The "B" capital had not been issued at par, & the liability for calls was not the same on all the shares that had been issued. A scheme was devised with the object of equalising the liability in the event of calls, & placing the old & the new "B" shareholders on the same footing:—*Held:* such a scheme between a bank & its members was an "arrangement" within the meaning of 1908 Act, s. 120, & the ct. had juris-

proposal to trustee.]—If the shareholders desire to propose a composition, extension or scheme of arrangement, which they have power to do, the method of conveying the proposal to the trustee must be such as the charter & bye-laws or the shareholders themselves, acting within the charter & bye-laws, may provide.—*Re CANADIAN CEREAL & FLOUR MILLS CO. (1921), 67 D. L. R. 234; 51 O. L. R. 316.—CAN.*

q. From what date binding.]—When Indian Cos. Act, 1913, s. 153, a compromise or arrangement between a co. & its creditors has been agreed by a three-fourths majority & has been sanctioned by the ct., it is binding upon all the creditors from the date at which it was agreed.—*RAGHUBAR DAYAL v. BANK OF UPPER INDIA, LTD. (1919), L. R. 46; Ind. App. 135.—IND.*

r. Proposed "between company & its members"—*Petition of directors for sanction.*]—A petition was presented by a co. for authority under Cos. (Consolidation) Act, 1908 (c. 69), s. 120, to call meetings to consider & if so resolved, approve of a scheme whereby the co. would be absorbed by another co. A motion was made in terms of the prayer of the petition &

for an order for meetings to be convened of the members of the co. & of particular different classes of shareholders. Objection was taken on behalf of certain shareholders to the order for meetings on the ground that the petition was the petition of the directors & not of the co. & not having been proposed "between the co. & its members," was incompetent under sect. 120:—*Held:* it was necessary that an opportunity should be given for any one who conceived that the petition was incompetent & did not fall within the Act, to be allowed to say so & appointed the petition to be intimated on the walls & in the minute book in common form.—*DAILUAINE-TALISKER DISTILLERIES, LTD. v. MACKENZIE (1910), 47 Sc. L. R. 717.—SCOT.*

s. ——— Competence of directors.]—A petition in name of a co. was presented to the ct. under Cos. (Consolidation) Act, 1908 (c. 69), s. 120, setting forth a scheme of arrangement between the co. & its debenture holders & craving the ct. (a) to order meetings of the co. & debenture-holders for approval of the scheme, & (b) to sanction the scheme, if approved at these meetings. The petition was

diction to sanction it.—*Re BARCLAY'S BANK, LTD. (1918), 62 Sol. Jo. 752.*

— *Scheme for re-organisation of capital.*]—*See Nos. 1076, 1077, 1085, 1087, ante.*

7372. Scheme sanctioned by colonial court under colonial statute—Whether binding on English court.]—Pltf., having deposited with an Australian bank a sum of money for a fixed period at a fixed rate of interest, effected a policy of insurance with deft. corpn., whereby the corpn. contracted to pay pltf. the principal sum & interest if the bank made default in payment. The bank failed to pay the principal sum on the due date, & subsequently a scheme of arrangement between the bank & its creditors was sanctioned by the colonial ct. in accordance with the terms of a colonial statute, whereby certain provisions were made with regard to the claims of the creditors, & the creditors were bound to accept such provisions in satisfaction of their claims. Pltf. having brought an action against defts. on the policy:—*Held:* the scheme of arrangement afforded no answer to pltf.'s claim.—*DANE v. MORTGAGE INSURANCE CORPN., [1894] 1 Q. B. 54; 63 L. J. Q. B. 144; 70 L. T. 83; 42 W. R. 227; 10 T. L. R. 86; 9 R. 96, C. A.*

Annotations:—Apld. Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insee. Co.'s Case, [1914] 2 Ch. 617. Rejd. Finlay v. Mexican Investment Corpn., [1897] 1 Q. B. 517; Shaw v. Royce, [1911] 1 Ch. 138. Mentd. Seaton v. Heath, Seaton v. Burnand, [1899] 1 Q. B. 782; Parr's Bank v. Albert Mines Syndicate (1900), 5 Com. Cas. 116; Re Denton's Estate, Licenses Insee. Corpn. & Guarantee Fund v. Denton, [1904] 2 Ch. 178.

7373. Scheme under Joint-Stock Companies Arrangement Act, 1870 (c. 104)—Whether binding on colonial court.]—A scheme of arrangement under the above Act, sanctioned by an English ct. is *quoad* the colonies a proceeding in a foreign ct., & cannot be pleaded by the co. in a Victorian ct. as a defence to an action by a non-assenting Victorian creditor for the full amount of her claim.—*NEW ZEALAND LOAN & MERCANTILE AGENCY CO. v. MORRISON, [1898] A. C. 349; 67 L. J. P. C. 10; 77 L. T. 603; 46 W. R. 239; 14 T. L. R. 141; 5 Mans. 171, P. C.*

Annotation:—Mentd. Re Nelson, Ex p. Dare & Dolphin, [1918] 1 K. B. 459.

B. Sanction of Court.

7374. Necessity for—Alteration of rights of debenture-holders.]—A scheme of arrangement in a voluntary winding up conferred power upon

in fact presented on the initiative of the directors, who had entered into a provisional agreement with certain of the debenture-holders, & the co. had neither considered the scheme nor approved of the provisional agreement. It was objected that the petition was not competent on the ground that as the co. had not been consulted, this was not an arrangement "proposed between a co. & its creditors" within the meaning of s. 120:—*Held:* in view of the powers conferred on the directors by the arts. of assocn., which provided that the board of management should have & exercise all such powers of the co. as were not by Act of Parliament or those presents expressly declared to be exercisable by the co. in general meeting, the petition was competent, as there was nothing in any Act of Parliament or in the arts. which required the previous sanction of the arrangements by the co. in general meeting.—*BRUCE PEEBLES & CO. v. BAIN (WILLIAM) & CO., [1918] S. C. 781.—SCOT.*

PART III. SECT. 39, SUB-SECT. 1.—B.

t. When exercised—Power to modify—On ground of individual hardship.]—The ct. will not vary an

a majority in number representing three-fourths in value of the existing debenture-holders to make binding upon all the holders of the existing debentures any compromise or arrangement which the ct. might sanction under Joint-Stock Cos. Arrangement Act, 1870 (c. 104):—*Held*: such power must be subject to the sanction of the ct. —*Re LAND MORTGAGE BANK OF FLORIDA, LTD.* (1896), 3 Mans. 164.

7375. When exercised—Approval of creditors & contributories.]—A limited bank having stopped payment through the operation of a panic, & not by any actual deficiency of assets, a scheme was devised for resuscitating a portion of the bank's former business by the construction of a new bank which should take over the suspended bank's assets & liabilities.

The liquidation being under the supervision of the ct., the scheme was submitted for its approval; & as it appeared that, after the fullest & fairest explanations had been given to all parties interested, a vast majority of the creditors had given their assent, while only a small portion had dissented, & not a single shareholder had dissented, the ct. ordered the scheme to be carried into effect notwithstanding a considerable number of both the creditors & shareholders had expressed no wish one way or the other.—*Re AGRA & MASTERMAN'S BANK* (1866), L. R. 12 Eq. 509, n.; 15 L. T. 408; *sub nom. Re AGRA & MASTERMAN'S BANK, Ex p. POLLOCK*, 15 W. R. 554.

Annotations:—*Consd. Re Tunis Rys.* (1874), 22 W. R. 639; *Re Cambrian Mining Co.* (1882), 48 L. T. 114. *Refd. Re Albert Life Assee.* (1871), 6 Ch. App. 381; *Re Irrigation Co. of France, Ex p. Fox* (1871), 6 Ch. App. 176.

7376. ———.]—*Re WESTERN OF CANADA OIL, LANDS & WORKS CO.*, [1874] W. N. 148.

7377. ———.]—If a scheme of arrangement under 1862 Act, & Joint-Stock Cos. Arrangement Act, 1870 (c. 104), has received the sanction of the majorities of contributories & creditors required by the Act, & also the sanction of the ct., it is not material in what order these sanctions had been obtained. When the arrangement is a fair one, & is likely to be beneficial to all parties, the ct. will not be astute to find technical defects in the proceedings.—*Re DYNEVOR, DYFFRYN & NEATH ABBEY COLLIERIES CO.* (1879), 11 Ch. D. 605; 48 L. J. Ch. 314; 27 W. R. 670; *sub nom.*

arrangement or compromise under Joint Stock Cos. Arrangement Act, 1891, merely because it may work individual hardship.—*Re ANGLO-AUSTRALIAN LAND & FINANCE CO., LTD.* (1892), 13 N. S. W. Eq. 38.—**AUS**

a. ——— Considerations guiding court.]—In sanctioning a proposed scheme of arrangement under Joint Stock Cos. Arrangement Act, the ct., if it sees anything unreasonable or unjust in the scheme, or that it has not received proper or full consideration, can itself introduce modifications, but if any proposed modification is of a material character, it will refer the scheme back to the creditors. The ct. refused to modify a scheme of arrangement by fixing a limit on the dividends to be paid on the shares.—*Re AUSTRALIAN JOINT STOCK BANK* (1893), 14 N. S. W. L. R. 89.—**AUS**.

b. ———.]—Before sanctioning a scheme for compromise or arrangement made between a co. & its creditors under Cos. Act, Amendment Act, 1892 (No. 1269), ss. 3, 4, the ct. will consider whether or not the scheme proposed is such that men of business might reasonably come to the conclusion that it was a fair scheme & likely to be beneficial to all classes of creditors concerned. Subject to this, it is the intention of the Act that the majority of the creditors should be

allowed to bind the minority, but the ct. must be satisfied that as far as possible the approval of the majority was founded on sufficient information as to the financial position & prospects of the co.—*Re COMMERCIAL BANK OF AUSTRALIA* (1893), 19 V. L. R. 333.—**AUS**.

c. ———.]—*BRUCE PEEBLES & CO., LTD. (IN LIQUIDATION) v. WHITELEY'S EXECUTORS* (1908), 16 S. L. T. 506.—**SCOT**.

d. ———.]—Joint Stock Cos. Arrangement Act, 1870, s. 2, as amended by the Cos. Act, 1900, s. 24, empowers the ct. to sanction an arrangement between a co. that is being wound up & its creditors or members after a meeting of creditors or members has been held & a requisite majority obtained, in such manner as to make it binding upon all the creditors or members. The Cos. Act, 1907, s. 38, enacted that the Joint Stock Cos. Arrangement Act, 1870, should apply to a co. which is not in the course of being wound up in like manner as it applied to a co. which was in the course of being wound up. A petition under Cos. Act, 1907, s. 38, by a co. which was not being wound up, to obtain the sanction of the ct. to a scheme of arrangement between the various classes of its members, which had been approved by the statutory

SMITH v. DYNEVOR, DYFFRYN & NEATH ABBEY UNITED COLLIERIES CO., 40 L. T. 409, C. A.

Annotation:—*Refd. Re Alabama, New Orleans, Texas & Pacific Junction Ry.* [1891] 1 Ch. 213.

7378. ——— Whether special resolution necessary —Winding up under supervision.]—Upon the construction of 1862 Act, where there has been a supervision order, just as under a compulsory order, the ct., by sect. 95, is at liberty without any special resolution of shareholders, to sanction an arrangement which in case of a winding up altogether voluntary could only be made by a special resolution under sect. 161.—*Re CAMBRIAN MINING CO.* (1882), 48 L. T. 114.

7379. ——— Sufficient information before creditors.]—(1) The ct. ought to sanction a scheme of arrangement resolved upon by the creditors of a co. in liquidation under Joint-Stock Cos. Arrangement Act, 1870 (c. 104), s. 2, unless there is some thing *ex facie* wrong about it, or unless it is shown that there has been some great oversight or miscarriage; but the ct. ought not to sanction any scheme unless the resolution adopting it was passed by the creditors acting upon sufficient information.

(2) A scheme of arrangement provided that a new co. should be formed, & that the holders of shares in the old co. upon which £20 per share was immediately payable might receive in exchange an equivalent number of shares in the new co. upon which £25 was payable, of which half was reserve liability, & the other half could not be called up in full for some time:—*Held*: the ct. could insert in the memorandum & arts. of assocn. of the new co. a provision that persons who had been shareholders in the old co. should not, by transferring their shares in the new co. while not fully paid, escape their liability in respect of their shares in the old co.

(3) A scheme of arrangement under 1870 Act is an alternative mode of liquidation analogous to a liquidation by arrangement under Bankruptcy Act, 1869 (c. 71), or a composition under sect. 126 of that Act. It effects a discharge of the co. & contributories from liability other than that imposed by the scheme by operation of law, & therefore it does not deprive the creditors of the co. of their rights against persons who have

majorities, was opposed by a minority of debenture-holders:—*Held*: the ct. being satisfied that the arrangement was one which a reasonable business man might be expected to approve of, the scheme must be sanctioned.—*EDINBURGH AMERICAN LAND MORTGAGE CO., LTD. v. LANG'S TRUSTEES*, [1900] S. C. 488; 46 Sc. L. R. 340; 1 S. L. T. 130.—**SCOT**.

e. ——— Provisions in favour of special class.]—A scheme of compromise or arrangement between a banking co. & its creditors, sanctioned by the ct., provided for claims by giving to ordinary depositors deposit receipts for two-thirds of their claim & interest payable five years from the due date of their old deposits, & shares preferential as to the capital of the co. for the other one-third of their claims, but gave to those depositors who were corps. or trustees, however constituted, without the legal power to take up preferential shares, deposit receipts for the whole of their claims & interest payable five years from the due date of their old deposits:—*Held*: the scheme must be modified by providing that the latter class should take one third of their claim in deposit receipts, due ten years from the date of suspension of the co., as no deposits in the old co. were for so long a time, in the hope that thereby such one-third

Sect. 39.—Arrangements and compromises: Sub-sect. 1, B., C., D., E. & F. (a).]

guaranteed payment of the debts owing by it.—*Re LONDON CHARTERED BANK OF AUSTRALIA*, [1893] 3 Ch. 540; 62 L. J. Ch. 841; 69 L. T. 593; 42 W. R. 14; 9 T. L. R. 596; 37 Sol. Jo. 670; 3 R. 696.

Annotations:—*As to (2) Consd. Re Tea Corp., Sorsbie v. Same Co.*, [1904] 1 Ch. 12. *As to (3) Consd. Mortgage Insee. Corp. v. Pound* (1895), 64 L. J. Q. B. 394. *Generally, Refd. Re Canning Jarrah Timber Co.* (1900), 69 L. J. Ch. 416.

7380. — Provision preserving liabilities of shareholders in old company.]—*Re LONDON CHARTERED BANK OF AUSTRALIA*, No. 7379, *ante*.

7381. — Provision for taxation of costs of scheme.]—*Re MORTGAGE INSURANCE CORPN.*, [1896] W. N. 4.

7382. — Scheme involving payment of commission out of assets of old company.]—The ct. will be very slow to sanction a scheme of reconstruction & arrangement which involves the payment of a commission for underwriting the shares in the new co. out of the assets of the old co.

The ct. will not sanction a scheme of reconstruction & arrangement which deprives dissentient shareholders in the old co. of the right to have their shares valued by arbitration conferred by 1862 Act, s. 161.—*Re CANNING JARRAH TIMBER CO (WESTERN AUSTRALIA), LTD.*, [1900] 1 Ch. 708; 69 L. J. Ch. 416; 82 L. T. 409; 44 Sol. Jo. 345; 7 Mans. 439, C. A.

Annotations:—*Distd. Re General Motor Cab Co.*, [1913] 1 Ch. 377. *Apld. Re Sandwell Park Colliery Co.*, [1914] 1 Ch. 589. *Consd. Re Anglo-Continental Supply Co.*, [1922] 2 Ch. 723. *Refd. Re Guardian Assee.*, [1917] 1 Ch. 431.

7383. — Reservation of right to take misfeasance proceedings for benefit of old company.]—Upon a reconstruction scheme under which the assets of the old co. were transferred to a new co. & the shareholders of the old co. were entitled to take shares, partly paid-up, in the new co., the order sanctioning the scheme reserved the right of the liquidator of the old co. to take misfeasance proceedings under 1890 (Winding up) Act, s. 10, against the officers of the old co. & others, & the proceeds of any such proceedings were to be held by the liquidator for the benefit of the share-

would remain as a guarantee that the former class would get two-thirds of their claims.—*Re COMMERCIAL BANK OF AUSTRALIA* (1893), 19 V. L. R. 333.—AUS.

1. — Arrangement between company & shareholders—Extension of time for shareholder to take up shares in a new company.]—The liquidator of a co. petitioned the ct. under Joint Stock Cos. Arrangement Act, 1870, s. 2, & the Cos. Act, 1900, s. 24, to sanction an arrangement under which the assets & business of the co. were to be transferred to a new co. about to be performed. Special resolutions approving the agreement were passed by meetings of shareholders & of creditors. From the petition it appeared that the assets of the co. in liquidation considerably exceeded its liabilities. Its shares were all issued, & were fully paid up. The capital of the new co. was to be of the same nominal amount as that of the old co. Under the proposed agreement each shareholder became entitled to shares in the new co. of the same nominal amount as his holding in the old co., the shares in the new co. being issued as paid up to the extent of 10s. in the £1. The agreement further provided that any shareholders who within two weeks after the scheme had been sanctioned by the ct. failed to apply for his shares in the new co. should have

no interest in the assets of the old co. nor any claim for shares in the new co.

A shareholder lodged answers to the petition, in which he stated that he had not voted in favour of the special resolution approving the agreement, & that he had left a written notice of dissent at the registered office of the co. within seven days of the date of the resolution. He maintained accordingly that the agreement ought not to be sanctioned until the liquidator had purchased his interest in the co. in terms of Cos. Act, 1862, s. 161. He stated, further, that, as his entire capital had been invested in the old co., he would be unable to take up his shares in the new co., since he could not pay the calls in respect of them; & he maintained, alternatively, in the event of s. 161 being held to have been repealed by Cos. Act, 1900, s. 24, that in the circumstances it would be inequitable to deprive him of his interest in the assets of the old co.:—*Held*: the agreement must be sanctioned, but subject to the modification that resp. should be entitled to apply for his shares in the new co. within the extended period of three months.—*MELVILLE COAL CO., LTD. (LIQUIDATOR) v. CLARK* (1904), 6 F. (Ct. of Sess.) 913.—SCOT.

g. Terms on which granted—transfer of shares by shareholders until creditors satisfied.]—In sanctioning an

holders of the old co. Misfeasance proceedings were taken & a large sum was recovered:—*Held*: this sum belonged to the shareholders of the old co., whether they came in under the scheme or not.—*Re OLYMPIA, LTD.* (1900), 16 T. L. R. 564; *previous proceedings, sub nom. GLUCKSTEIN v. BARNES*, [1900] A. C. 240, H. L.

7384. — Provision of rights of dissentient shareholders.]—*Re PATERSON, LAING & BRUCE, LTD.* (1902), 18 T. L. R. 515.

7385. — Sale of undertaking to foreign company.]—The reconstruction of an existing co. by winding up & sale of its entire undertaking & assets for shares in a new foreign co., though quite outside the scope of a reconstruction under 1908 Act, s. 192, may be effected as an arrangement under sect. 120.—*Re ANGLO-CONTINENTAL SUPPLY CO.*, [1922] 2 Ch. 723; 91 L. J. Ch. 658; 128 L. T. 59; 66 Sol. Jo. 710; [1922] B. & C. R. 199.

C. Rights of Secured Creditors.

7386. Modification of rights of debenture-holders.]—*See Sect. 34, sub-sect. 3, K. (b), ante.*

D. Rights of Unsecured Creditors.

7387. Satisfaction by allotment of fully-paid shares.]—*SLATER v. DARLASTON STEEL & IRON CO.*, [1877] W. N. 165.

Annotations:—*Consd. Re Alabama, New Orleans, Texas & Pacific Junction Ry.*, [1891] 1 Ch. 213. *Refd. Re Empire Mining Co.* (1890), 59 L. J. Ch. 345; *Re Guardian Assee.*, [1917] 1 Ch. 431.

7388. —.]—*Re PRESTON DAVIES TYRE & VALVE CO., LTD.* (1896), 40 Sol. Jo. 801.

7389. — Provision for dissentient creditors.]—*Re BROWNFIELDS GUILD POTTERY SOCIETY*, [1898] W. N. 80.

7390. Preferential right in winding up.]—An arrangement under Joint-Stock Cos. Arrangement Act, 1870 (c. 104), will not be sanctioned where it will bind a creditor whose preferential right would have been respected if a winding-up order had been made.—*Re RICHARDS & CO.* (1879), 11 Ch. D. 676; 48 L. J. Ch. 555; 27 W. R. 530; *sub nom. Re RICHARDS & CO., LTD., Ex p. CRAWSHAY*, 40 L. T. 315.

Annotations:—*Distd. Re Vron Colliery Co.* (1882), 20 Ch. D. 442. *Refd. Re Withernsea Brickworks* (1880), 16 Ch. D.

arrangement between a co. & its creditors under the Joint Stock Cos. Arrangement Act, the ct. refused to order that shares should not be transferred till the creditors were paid, or that no dividends should be paid.—*Re AUSTRALIAN MUTUAL INVESTMENT & BUILDING CO.* (1892), 13 N. S. W. Eq. 51.—AUS.

—It is a matter for the creditors to consider whether the shareholders shall be prohibited from transferring their shares & the ct. will not, save in exceptional cases, make it a condition of sanctioning a compromise or arrangement, that the shareholders be so prohibited, or that no dividends be paid until the then existing creditors be paid.—*Re ANGLO-AUSTRALIAN LAND & FINANCE CO., LTD.* (1892), 13 N. S. W. Eq. 38.—AUS.

PART III. SECT. 39, SUB-SECT. 1.—D.

7387 i. Satisfaction by allotment of fully paid shares.]—A scheme of compromise or arrangement between a banking co. & its creditors, under Cos. Act, Amendment Act, 1892 (No. 1269), which provides that the status of creditors shall be converted into that of shareholders, may be legally sanctioned by the ct.—*Re COMMERCIAL BANK OF AUSTRALIA* (1893), 19 V. L. R. 333.—AUS.

k. After failure by company

337. **Mentd.** *Re* Normanton Iron & Steel Co. (1881), 50 L. J. Ch. 223.

7391. Contingent claim.—The lessee of certain mines assigned his leases to a co. which covenanted to indemnify him against liability thereunder. The co. went into liquidation, & a scheme of arrangement under Joint-Stock Companies Arrangement Act, 1870 (c. 104), was adopted & approved by the ct. for forming a new co., which should take over the assets & liabilities of the old co., & should pay or satisfy the unsecured creditors of the old co. within three months of the approval of the scheme by the ct. After the new co. was incorporated the lessee applied in the liquidation to have a sum provided to meet his contingent liability for rents, royalties, & breaches of covenant:—*Held*: the Act applied to every person having a pecuniary claim against a co., whether actual or contingent, the lessee was bound by the scheme, & the application failed.—*Re* MIDLAND COAL, COKE & IRON CO., CRAIG'S CLAIM, [1895] 1 Ch. 267; 64 L. J. Ch. 279; 71 L. T. 705; 43 W. R. 244; 11 T. L. R. 100; 39 Sol. Jo. 112; 2 Mans. 75; 12 R. 62, C. A.; *on appeal*, S. C. *sub nom.* CRAIG *v.* MIDLAND COAL & IRON CO. (1896), 74 L. T. 744, H. L.

Annotations:—**Refd.** Nepean (Liquidator of Securities Insee.) *v.* Marten (1895), 11 T. L. R. 256. **Mentd.** *Re* New Oriental Bank Corpn. (No. 2), [1895] 1 Ch. 753; *Re* Panther Lead Co., [1896] 1 Ch. 978; *Curtis v. B. U. R. T. Co.* (1912), 28 T. L. R. 353; *Re* Law Car & General Insee. Corpn., [1913] 2 Ch. 103.

E. Rights of Shareholders.

7392. Whether consent necessary—After order sanctioning scheme.—*Re* DYNEVOR, DYFFRYN & NEATH ABBEY COLLIERIES CO., No. 7377, *ante*.

7393. ————]—A scheme under Joint-Stock Cos. Arrangement Act, 1870 (c. 104), had received the sanction of the creditors of the co. The ct., however, directed that the scheme should also receive the assent of the shareholders by special resolution under 1862 Act, s. 161.—*Re* AKANKOO (GOLD COAST) MINING CO. (1888), 1 Meg. 43.

7394. ———— **Where no interest in assets.**—*Re* BROWNFIELDS GUILD POTTERY SOCIETY, [1898] W. N. 80.

7395. ————]—Under Joint Stock Cos. Arrangement Act, 1870 (c. 104), s. 2, combined with Cos. Act, 1900 (c. 48), s. 24, the ct. has jurisdiction to sanction a scheme of arrangement with the creditors & contributories of a co. in liquidation, notwithstanding the dissent of one

carry out scheme—*Remitted to original rights.*—On the failure of a co. to carry out a scheme of arrangement which provided for payment of 2s. 6d. in the pound to creditors, the creditors bound by the scheme were remitted to their original rights, & were at liberty to prove in the subsequent liquidation of the co. for the full amount of their original claims giving credit, however, for any amounts received under the scheme.—*Re* ALFRED SHAW & CO. (1897), 8 Q. L. J. 48.—AUS.

PART III. SECT. 39, SUB-SECT. 1.—E.

7396 i. Scheme binding on all contributories—When sanctioned by court. In a petition under Cos. Act, 1907, s. 38, by a co. which was not being wound up, to obtain the sanction of the ct. to a scheme of arrangement between the various classes of its members, which had been approved by the statutory majorities, but was opposed by a minority of debenture-holders, the ct., being satisfied that the arrangement was one which a reasonable business man might be expected to approve of,

class of contributories, if the ct. is satisfied that having regard to the value of the co.'s assets that class has no interest in them. Under such circumstances the scheme must be treated as made between the co. & their creditors, & between the co. & the other classes of contributories, & a provision made by it for the benefit of the dissentient class must be regarded as in the nature of a gift or concession to them.—*Re* TEA CORPN., LTD., SORSBIE *v.* SAME CO., [1904] 1 Ch. 12; 73 L. J. Ch. 57; 89 L. T. 516; 52 W. R. 177; 20 T. L. R. 57; 48 Sol. Jo. 99; 11 Mans. 34, C. A.

Annotations:—**Refd.** *Re* Sandwell Park Colliery Co., [1914] 1 Ch. 589; *Re* Guardian Assee., [1917] 1 Ch. 431; *Re* Anglo-Continental Supply Co., [1922] 2 Ch. 723.

7396. Scheme binding on all contributories—When sanctioned by court.—A scheme for the transfer of the assets of a co. in liquidation to a new co., if sanctioned by an order of the ct. under Joint-Stock Companies Arrangement Act, 1870 (c. 104), s. 2, is binding in all its terms upon all the contributories of the co. in liquidation, notwithstanding that some of such terms are not authorised by 1862 Act, s. 161, & cannot afterwards be impeached, except in the form of an appeal from the order of the ct.—*NICHOLL v. EBERHARDT CO.* (1889), 59 L. J. Ch. 103; 61 L. T. 489; 5 T. L. R. 464 1 Meg. 402, C. A.

Annotations:—**Refd.** *Postlethwaite v. Port Phillip & Colonial Gold Mining Co.* (1889), 43 Ch. D. 452; *Burdett-Countts v. True Blue (Hannan's) Gold Mine*, [1899] 2 Ch. 616; *Fuller v. White Feather Reward*, [1906] 1 Ch. 823.

7397. Dissentient shareholders—Right to decline shares in new company.—*MIDLAND COAL, COKE, & IRON CO.* (1893), 37 Sol. Jo. 793.

7398. ————]—*Re* CANNING JARRAH TIMBER CO. (WESTERN AUSTRALIA), LTD., No. 7382, *ante*.

F. Meetings.

(a) In General.

7399. Of creditors—Majority required—Three-fourths in value of those present.—Under Cos. Arrangement Act, 1870 (c. 104), s. 2, it is sufficient that the sanction of three-fourths in value of the creditors present at the meeting should be given to any proposed arrangement.—*Re* BESSEMER STEEL & ORDNANCE CO. (1875), 1 Ch. D. 251; 33 L. T. 631; 24 W. R. 94.

Annotation:—**Refd.** *Mathias v. Wilts & Berks Canal Navigation Co.* (1876), 34 L. T. 346.

7400. ———— **Creditors also shareholders—Whether resolution passed bonâ fide.**—A majority in number, representing three-fourths in value, of the

sanctioned the scheme.—*EDINBURGH AMERICAN LAND MORTGAGE CO., LTD. v. LANG'S TRUSTEES*, [1909] S. C. 488.—SCOT.

1. Cancellation of arrears of cumulative preference dividend.—Where a memorandum & arts. of assocn. of a co. contained power to cancel arrears of dividends on cumulative preference shares, the ct., under Cos. Act, 1908, s. 120, sanctioned a scheme of arrangement between the co. & its shareholders, whereby such arrears were cancelled.—*Re* BALMENACH - GLENLIVET DISTILLERY CO., LTD., [1916] S. C. (H. L.) 639.—SCOT.

m. Hardship to individual shareholder—Extension of time in which to take up shares in new company.—*MELVILLE COAL CO., LTD. (LIQUIDATOR) v. CLARK* (1904), 6 F. (Ct. of Sess.) 913.—SCOT.

PART III. SECT. 39, SUB-SECT. 1.—F. (a).

7399 i. Of creditors—Majority required—Three-fourths in value of those present.

—The requisite majority of creditors of a co. to agree to a scheme of compromise or arrangement between a co. & its creditors, under Cos. Act Amendment Act, 1892, ss. 3, 4, is three-fourths of those creditors of the co. assembled at the meeting of the co.'s creditors & not three-fourths of all the creditors of the co.—*Re* COMMERCIAL BANK OF AUSTRALIA (1893), 19 V. L. R. 333.—AUS.

n. Of shareholders—Class meetings.—The co. was in liquidation & an application was made on behalf of certain bondholders, to call a meeting of the bondholders & of preferred & ordinary shareholders to approve of a scheme of arrangement with the co. under Winding-up Act, 1899, s. 3:—*Held*: the liquidator must convene separate meetings (a) of the bondholders, (b) of the preferred shareholders, (c) of the holders of common shares, & that fourteen days' notice must be given of such meeting by advertisement in newspapers published in various provinces, also giving the names of the chairmen of the meetings.

**Sect. 39.—Arrangements and compromises: Sub-
(a)**

debenture-holders present at a meeting, duly summoned under Joint-Stock Cos. Arrangement Act, 1870 (c. 104), s. 2, passed a resolution in favour of a proposed scheme for reconstructing the co. The majority in number was made up of debenture-holders, who were also shareholders, & as such, under a heavy liability to the creditors of the co.:—*Held*: the resolution could not have been passed *bonâ fide*, the majority having voted, not with a *bonâ fide* regard to the interests of all the debenture-holders, but for the purpose of escaping their own liability as shareholders, & the petition to obtain the sanction of the ct. to the scheme would be dismissed with costs.—*Re WEDGWOOD COAL & IRON CO.* (1877), 6 Ch. D. 627; 37 L. T. 309.

Annotation:—*Refd.* *Re Alabama, New Orleans, Texas & Pacific Junction Ry.*, [1891] 1 Ch. 213.

7401. ———.—*Re MADRAS IRRIGATION & CANAL CO.*, [1881] W. N. 172.

7402. ———.—(1) The power given by Joint-Stock Cos. Arrangement Act, 1870 (c. 104), s. 2, to sanction a scheme of arrangement between a co. in liquidation & its creditors extends to debenture-holders & other secured creditors, & enables the ct. to sanction a scheme, although it deprives debenture-holders of their security wholly or in part.

(2) In exercising the power the ct. will not only ascertain that all statutory conditions have been complied with, but also whether the class of creditors summoned to the meeting was fairly represented by those who attended, & whether the statutory majority who approved were acting *bonâ fide* or were seeking to promote interests adverse to those of the class whom they professed to represent & generally if the arrangement is such as a man of business would reasonably approve.—*Re ALABAMA, NEW ORLEANS, TEXAS & PACIFIC JUNCTION RY. CO.*, [1891] 1 Ch. 213; 60 L. J. Ch. 221; 64 L. T. 127; 7 T. L. R. 171; 2 Meg. 377, C. A.

Annotations:—*As to* (1) *Folld.* *Re Labuan & Borneo, Peirson v. Labuan & Borneo* (1901), 18 T. L. R. 216. *As to* (2) *Folld.* *Re English, Scottish & Australian Chartered Bank*, [1893] 3 Ch. 385. *Generally, Refd.* *Re London Chartered Bank of Australia*, [1893] 3 Ch. 540; *Sneath v. Valley Gold*, [1893] 1 Ch. 477; *Walker v. Elmore's German & Austro-Hungarian Metal Co.* (1901), 85 L. T. 767; *Re Guardian Assce.*, [1917] 1 Ch. 431. *Mentd.* *Re A Debtor, Ex p. Peak Hill Goldfield*, [1909] 1 K. B. 430.

7403. ———.—*Re ENGLISH, SCOTTISH & AUSTRALIAN CHARTERED BANK*, No. 7410, *post*.

7404. ———.—**Company carrying on business abroad—Separate meeting of English creditors.**—*Re QUEENSLAND NATIONAL BANK* (1893), 37 Sol. Jo. 632.

7405. Of shareholders—Offer to induce ratification.—A co. formed for the purpose of acquiring & working a Govt. concession was unable to obtain sufficient moneys to complete the necessary works, & accordingly the directors entered into contracts for the surrender of the undertaking to the Govt. for the best terms they could get, which did not

admit of any distribution among the ordinary shareholders, but only among the debenture-holders & preference shareholders. Before the day appointed for a poll to be taken on the question of the ratification of the contracts, a letter was written by a firm holding a large number of preference & ordinary shares in the co. containing an offer to the ordinary shareholders in the event of the contracts being ratified. The ratification of the contracts, was carried by a very large majority of shareholders. The affairs of the co. could not be restored to their former position. On a petition for the sanction of the ct. to a scheme of arrangement by the liquidators of the co. for the purpose of carrying out the contracts:—*Held*: the offer to the ordinary shareholders did not invalidate the ratification of the contracts, & the scheme would be sanctioned.—*Re BUENOS AYRES WATER SUPPLY & DRAINAGE CO., LTD.* (1892), 66 L. T. 408.

7406. ———.—**Class meetings—Shares partly paid with uncalled balance paid in advance—Separate class to fully-paid shares.**—For the purpose of class meetings of members summoned in a winding up to approve a scheme of arrangement under 1908 Act, s. 120, holders of shares partly paid with the uncalled balance paid in advance of calls & carrying interest are a different class to holders of fully-paid shares.—*Re UNITED PROVIDENT ASSURANCE CO., LTD.*, [1910] 2 Ch. 477; 79 L. J. Ch. 639; 103 L. T. 531.

7407. ———.—**Approval by some classes—Subsequent approval of dissentient class.**—*Re UNITED PROVIDENT ASSURANCE CO., LTD.*, [1911] W. N. 40.

(b) Proxies.

7408. Form of.—Proxies for use on a reconstruction under Joint-Stock Cos. Arrangement Act, 1870 (c. 104), must be in the form approved by the ct., otherwise the reconstruction will not be sanctioned.—*Re INTER-OCEANIC RY. OF MEXICO (ACAPULCO & VERA CRUZ), LTD.* (1896), 3 Mans. 162; *sub nom.* *PRACTICE DIRECTION*, 40 Sol. Jo. 545.

Annotation:—*Folld.* *Practice Direction*, [1910] W. N. 154.

7409. ———.—*PRACTICE DIRECTION*, [1910] W. N. 154.

7410. May be deposited abroad—& telegraphed for use at meeting.—(1) In considering whether a scheme ought to be sanctioned under Joint Stock Cos. Arrangement Act, 1870 (c. 104), the ct. has to see that the statutory conditions have been complied with, that the majority are acting *bonâ fide*, & not overriding the minority for purposes of their own, & that the scheme is itself a reasonable one.

(2) A winding-up order having been made against an English bank carrying on business in Australia, an order convening the creditors to consider a scheme under sect. 2 of the Act, provided that the Australian creditors should be at liberty to give proxies to persons designated for the purpose by the official receiver, provided that such proxies were deposited at the office in Mel-

—*Re PORT HOOD COAL CO.* (1906), 1 E. L. R. 81.—**CAN.**

o. ———.—**Necessity for—Before petition to sanction.**—A petition was presented in the name of a co., but, admittedly, really by the directors, for authority to call & hold meetings & if so resolved, approve of a scheme of arrangement:—*Held*: the petition was premature because before the ct. could order a meeting under Cos. (Consolidation) Act, 1908, s. 120, they must have before them a proposed arrangement between the co. & its members

& be asked by the co. or by its members to interfere for the purpose of calling a meeting & that neither of those conditions was satisfied because the directors were not entitled to speak for the co. in this matter, amalgamation not being ordinary purpose of management but the ct. sisted the petn. to give the directors an opportunity of bringing about that an arrangement should be proposed between the co. & its members.—*DAILUAIN-TALISKER DISTILLERIES, LTD. v. MACKENZIE* (1910), 47 Sc. L. R. 717.—**SCOT.**

p. *Effect of failure to hold meetings—Objection raised after scheme sanctioned.*—In an action by a co. against a member for calls, debt. set out a special agreement with the co. that calls were to be paid out of deposits with the co.; the co. replied that the scheme of arrangement between the co. & the depositors had been duly sanctioned. Debt. rejoined that there was no separate meetings held of the depositors who had special agreements as to calls; to this the co. demurred:—*Held*: the mere fact of there being no separate

bourne or Sydney of the bank not later than three days prior to the holding of the meetings in London, & that particulars of the proxies were communicated by telegram to the official receiver for use at the meetings:—*Held*: there was power to make the order, & it was not necessary that the proxy papers should be in England at the time of the meeting.—*Re* ENGLISH, SCOTTISH & AUSTRALIAN CHARTERED BANK, [1893] 3 Ch. 385; 62 L. J. Ch. 825; 69 L. T. 268; 42 W. R. 4; 9 T. L. R. 581; 37 Sol. Jo. 648; 2 R. 574, C. A.

Annotations:—*As to* (1) *Consd.* *Re* London Chartered Bank of Australia, [1893] 3 Ch. 540. *Refd.* *Re* Canning Jarrah Timber Co. (1900), 69 L. J. Ch. 416. *As to* (2) *Refd.* *Re* Queensland National Bank (1893), 37 Sol. Jo. 632; *Re* Syria Ottoman Ry. (1904), 20 T. L. R. 217; *Re* Tea Corp., *Sorsbie v. Tea Corp.*, [1904] 1 Ch. 12. *Generally, Mentd.* *Re* A Debtor, *Ex p. Peak Hill Goldfield*, [1909] 1 K. B. 430.

7411. Must be held by members of class.—For the purposes of a meeting of any particular class of persons, proxies can only be given to & held by members of that class.—*Re* CENTRAL BAHIA RY. Co., LTD. (1902), 18 T. L. R. 503.

G. Construction of.

7412. Ordinary commercial meaning—"Discount."—A scheme of arrangement with creditors made by a co. in liquidation should be construed in the sense that an ordinary business man would attach to it. Accordingly, where provision is made in such a scheme for payment of calls in advance "under discount" at 4 per cent, "discount" is to be interpreted in the commercial sense as meaning a rebate of interest at 4 per cent on the sum payable, & not as true mathematical discount or such a sum as would leave an amount which at 4 per cent would produce the sum payable when it becomes due.—*Re* LAND SECURITIES Co., *Ex p. FARQUHAR*, [1896] 2 Ch. 320; 65 L. J. Ch. 587; 74 L. T. 400; 44 W. R. 514; 12 T. L. R. 373; 40 Sol. Jo. 500, C. A.

Annotation:—*Refd.* *National Provident Institution v. Brown, Brown v. National Provident Institution, Provident Mutual Life Assee. Assocn. v. Ogston, Ogston v. Provident Mutual Life Assee. Assocn.*, [1920] 3 K. B. 35.

7413. Postponement of payment to "debts proved"—Interest accrued subsequent to winding up.—*Re* NEW ENGLISH BANK OF RIVER PLATE, LTD. (1898), 14 T. L. R. 526, C. A.

meeting, no prejudice to debt. being proved or alleged, was not a fatal objection to the scheme sanctioned &, in any case, the point should have been raised before the judge who sanctioned the scheme.—*EXCELSIOR LAND INVESTMENT & BUILDING CO. & BANK, LTD. v. PHELAN* (1898), 19 N. S. W. L. R. 59.—AUS.

PART III. SECT. 39, SUB-SECT. 1.—G.

q. To pay interest.—By a scheme of arrangement adopted by a majority of depositors & duly sanctioned by the ct. under Joint Stock Cos. Arrangement Act, debt. co. agreed to pay interest at a certain rate upon money which had been deposited with it:—*Held*: the obligation to pay interest arose out of the contract with the depositors, & was not created by the statute, & therefore debts. were liable to be sued for six years' arrears of interest only.—*DEWAR v. EXCELSIOR LAND, ETC. Co.* (1906), 6 S. R. N. S. W. 433.—AUS.

r. Postponement of rights by one creditor—Until other creditors paid—Whether conditional on company continuing to carry on business.—In Aug. 1909, co. A. was indebted to co. B., & also to sundry other creditors, & was unable to pay these debts. A

deed was made between co. B., co. A. & the creditors, whereby co. B. covenanted with the creditors, & by a separate covenant with co. A., that it would not at any time take any steps to enforce payment of its debt or any part thereof until the whole of the creditors of co. A. under the amount of £10 should have been paid in full, & also until the creditors under the deed should have been paid in full their respective amounts. At the date of the deed co. A. was indebted to co. B. in the sum of £2,287 14s. 2d., & to the creditors, parties to the deed, in the sum of £1,092. In Aug. 1912, co. A. went into voluntary liquidation, & between the date of the deed & the liquidation it had incurred unpaid debts to various creditors to the amount of £498 12s. 3d. On liquidation the assets of co. A. amounted to £375, & co. B. put in its proof for its debt of £2,287 14s. 2d., claiming that it was an implied condition that its covenant to postpone its claim should be subject to co. A. continuing to carry on its business, & that such covenant would not be operative in the event of co. A. going into liquidation before the creditors under the deed had been paid in full:—*Held*: there was no such implied condition, & the liquidator should receive the proof, but co. B.

. *Effect of.*

7414. As discharge of contributories from liability.—*Re* LONDON CHARTERED BANK OF AUSTRALIA, No. 7379, *ante*.

7415. Claims for breach of contract.—Pltf. had a contract of employment for seven years with resp. co., commencing in 1910. In May, 1911, pltf. was given a week's notice to leave, but he refused to leave, & was then told he would have to leave in three months. At the expiration of that time he was sent away. In May, 1911, a petition to wind up the co. was presented, & a scheme being proposed pltf. attended a meeting of creditors & approved a deed of arrangement under which he & other creditors were to receive 10s. in the £. At the date of the meeting there was a sum due to pltf. for commission, & he approved & voted for the scheme with reference to that sum only, & not with reference to his claim under the agreement of employment for seven years. The scheme of arrangement was subsequently approved by the ct. under 1908 Act, s. 120. In an action claiming damages for breach of the agreement of employment the jury found a verdict in favour of pltf. for £225:—*Held*: although pltf. did not put forward a claim for the breach of the agreement under the deed of arrangement, he was not barred from claiming damages in respect of the breach & he was entitled to judgment for £112 10s., being 10s. in the £ on the amount found by the jury.—*CURTIS v. B. U. R. T. Co., LTD.* (1912), 28 T. L. R. 585, C. A.

I. Practice and Procedure.

7416. Petition — How entitled.—*SLATER v. DARLASTON STEEL & IRON Co.*, [1877] W. N. 165.

Annotations:—*Mentd.* *Re* Empire Mining Co. (1890), 59 L. J. Ch. 345; *Re* Alabama, New Orleans, Texas & Pacific Junction Ry., [1891] 1 Ch. 213; *Re* Guardian Assee., [1917] 1 Ch. 431.

7417. — Amendment of clerical error.—*Re* PRESTON DAVIES TYRE & VALVE Co., LTD. (1896), 40 Sol. Jo. 801.

7418. Appeals—Creditor not party but bound by decision — Leave necessary.—A judge having made an order sanctioning an arrangement under Joint-Stock Cos. Arrangement Act, 1870 (c. 104), an appeal was presented by persons whose interests

should not be allowed to rank for dividend in competition with the creditors, parties to the deed, but should be postponed until the latter were fully paid.—*Re* NEW ZEALAND IMPERIAL CASH REGISTER Co., LTD. (1913), 32 N. Z. L. R. 981.—N.Z.

PART III. SECT. 39, SUB-SECT. 1.—H.

s. On failure of company to carry out scheme—Creditors remitted to original position.—On the failure of a co. to carry out a scheme of arrangement which provided for payment of 12s. 6d. in the pound to the creditors, the creditors bound by the scheme were remitted to their original rights, & were at liberty to prove in the subsequent liquidation of the co. for the full amount of their original claims, giving credit, however, for any amounts received under the scheme.—*Re* ALFRED SHAW & Co. (1897), 8 Q. L. J. 48.—AUS.

PART III. SECT. 39, SUB-SECT. 1.—I.

t. Originating summons for order to convene meetings—If majority obtained, proceedings for sanction by petition.—When it is desired to obtain the sanction of the ct. to a scheme of arrangement under Cos. Consolidation Act, 1908, s. 120, the practice is to

Sect. 39.—Arrangements and compromises: Sub-sect. 1, I.;

as creditors were affected by the scheme, but who had not opposed the scheme at the meeting of creditors, nor appeared before the judge when his sanction was applied for, nor obtained leave to appeal:—*Held*: the right of appeal under the Act is governed by 1862 Act, s. 124, which gives a right of appeal subject to the same conditions as appeals from decisions in the ordinary jurisdiction of the ct.; & as according to the practice of the Ct. of Ch. a person not a party to the proceedings could not appeal from an order without the leave of the ct., the present appeal must be dismissed, applts. not having obtained leave, & the case not being one in which the ct. thought that leave ought to be given.—*Re SECURITIES INSURANCE CO.*, [1894] 2 Ch. 410; 63 L. J. Ch. 777; 70 L. T. 609; 42 W. R. 465; 38 Sol. Jo. 437; 1 Mans. 289; 7 R. 217, C. A.

7419. Stay of proceedings—Execution of judgment recovered prior to order summoning meetings.]

—On an application by deft. co. under 1908 Act, s. 120, an order was made that meetings of the creditors & of the members of the co. be summoned for the purpose of considering &, if thought fit, of agreeing to an arrangement proposed to be made between the co. & its creditors & members. Before the meetings had been held, the co. applied to the ct. to grant a stay of execution on a judgment recovered by pltf. against the co. previously to the making of the order summoning the meetings:—*Held*: there was no power to grant a stay of execution.—*BOOTH v. WALKDEN SPINNING & MANUFACTURING CO., LTD.*, [1909] 2 K. B. 368; 78 L. J. K. B. 764; 16 Mans. 225, D. C.

7420. Petition by liquidator to sanction scheme—Summons by receiver in debenture-holders' action to approve conditional contract—One order on two applications.]—Where a co. is in liquidation & a receiver has been appointed in a debenture-holders' action & there is before the ct. both a petition by the liquidator to sanction a scheme of arrangement & a summons by the receiver to approve a conditional contract of sale, one order can be made on the two applications.—*Re DURHAM COLLIERIES ELECTRIC POWER CO., LTD.*, *POOLE v. DURHAM COLLIERIES ELECTRIC POWER CO., LTD.* (1913), 57 Sol. Jo. 558.

obtain upon originating summons an order convening the requisite meeting or meetings to consider the scheme; if the necessary majority is obtained, the sanction of the ct. may then be sought on petition.—*Re COMPANIES CONSOLIDATION ACT, 1908, Re JOHN CLARKE & CO., LTD.*, [1912] 1 L. R. 24.—**IR.**

PART III. SECT. 39, SUB-SECT. 2.

a. Power of liquidator—In respect of calls—Whether sanction of company necessary.]—The power given by Cos. Act, s. 211, to liquidators in a voluntary winding up to compromise with contributories in respect of calls, is not confined to cases where the sanction of an extraordinary resolution of the co. has been obtained, but the ct. may sanction such compromises & the liquidators may act upon such sanction in lieu of that of an extraordinary resolution of the co.—*Re BRITISH AUSTRALIAN LAND & BANKING CO., LTD.* (1892), 13 N. S. W. Eq. 42.—**AUS.**

b. — Creditors to receive debenture stock in new company.]—In the course of the winding up by the ct. of the B. co., a scheme of reconstruction was adopted by a majority of the creditors & contributories, under which a new co. was to be incorporated with the same name as the old, but with a

larger share capital, & the unsecured creditors were to receive debenture stock at par for their claims as proved. A minority at the meeting, being unsecured creditors, objected to the scheme, & upon application to the High Ct. of Griqualand by the debenture holders of the old co. for a sanction of the scheme, the minority appeared to object:—*Held*: the High Ct. properly refused to sanction the scheme as not being within the powers of the liquidator.—*Re NORTH-EASTERN BULT-FONTEIN (IN LIQUIDATION)* (1894), 7 H. C. 117; 11 S. C. 368; 4 C. T. R. 399.—**S. AF.**

c. Sanction of court—Compromise before list of contributories settled.]—Under Indian Cos. Act, s. 174, the ct. has power to sanction compromises of calls, debts & liabilities before the list of contributories has been settled, or the competence of the shareholders has been ascertained.—*BANK OF HINDUSTAN, CHINA, & JAPAN v. EASTERN FINANCIAL ASSOCN., LTD.* (1869), 3 B. L. R. P. C. 8; 12 W. R. 27; 13 Moo. Ind. App. 15.—**IND.**

d. — Whether necessary—Failure to obtain—Repudiation by debtor.]—A compromise between a liquidator of a co. & a debtor or creditor of the co. which is otherwise binding

7421. Costs—Stamp duty on securities issued by new company—How borne.]—*Re GOLDSBOROUGH, MORT & CO., LTD.* (1893), 37 Sol. Jo. 728.

7422. — Of convening meeting—Discretion of taxing master.]—In the case of notices of judgment in a debenture-holders' action & of meetings of creditors & members of a co. to agree to an arrangement under 1908 Act, s. 120, the taxing master may, under R. S. C. 1883, Ord. 45, r. 27, sub-r. 38 A., assess the costs thereof at gross sums, & in that sub-rule the words "other cause" are not to be read as *ejusdem generis* with those matters which are expressly mentioned in the sub-rule, but the taxing master may act on the sub-rule in cases where no misconduct or negligence on the part of the solrs. whose costs are being taxed is imputed.—*Re COMMONWEALTH OIL CORPN., LTD.*, *PEARSON v. COMMONWEALTH OIL CORPN., LTD.*, [1917] 1 Ch. 404; 86 L. J. Ch. 348; 116 L. T. 402; 61 Sol. Jo. 315.

Annotation:—**Consd.** *Re Wyatt's Appln.*, [1918] 2 Ch. 293.

SUB-SECT. 2.—COMPROMISES BY LIQUIDATOR.

7423. Power of liquidator—To release future liabilities—On payment of fixed sum.]—The ct. will confirm an arrangement by which a party found to be a contributory in a joint-stock assocn., in consideration of the payment of a certain sum, was to be released from all future liabilities.—*Re INDEPENDENT ASSURANCE CO.* (1851), 17 L. T. O. S. 89.

7424. — — — — —.]—Where an official liquidator proposed to compromise with the contributories generally, under a compulsory winding up, by accepting £20 per share to be paid speedily, in lieu of calls to the extent of £25 per share, payable at intervals over two years, & the compromise was approved by creditors to the extent of £323,000 out of creditors to the extent of £365,000, the remaining creditors not opposing:—*Held*: an order would be made sanctioning the proposed compromise.—*Re SMITH, KNIGHT & CO.* (1868), 37 L. J. Ch. 864; 16 W. R. 1104.

7425. — Voluntary winding up—Compromise not sanctioned by extraordinary resolution—Binding till set aside.]—*CYCLEMAKERS' CO-OPERATIVE SUPPLY CO. v. SIMS*, No. 6863, *ante*.

upon both cannot afterwards be objected to on the ground that the liquidator did not obtain the sanction of the ct. to the compromise.—*HARRIS (FRANK) & CO., LTD. v. RORA HAKARAIA* (1914), 33 N. Z. L. R. 1074.—**N.Z.**

e. — — — — — Repudiation by liquidator.]—A compromise effected between the liquidators of a bank placed under the winding-up Act, & a contributory is not final & binding until sanctioned by the ct.

Where the official liquidators of a bank in liquidation accepted the assignment of the estate of a shareholder in the bank, in compromise of his liability to contribute, without having obtained the ct.'s sanction, & certain acts were done under this assignment although the formal deed had not been executed:—*Held*: the liquidators were not debarred from repudiating the arrangement, & applying for the sequestration of the shareholder's estate.—*CAPE OF GOOD HOPE BANK (IN LIQUIDATION) v. DENEYS* (1891), 8 S. C. 163.—**S. AF.**

f. — — — — — Failure by liquidator to apply for—Whether debtor may set up as a defence.]—In an action by a co., which was being wound up subject to the supervision of the ct., & its liquida-

7426. How far binding—Question not really doubtful.]—To render valid the compromise of a litigation, it is not necessary that the question in dispute should really be doubtful, if the parties *bonâ fide* consider it to be so. Therefore where, after the decision in *Bright v. Hutton*, No. 6232, *ante*, a person placed on the list of contributories as an allottee & provisional director, agreed to pay a sum in discharge of his liability under a compromise approved of by the master, he was not allowed to recede from the agreement on the grounds that he had misapprehended the decision in *Bright v. Hutton*, & that there was really no question to be the subject of a compromise.—*Re MIDLAND UNION, ETC. RY. CO., LUCY'S CASE* (1853), 4 De G. M. & G. 356; 22 L. J. Ch. 732; 18 L. T. O. S. 235; 17 Jur. 1143; 1 W. R. 440; 43 E. R. 545, L. JJ.

7427. Sanction of court—Facts must be fully disclosed.]—When an order has been made under Joint-Stock Companies Amendment Act, 1858 (c. 60) for the compulsory winding up of a co., the ct., notwithstanding the discretionary power which it has, will not sanction a compromise between certain of the contributories, unless upon sufficient evidence being furnished as to the basis on which the compromise is to be supported.—*Re NORTHUMBERLAND & DURHAM DISTRICT BANKING CO., Ex p. TOTTY* (1860), 1 Drew. & Sm. 273; 3 L. T. 94; 6 Jur. N. S. 849; 8 W. R. 713; 62 E. R. 383; *sub nom. Re NORTHUMBERLAND & DURHAM DISTRICT BANKING CO., Ex p. TOTTY, Re NORTHUMBERLAND & DURHAM DISTRICT BANKING CO., Ex p. BARTLEMAN*, 29 L. J. Ch. 702, L. JJ. *Annotations:—Expld. & Distd.* Bank of Hindustan, China & Japan v. Eastern Financial Assn. (1869), L. R. 2 P. C. 489. *Refd.* Nicholl v. Eberhardt Co. (1888), 58 L. J. Ch. 399.

7428. ——— Compromise beneficial to majority of shareholders.]—The powers of compromise given by 1856 Act, s. 90, to the official liquidator of a co. with the consent of the ct., are not superseded by those given to such liquidator by 20 & 21 Vict., c. 14, s. 16, repealed & re-enacted by 21 & 22 Vict., c. 60, s. 19, & the ct. has jurisdiction to sanction the compromise of any claim made against the co., if it shall consider it expedient & beneficial, having regard to the interests of all parties, so to do.—*Re RISCA COAL & IRON CO* (1861), 30 Beav. 528; 31 L. J. Ch. 283; 8 Jur. N. S. 128; 10 W. R. 160; 54 E. R. 994; *on appeal, sub nom. Re RISCA COAL & IRON CO., Ex p. HOOKEY* (1862), 4 De G. F. & J. 456, L. C.

Annotation:—Mentd. *Re Greaves, Ex p. Whitton* (1880), 13 Ch. D. 881.

7429. ——— What amounts to—Sanction by chief clerk.]—An official manager, having entered into a compromise with an alleged contributory in the

winding up of a co., believing that some of the statements made by the contributory were untrue, sought to set aside the compromise, on the ground that it had only received the sanction of the chief clerk, & had not received that of the judge, or been brought before his attention:—*Held*: the compromise was valid, although it had not been brought before the judge.—*Re HOME COUNTIES LIFE ASSURANCE CO., Ex p. GARSTIN* (1862), 6 L. T. 374; 10 W. R. 457.

7430. ——— Whether necessary — Voluntary winding up—Matter already before court.]—A claim made against a co. which was in course of voluntary winding up, was submitted to the ct. for adjudication. After some proceedings towards obtaining such adjudication had taken place, an agreement for compromise was come to between claimant & the liquidator, subject to the sanction of a general meeting. A general meeting, under 1862 Act, s. 159, sanctioned the compromise by a large majority; but some contributories strongly opposing its being carried into effect, the liquidator applied to the ct. for directions. The Master of the Rolls was of opinion that although the compromise had been sanctioned by the general meeting, the ct. was bound to look to its propriety, & his Lordship not being satisfied of its propriety, refused to make any order:—*Held*: as the ct., although the winding up was purely voluntary, had seisin of this particular claim, it would not, without considering the propriety of the compromise, order it to be carried into effect because it had been sanctioned by a general meeting, but such sanction was an important element in judging of its propriety.—*Re LAMA COAL CO., Ex p. MILLER* (1867), 2 Ch. App. 692; 36 L. J. Ch. 837; 16 L. T. 726; 15 W. R. 1054, L. JJ.

Annotation:—Mentd. *Re London Flour Co.* (1868), 16 W. R. 552.

7431. ——— Winding up under supervision.]—*Re ANGLO-ROMANO WATER CO., WRIGHT'S CASE*, No. 7273, *ante*.

7432. ——— Whether binding on dissentients.]—The ct. has jurisdiction, under 1862 Act, ss. 159, 160, to sanction a compromise between a co. & its creditors & contributories, & to declare such compromise binding upon dissentient creditors & contributories.—*Re COMMERCIAL BANK CORPN. OF INDIA & THE EAST* (1869), L. R. 8 Eq. 241; 38 L. J. Ch. 525; 20 L. T. 839; 17 W. R. 840.

Annotation:—Refd. Nicholl v. Eberhardt Co. (1888), 58 L. J. Ch. 399.

7433. ———.]—The A. insurance co. purchased the businesses of several cos., & indemnified them against their liabilities. Some of the policyholders of the amalgamated cos. accepted the liability of the A. co., & some did not. Afterwards

tor against an alleged debtor of the co., defender pleaded that the liquidator having agreed to a compromise of the claim sued for, & having failed to apply to the ct. for its sanction, was barred *personali exceptione* from insisting in the action. The ct. repelled this plea upon the ground that there was *locus penitentie* until the sanction of the ct. had been obtained, & that the liquidator was not bound to apply for the sanction of the ct. or to recommend the compromise to it.—*REID & LAIDLAW, LTD. v. REID* (1905), 7 F. (Ct. of Sess.) 457; 42 Sc. L. R. 314; 12 S. L. T. 705.—**SCOT.**

g. Jurisdiction of court to set aside—Discharges given to insolvent contributories—Fraud.]—Nothing short of a case of fraud will induce the ct. to open up discharges in favour of insolvent contributories granted by the liquidators of a co. which was being

wound up subject to supervision.—*CITY OF GLASGOW BANK (LIQUIDATORS) v. ASSETS CO., LTD.* (1883), 10 R. (Ct. of Sess.) 676.—**SCOT.**

h. ——— Concealment of material facts.]—Where it is found in the liquidation of a co., while matters are still entire, that the sanction of the ct. to a compromise between the liquidator & creditors has been obtained by concealment or non-disclosure of material facts, although with no fraudulent intention, such compromise cannot stand.—*HENDERSON (D. & W.) & CO. v. STEWART* (1894), 22 R. (Ct. of Sess.) 154; 32 Sc. L. R. 120; 2 S. L. T. 367.—**SCOT.**

k. ———.]—Separate actions were raised by a co. against the testamentary trustees of two contributories, who had been discharged of their liabilities on a surrender of their assets to the liquidators, for reduction

of the discharges on the ground that the contributories had failed to disclose certain properties specified, & also failed to disclose other properties not specified in the summons:—*Held*: pursuers must be allowed a proof restricted to the specified items.—*ASSETS CO., LTD. v. BAIN'S TRUSTEES & PHILLIPS' TRUSTEES* (1904), 6 F. (Ct. of Sess.) 676.—**SCOT.**

l. ——— Compromise of claims against directors—Inadequate terms.]—E. Co. went into voluntary liquidation, which was afterwards continued as a liquidation under supervision. There were no realisable assets; but a third party guaranteed to the liquidators a sum of money which was actually paid & still later another offer was made of a sum of money subject to the sanction of the ct. being obtained to a compromise of the various claims which had emerged in the liquidation:

Sect. 39.—Arrangements and compromises: Sub-sect. 2. Sect. 40: Sub-sects. 1 & 2, A.]

the A. co. & the other cos. were ordered to be wound up. A scheme of reconstruction was proposed for the sanction of the ct. under which the contributories of the A. co. & the other cos. were to pay certain contributions; & the assets of the A. co. & also the contributions when called up, were to be handed over to a new co., which was to take the business & pay the policies when they arrived at maturity, with a deduction of £5 per cent. on their amounts. The scheme had been accepted by a majority of three-fourths in value of the creditors present at meetings of each of the cos., & also by a large majority of the shareholders:—*Held*: the ct. had no jurisdiction to sanction the arrangement. Such a scheme is not a sale within 1862 Act, s. 95. The ct. has no power, under sects. 159 & 160, to sanction an arrangement by which a minority of creditors or contributories are bound to accept a compromise against their will. Considering the different value of policies of the same amount on different lives, & considering that it was uncertain in which cases there had been a novation by the policy-holders of the amalgamated cos., it was not possible to estimate the amounts of the claims of the individual creditors of the respective cos., & the ct. could not act under the powers of Joint-Stock Cos. Arrangement Act, 1870 (c. 104).—*Re ALBERT LIFE ASSURANCE Co.* (1871), 6 Ch. App. 381; 40 L. J. Ch. 505; 24 L. T. 768; 19 W. R. 670, L. JJ.

Annotation:—*Consd. Nicholl v. Eberhardt Co.* (1888), 58 L. J. Ch. 399.

7434. Jurisdiction of court to set aside.]—The judge in chambers has power to set aside a compromise entered into with his sanction by the official liquidator in a winding up, under 1862 Act, s. 160; but unless the compromise requires the approval of the ct., the judge does not possess such jurisdiction.—*Re LEEDS BANKING Co., Ex p. CLARKE* (1866), 14 L. T. 789; 12 Jur. N. S. 780; 14 W. R. 856.

7435. — Facts not properly before shareholders.]—The arts. of assocn. of a joint-stock co. provided that if a director was individually concerned in, or participated in the profits of any contract with the co., except as manager, or managing director of it, his office of director should be vacated. C. was the owner of an estate, & a director of the co. He entered into a contract on the face of which he appeared to be the agent

for his son in the transaction for the sale to the co. of the estate. The purchase was never completed. The co. was ordered to be wound up. A compromise of C.'s claims against it was proposed & approved of by the chief clerk. That approval was afterwards objected to by several of the largest shareholders of the co., on the grounds that the original contract with C. was an invalid one; that the shareholders had never had a proper opportunity of discussing the matter; that in fact, they were ignorant of the circumstances connected with the arrangement, but thought, if they had known them, they would not have sanctioned the compromise:—*Held*: under the circumstances, the compromise could not be upheld, but the ct. expressed no opinion on the validity of the original contract.—*Re CENTRAL DARJEELING TEA Co., LTD.* (1866), 15 L. T. 234.

7436. Jurisdiction of court to compel liquidator to accept compromise.]—The ct. has no jurisdiction to order the liquidator in a winding up to consent to a compromise with a contributory.—*Re EAST OF ENGLAND BANKING Co., PEARSON'S CASE* (1872), 7 Ch. App. 309; 41 L. J. Ch. 524; 27 L. T. 379; 20 W. R. 394, L. JJ.

Annotation:—*Folld. Re International Contract Co., HANKEY'S CASE* (1872), 41 L. J. Ch. 385.

7437. —.]—The ct. will not compel a liquidator against his judgment to sanction a compromise of debts.—*Re INTERNATIONAL CONTRACT Co., HANKEY'S CASE* (1872), 41 L. J. Ch. 385; 26 L. T. 358; 20 W. R. 506.

Effect of compromise with transferee—On liability of transferor as contributory.]—*See Nos. 6227, 6229, 6283, ante.*

SECT. 40.—DEFUNCT COMPANIES.

SUB-SECT. 1.—REMOVAL FROM REGISTER OF COMPANIES.

See 1908 Act, s. 242.

7438. Effect of—On personal liability of officers.]—Where a co. neglects to send to the Registrar of Joint-Stock Cos. the annual return required by 1862 Act, s. 26, as amended by Cos. Act, 1900 (c. 48), s. 19, & the Registrar strikes the name of the co. off the register under Cos. Act, 1880 (c. 19), s. 7 (4), as a defunct co., the ct., upon an application under sect. 7, sub-sect. 5, of the 1880 Act, to restore the name to the register, has no power to impose a penalty as a condition of restoring the name.

—*Held*: it was the duty of the ct. in such a case to exercise its discretion after fair & full disclosure of the facts; in the present case the claims against the directors of the E. Co. seemed *prima facie* so serious & substantial that the terms of compromise offered might well be set down as inadequate; as, however, the arrangement, if carried out, would put an end to not only the claims against the directors of the E. Co., but also the claim of the third party guarantor, on a balance of considerations & for reasons of expediency, the prayer of the liquidators' note for sanction of the compromise would be granted.—*ECUADORIAN ASSOCN., LTD. (IN LIQUIDATION) v. FOX* (1907), 14 S. L. T. 699.—**SCOT.**

7436 i. Jurisdiction of court to compel liquidator to accept compromise.]—There is no power given by Winding-up Act, R. S. C., c. 129, to enforce a compromise upon dissentient minorities, of creditors. *Semble*: a liquidator cannot be compelled to consent to a compromise, & even when a compromise is recommended by a liquidator, it may be frustrated by an opposing

minority.—*Re SUN LITHOGRAPHING Co.* (1893), 24 O. R. 200.—**CAN.**

7436 ii. —.]—Under Cos. Act, 1862, s. 160, the ct. will not compel liquidators to accept a compromise of which they do not approve.—*TENNENT v. CITY OF GLASGOW BANK* (1879), 6 R. (Ct. of Sess.) 972; 16 Sc. L. R. 555.—**SCOT.**

m. Compromise on terms of creditor surrendering all his assets—Property held jointly—Creditor bound to procure conveyance of one-half pro indiviso.]—The liquidators of a co. agreed to discharge their claims against a contributory on receiving a surrender of his whole estate. The compromise proceeded on the faith of a list of the contributory's assets prepared by him. This list contained, *inter alia*, the entry of a heritable property as "held jointly with G." The property belonged to the contributory & G. equally *pro indiviso*, & the title was a conveyance by the contributory to himself & G., the survivor of them, & the heir of the survivor, in trust for the purposes specified in a separate minute of agreement & declaration of

trust. G. declined to concur in granting a conveyance of the contributory's share of the property to the liquidators, & the contributory offered instead to assign to them his interest in the trust:—*Held*: under the terms of the compromise he was bound to procure & deliver to the liquidators a valid conveyance of one-half *pro indiviso* of the subjects in question.—*CLARK v. CITY OF GLASGOW BANK (LIQUIDATORS)* (1882), 9 R. (Ct. of Sess.) 1063; 19 Sc. L. R. 792.—**SCOT.**

n. Compromise with creditors—Meetings ordered to consider.]—The ct., on the application of the provisional liquidator of a co., directed meetings of creditors & contributories under Act 31 of 1909, s. 104, to consider a scheme involving a compromise between the co. & its creditors, & ordered a copy of the scheme to be attached to each of the notices convening the meetings. It is not necessary to submit such scheme to the minister under Cos. Act, s. 209.—*Re DEEP WATER DIAMONDS, LTD., Ex p. COUSINS*, [1921] W. L. D. 31.—**S. AF.**

By sect. 7, sub-sect. 4, of the 1880 Act, the effect of striking the name of a co. off the register is to dissolve the co., but the personal liability of its officers for the engagements made as its agents is preserved, & the mere restoring of the name to the register does not relieve them from that liability. To relieve them from liability the ct. must make an order under sect. 7, sub-sect. 5.—*Re BROWN BAYLEY'S STEEL WORKS, LTD.* (1905), 21 T. L. R. 374.

7439. — Remedy of creditors—Petition to wind up.—Where the name of a co. has been struck off the register as defunct by the Registrar of Joint-Stock Cos., acting under Cos. Act, 1880 (c. 19), s. 7, & the co. has been dissolved, a creditor who seeks to enforce the liability of any director, managing officer, or member under sub-sect. 4 of that sect. should do so by a petition to wind up the co.—*Re ANGLO-AMERICAN EXPLORATION & DEVELOPMENT CO.*, [1898] 1 Ch. 100; 67 L. J. Ch. 45; 4 Mans. 389.

Annotation:—Appld. Re Grosvenor House Property Acquisition & Investment Bldg. Soc. (1902), 71 L. J. Ch. 748.

7440. — — — — —.—Where the registration of a building society has been cancelled, & it has ceased to carry on business, a creditor's remedy is to petition for a winding-up order.—*Re GROSVENOR HOUSE PROPERTY ACQUISITION & INVESTMENT BUILDING SOCIETY* (1902), 71 L. J. Ch. 748; 50 W. R. 630.

SUB-SECT. 2.—RESTORATION TO REGISTER.

A. In General.

7441. When ordered — Whether company in operation—Omission to register order to wind up.—*Re ESTATES INVESTMENT CO.* (1883), 27 Sol. Jo. 585.

7442. — — — — — Statutory notices not received.—*Re FINANCIAL CORPN., LTD.* (1883), 27 Sol. Jo. 199.

7443. — — — — —.—The winding up of a co. began in 1880, & a call was made in May, 1883. The Registrar of Joint-Stock Cos. sent notice to the office of the co. as required by 43 Vict., c. 19, s. 7, but by an accident the notice could not be delivered & it was returned. In Apr. 1887, he

struck the name of the co. off the register. Nothing appeared to have been done by the co. between 1883 & 1888, but on the petition by the liquidator to have the name restored, & on production of evidence that some debts were still unpaid as also some calls, the ct. directed the co.'s name to be restored to the register.—*Re CARPENTER'S PATENT DAVIT BOAT LOWERING & DETACHING GEAR CO.* (1888), 1 Meg. 26.

7444. — — — — —.—*Re AUSTER, LTD.* (1903), 47 Sol. Jo. 778.

7445. — — — — —.—It is not necessary for a dissolved co., when presenting a petition under 1908 Act, s. 242, sub-sect. 6, to have its name restored to the register, to present such petition during the period between the striking off & the dissolution.

The practice in the past has been for the publication of dissolution of the co. in the Gazette to follow almost immediately on the striking off of the co.'s name by the Registrar, & it has been a common & usual practice to make orders for restoration after the date of dissolution under sub-sect. 5 of sect. 242, & this practice ought not to be disturbed.—*Re HALL (CONRAD) & CO., LTD.* (1916), 60 Sol. Jo. 666.

7446. — — — — —.—*Re HOLLINWOOD ESTATE CO., LTD.* (1886), 3 T. L. R. 232.

7447. — — — — — For purposes of winding up only.—The ct. has jurisdiction under Cos. Act, 1880 (c. 19), s. 7 (5), to restore to the register of joint-stock cos. the name of a co. which has been struck off by the registrar under the provisions of that sect., although, at the time of striking off, the co. was carrying on business only for the purpose of a voluntary winding up.—*Re OUTLAY ASSURANCE SOCIETY* (1887), 34 Ch. D. 479; 56 L. J. Ch. 448; 56 L. T. 477; 35 W. R. 343.

Annotation:—Folld. Re Hall (1916), 60 Sol. Jo. 666.

7448. — — — — — Abortive company.—*Re BRITISH INCANDESCENT HEATING SYNDICATE, LTD.* (1904), cited in Halsbury's Laws of England, Vol. V. at p. 611.

7449. — — — — — For purpose of realising assets.—*LANGLAAGTE PROPRIETARY CO., LTD.* (1912), 28 T. L. R. 529.

7450. Power to impose penalty as condition of restoration.—*Re BROWN BAYLEY'S STEEL WORKS, LTD.*, No. 7438, *ante*.

PART III. SECT. 40, SUB-SECT. 2.—A.

7449 i. When ordered—For purpose of realising assets.—A liquidator of a co. made a return to the Registrar of a meeting having been held in terms of Cos. Act, 1862, s. 142. Subsequently the co. & the liquidator presented a petition to the ct. to find that the affairs of the co. were not fully wound up, & to suspend the operation of s. 143 of that Act. They averred that since the date of the final meeting, it had come to the knowledge of the liquidator that £45,000 was due to the co. by one of its directors & that he was taking proceedings against the director to recover the same; the liquidator also petitioned the ct. for a decree against the director for the payment of the sum:—*Held: the first petition was incompetent & must be dismissed.*—*SCOTTISH FLUID BEER CO., LTD. v. AULD* (1898), 25 R. (Ct. of Sess.) 1056.—*SCOT.*

7449 ii. — — — — —.—A co. was dissolved after voluntary liquidation at the beginning of the year 1906. At that date it owned heritable property which it was under obligation to pay to a new co. In 1915 the new co.

acquired a formal title to the property & presented a petition craving the dissolution of the old co. should be declared void, & its liquidator should be authorised to grant the necessary conveyance. The ct. in exercise of its *nobile officium*, the power conferred by Cos. (Consolidation) Act, 1908, s. 223 (1), not being available since the application was made more than two years after the dissolution, granted decree as craved.—*Re COLLINS BROTHERS & CO., LTD.* (1915), 53 Sc. L. R. 454.—*SCOT.*

7449 iii. — — — — —.—Within two years of its dissolution the liquidator of a co. presented a petition in which he craved the ct. in terms of Cos. (Consolidation) Act, 1908, s. 223, to declare the dissolution void so as to enable him to grant a title to heritage belonging to the co., which had been held subsequent to its dissolution. The ct. granted a decree as craved.—*M'CALL & STEPHEN, LTD. (LIQUIDATOR)* (1920), 57 Sc. L. R. 480.—*SCOT.*

7449 iv. — — — — —.—When the name of a co., registered under Law 5 of 1874 (Transvaal), had been removed from the register & the co. dissolved

as defunct under Act 31 of 1909, s. 196 (Transvaal):—*Held: the ct. could replace the name of the co. on the register when property belonging to it had been found and the Crown did not object.*—*Re HEBRON DIAMOND MINING SYNDICATE, LTD., Ex p. SPRAWSON*, [1914] T. P. D. 458.—*S. AF.*

o. — — — — — Fraud or concealment—Laches in invoking assistance of court.—Cos. Act, 1909, s. 193 (1), giving the ct. power to declare the dissolution of a co. void, will not be applied unless (a) some unforeseen event, such as the discovery of new assets, has occurred; (b) there has been some fraud or concealment practised; or (c) the dissolution has become, either by reason of surrounding circumstances or through some contrivance of parties, the instrument of injustice.

The extraordinary relief, of voiding the dissolution of a co., will not be granted to an appet. who has acquiesced in the action of which he complains, or has been guilty of laches in invoking the assistance of the ct.—*GOODMAN v. SUBURBAN ESTATES, LTD. (IN LIQUIDATION)*, [1915] W. L. D. 15. *AF.*

Sect. 40.—Defunct companies: Sub-sect. 2, B. Part IV. Sects. 1, 2 & 3: Sub-sect. 1.]

B. Procedure.

7451. How petition entitled.]—*Re JOHANNESBURG MINING & GENERAL SYNDICATE, LTD. (1901), 45 Sol. Jo. 343.*

Annotation:—Folld. Re Hall (1916), 60 Sol. Jo. 666.

7452. Parties—Petition by shareholders—Addition of company as co-petitioners.]—Where the name of a co. has been struck off the register under

1908 Act, s. 242, & a petition to restore is brought by shareholders, the co. should be added as co-petitioner in order that they may give the undertakings required by the Board of Trade to make the necessary returns.—*Re WRIGHT (WALTER), LTD. (1923), 67 Sol. Jo. 577.*

7453. Jurisdiction of Court of Chancery.]—*Re CITY LANDS INVESTMENT CORPN., LTD., [1897] W. N. 162.*

7454. —.]—*Re CHACO (PARAGUAY) LAND CO., LTD., [1901] W. N. 124.*

Part IV.—Banking Companies.

SECT. 1.—IN GENERAL.

7455. What are—Banking business carried on—Not in pursuance of settlement deed.]—The deed of settlement of a co., stated that the co. was formed for the purpose of purchasing land & erecting thereon dwellings to be allotted to members of the co., & also of raising a fund out of which sums of money should be paid to or applied for the benefit of members being allottees of land. The deed provided that the directors should from time to time, & as the funds should admit of, purchase land for the purposes of the co., to be divided among shareholders in a manner therein provided:—*Semle*: the fact of the business of banking having been carried on by the directors, not in pursuance of the deed of settlement, would not make it a banking co. so as to be excepted from 1844 Act.—*R. v. WHITMARSH, Re NATIONAL LAND CO. (1850), 15 Q. B. 600; 19 L. J. Q. B. 469; 16 L. T. O. S. 108; 117 E. R. 586; sub nom. R. v. JOINT-STOCK COMPANIES' REGISTRAR, Re NATIONAL LAND CO., 15 Jur. 7.*

Annotations:—Refd. Bear v. Bromley (1852), 18 Q. B. 271; Re Padstow Total Loss & Collision Assoc. Assocn. (1882), 20 Ch. D. 137. Mentd. Hambro v. Hull & London Fire Insee. (1858), 28 L. J. Ex. 62; Moore v. Rawlins (1859), 6 C. B. N. S. 289; Smith v. Anderson (1880), 15 Ch. D. 247; Re Jones, Clegg v. Ellison, [1898] 2 Ch. 83; Re Russell Institution, Figgins v. Baghino, [1898] 2 Ch. 72.

—.]—*See, also, BANKERS & BANKING, Vol. III., pp. 138–140.*

Savings banks.]—*See BANKERS & BANKING, Vol. III., pp. 134–138.*

7456. Powers—Cannot be treasurer of friendly society.]—(1) A banking co. acted as treasurer of a friendly society. A claim for priority in the winding up of the bank in respect of money of the society lodged in the bank was rejected.

(2) An incorporated banking co. cannot be the treasurer of a friendly society within Friendly Societies Act, 1875 (c. 60).—*Re WEST OF ENGLAND & SOUTH WALES DISTRICT BANK, Ex p. SWANSEA FRIENDLY SOCIETY (1879), 11 Ch. D. 768; 48*

L. J. Ch. 577; 40 L. T. 551; 43 J. P. 637; 27 W. R. 596.

Annotation:—Generally, Mentd. John O'Gaunt Lodge of Oddfellows v. Bell (1883), Diprose & Gammon, 67.

—.]—*See, generally, BANKERS & BANKING, Vol. III., pp. 123 et seq.*

SECT. 2.—RETURNS BY BANKING COMPANIES.

7457. Under Country Bankers Act, 1826 (c. 46), s. 5—Form of affidavit verifying accounts.]—(1) Under the above sect., which requires that copies of the annual accounts of banking cos. within the Act shall be verified by the oath of the public officer taken before any justice of the peace, & in sched. A, contains a form of such affidavit, ending "sworn before me, justice of the peace in & for the said county":—*Held*: a return, which appeared on the face of it to be verified "before L." without adding that he was a justice of the peace, was receivable in evidence, it being shown that L. was in fact a justice.

(2) The sect. requires that such return shall be delivered to the Comrs. of Stamps every year, "between Feb. 28 & Mar. 25":—*Held*: it was not necessary in order to make the copy of such return admissible in evidence under sect. 6 of the Act that it should be shown on the face of such copy or otherwise that the return had been delivered at the Stamp Office within the specified time.—*BOSANQUET v. WOODFORD (1843), 5 Q. B. 310; 1 Dav. & Mer. 419; 13 L. J. Q. B. 93; 2 L. T. O. S. 227; 8 Jur. 242; 114 E. R. 1266.*

Annotations:—As to (1) Refd. R. v. Stainforth (1847), 11 Q. B. 66. Generally, Mentd. Bosanquet v. Graham (1843), 6 Q. B. 601, n.; Harvey v. Scott (1847), 11 Q. B. 92.

7458. — Time for delivery.]—*BOSANQUET v. WOODFORD, No. 7457, ante.*

7459. Under Joint-Stock Banks Act, 1844 (c. 113)—Contents—Shareholder disputing liability—Injunction.]—The ct. refused, upon an interlocutory

PART III. SECT. 40, SUB-SECT. 2.—B.

*p. Remission to man of business—Whether necessary.]—*Within two years from its dissolution, the liquidator of a co., presented a petition in which he craved the ct. under Cos. (Consolidation) Act, 1908, s. 223, to declare the dissolution void, so as to enable him to grant a title to certain heritage which belonged to the co. & had been sold subsequent to its dissolution:—*Held*: a remit to a man of business was not required & a decree was granted as craved.—*MCCALL &*

STEPHEN, LTD. (LIQUIDATOR) (1920), 57 Sc. L. R. 480.—SCOT.

PART IV. SECT. 1.

*q. What are—Whether trust company a "banking institution."—*A. agreed to subscribe for & purchase 100 shares in a co. This undertaking stated: "This underwriting may be pledged or hypothecated with any 'banking institution'"; & undertaking was assigned to a co. which was trust co.:—*Held*: plff., the trust co., came within the phrase "banking institution" in above clause.—*MON-*

TREAL TRUST CO. v. RICHARDSON, [1922] 1 W. W. R. 548; 62 S. C. R. 617; 62 D. L. R. 186; affg. 55 D. L. R. 190; 48 O. L. R. 61.—CAN.

*r. Validity of registration—After cessation of business.]—*A banking co. is competently registered under Joint-Stock Banking Co.'s Act, 1857, although it had, previous to the resolution to register, stopped payment & never afterwards resumed business.—*WESTERN BANK (LIQUIDATORS) v. DOUGLAS (1860), 22 Durl. (Ct. of Sess.) 447; 32 Sc. Jur. 212.—SCOT.*

application, to restrain by injunction a banking co. from returning to the Stamp Office, under the above Act, among the names of the shareholders in the co., the name of a person who, by his bill & affidavit, alleged facts to show that he had ceased to be a shareholder, his case not being perfectly clear on the evidence.—**BULLOCK v. CHAPMAN** (1848), 2 De G. & Sm. 211; 11 L. T. O. S. 326; 12 Jur. 738; 64 E. R. 94.

Admissibility in evidence.—See **BANKERS & BANKING**, Vol. III., pp. 142, 143, Nos. 144–147.

SECT. 3.—LEGAL PROCEEDINGS BY AND AGAINST BANKING COMPANIES.

SUB-SECT. 1.—CIVIL PROCEEDINGS.

7460. By company—Against shareholders jointly with strangers.—A joint-stock banking co., under Country Bankers Act, 1826 (c. 46), may sue, by their public officer, members of the co. jointly with strangers.—**MANNERS v. ROWLEY** (1840), 10 Sim. 470; 9 L. J. Ch. 169; 59 E. R. 697.

7461. Trial by special jury—Competency of shareholders to sit on jury.—Where in an action by the public officer of a banking co. pltf. has obtained a rule for a special jury, the ct. will compel him to furnish a list of the shareholder of the co., unless he undertakes that none of the 48 persons named as jurors shall be shareholders.—**ESDAILE v. LUND** (1844), 12 M. & W. 734; 1 Dow. & L. 990; 13 L. J. Ex. 191; 8 Jur. 385; 152 E. R. 1394.

Annotation:—**Mentd.** **Anderson v. Boynton** (1849), 13 Q. B. 308.

See, generally, **JURIES**.

— **In bankruptcy.**—See **BANKRUPTCY & INSOLVENCY**, Vol. IV., p. 208, Nos. 1923, 1924.

— **See, further,** **BANKERS & BANKING**, Vol. III., pp. 134, 140–142, 143, Nos. 92, 131–142, 144, 145, 150–152.

7462. Against company—Action by shareholders—Whether entitled to sue.—Bill by some of the shareholders of an insolvent joint-stock bank, established under Country Bankers Act, 1826 (c. 46), & Bank Notes Act, 1833 (c. 38), on behalf of themselves & all other shareholders except defts., against the directors, some of whom had become bkpt., & the trustees & public officer of the co., & certain shareholders, who were alleged to have not paid up their calls, praying that an account might be taken of all the partnership assets, & that such part as was outstanding might be got in by a receiver, & that the whole might be converted into money, & applied towards satisfaction of the partnership debts. Demurrer, for want of equity, want of parties, & multifariousness, overruled.—**WALLWORTH v. HOLT** (1841), 4 My. & Cr. 619; 41 E. R. 238; *sub nom.* **WALWORTH v. HOLT**, 10 L. J. Ch. 138; 4 Jur. 814; 5 Jur. 237, L. C.

Annotations:—**Consd.** **Richardson v. Larpent** (1843), 7 Jur. 691; **Deeks v. Stanhope** (1844), 14 Sim. 57; **Richardson v. Hastings** (1844), 7 Beav. 323. **Foldd.** **Apperly v. Page** (1847), 1 Ph. 779. **Consd.** **Hall v. Hall** (1850), 3 Mac. & G. 79. **Apld.** **Evans v. Coventry** (1854), 5 De G. M. & G. 911. **Refd.** **Foss v. Harbottle** (1843), 2 Hare, 461; **Mozley v. Alston** (1847), 1 Ph. 790; **Dawson v. Tabor** (1851), 18 L. T. O. S. 27; **Russell v. Wakefield Waterworks Co.** (1875), L. R. 20 Eq. 474; **Baillie v. Oriental Telephone & Electric Co.**, [1915] 1 Ch. 503. **Mentd.** **Fairthorne v. Weston** (1844), 3 Hare, 387; **Carlisle v. S. E. Ry.** (1850), 1 Mac. & G. 689; **Sheppard v. Oxenford** (1855), 1 K. & J. 491; **Fawcett v. Laurie** (1860), 1 Drew & Sm. 192; **Hare v. L. & N. W. Ry.** (1861), 2 John. & H. 80; **Re Anglesea Colliery Co.** (1866), L. R. 2 Eq. 379; **Turquand v. Marshall** (1868), L. R. 6 Eq. 112; **London City Sewers Comrs. v. Gellatly** (1876), 24 W. R. 1059; **Whitwam v. Watkin** (1898), 78 L. T. 188.

Actions by shareholders against companies, generally, see Part III., Sect. 33, *ante*.

7463. Who proper person to be sued.—**Semble**: (1) where by Act of Parliament a joint-stock co. may be sued through the medium of its public officer, he is the proper person to be sued, & not the directors, even where the directors are charged with a gross fraud; &, at all events, one only of such directors ought not to be made a party; & where a co. is so constituted, a bill is sustainable against a single shareholder, jointly with the public officer, if it allege that he is the assignee of the debt for which the co. have brought the action at law against pltf.

Semble: (2) that if a bill alleges that a person has become bankrupt, but does not allege that assignees have been chosen, a demurrer to the bill, on the ground that the assignees are not parties to the suit, is a speaking demurrer, and therefore bad.—**PENDLEBURY v. WALKER** (1841), 4 Y. & C. Ex. 424; 10 L. J. Ex. Eq. 27; 5 Jur. 334; 160 E. R. 1072.

Annotations:—**Generally**, **Mentd.** **Steel v. Dixon** (1881), 17 Ch. D. 825; **Re Arcedekne, Atkins v. Arcedekne** (1883), 24 Ch. D. 709; **Ellesmere Brewery Co. v. Cooper**, [1896] 1 Q. B. 75; **Re Denton's Estate, Licenses Insee. Corp'n. & Guarantee Fund v. Denton**, [1903] 2 Ch. 670.

7464. Change of public officer—After action brought.—Where the public officer of a joint-stock banking co., duly registered according to Country Bankers Act, 1826 (c. 46), is changed after the commencement of a suit in equity against such co., pltf., in all subsequent proceedings in the cause, should treat the new public officer as the statutable officer; & no order of the ct. or supplemental bill is required to bring such new officer before the ct.—**BUTCHART v. DRESSER** (1847), 16 L. J. Ch. 198; 9 L. T. O. S. 214; 11 Jur. 196, L. C.

— **See, also,** **BANKERS & BANKING**, Vol. III., p. 143, No. 153.

7465. Scire facias against shareholders—Whether shareholder at date of contract sued on—Alleged termination before date of contract.—The ct. will make absolute a rule for a *sci. fa.* under Country Bankers Act, 1826 (c. 46), s. 13, to obtain execution against a shareholder of a joint-stock banking co., although he states upon affidavit that he had ceased to be a member before the date of the contract declared upon, & although the affidavits upon which the rule was obtained show only that his name had never been returned to the Stamp Office in the list of those who had ceased to be members, but had been returned in the list of members at the date of the last return preceding the date of the contract, his name being excluded from all subsequent lists; as the question whether he was a member or not at the date of the contract was one proper to be raised by pleading to the *sci. fa.*—**BURNS v. SCOTT, Re BROOKE** (1848), 11 L. T. O. S. 241.

7466. Person becoming shareholder after judgment.—**WITTENBOROUGH v. LAW** (1849), 14 L. T. O. S. 203.

7467. Scire facias issued & judgment obtained against another shareholder.—To a *sci. fa.* under Country Bankers Act, 1826 (c. 46), s. 13, against a member for the time being of a banking co-partnership, it is no answer that pltf. had previously issued another *sci. fa.*, & obtained judgment thereon, against another member for the time being of the same co-partnership.—**BURMESTER v. CROPTON** (1849), 3 Exch. 397; 6 Dow. & L. 430; 18 L. J. Ex. 142; 12 L. T. O. S. 379; 13 Jur. 237, n.; 154 E. R. 899.

Annotation:—**Refd.** **Nunn v. Lomer** (1849), 13 Jur. 236.

Sect. 3.—Legal proceedings by and against banking companies: Sub-sects. 1 & 2. Sects. 4 & 5.]

—[See, also, **BANKERS & BANKING**, Vol. III., pp. 149–151, Nos. 177–192.

— **Execution against shareholder.]**—See **BANKERS & BANKING**, Vol. III., p. 151, Nos. 193–200.

— **Other proceedings against shareholders.]**—See **BANKERS & BANKING**, Vol. III., pp. 151, 152, Nos. 201–206; **BANKRUPTCY & INSOLVENCY**, Vol. IV., p. 34, Nos. 294–295.

SUB-SECT. 2.—CRIMINAL PROCEEDINGS.

Against officers of company.]—See **CRIMINAL LAW & PROCEDURE**, Vol. XV., pp. 939 *et seq.*

SECT. 4.—WINDING UP.

7468. Voluntary winding up—Whether company duly dissolved.]—A., B. C., D., & others, carried on the business of bankers, under Country Bankers Act, 1826 (c. 46), for some years prior to & upon Aug. 29, 1839, upon the terms contained in two deeds of July, 1834, & Aug. 1836, the former deed stating the circumstances under which, & the manner in which, the co. might be dissolved at an extraordinary general meeting of the shareholders, called for that purpose by a certain board of directors, of which B., C., & D. were members. In the co. A. held 100 shares of £10 each. The board called an extraordinary general meeting of the shareholders, to be held on Aug. 29, 1839, pursuant to the provisions of the deed of 1834. At the meeting so called, the shareholders present passed resolutions, in conformity with the deed of 1834, that the co. was thereby dissolved; that the winding up of its affairs should be entrusted to the then board of directors, with power to employ & pay for such assistance as might be

necessary; that any three directors might act; that the assets should be realised with all convenient speed, & that the portion not required to meet the engagements of the co. should be divided amongst the shareholders ratably, in such dividends as the directors might deem fit; a dividend to be declared at least once in every six months; a copy of the proceedings & resolutions to be transmitted to each shareholder; no transfer to parties not already shareholders to be permitted. No shareholder present at the meeting was desirous of continuing the concern. Neither A. nor B. was present at the meeting, but a copy of the state of the said proceedings & resolutions was transmitted to A. & the other shareholders. From Aug. 29, 1839, the business of the co., except so far as was necessary for winding up the affairs, was discontinued, & B., C., & D., in pursuance of the said resolutions, proceeded to wind up the affairs of the co.:—*Held*: the co. was duly dissolved, & notwithstanding the power to wind up the concern, an allegation in a declaration that the co. had altogether ceased & determined, was correct.—**LYON v. HAYNES** (1843), 5 Man. & G. 504; 6 Scott, N. R. 371; 134 E. R. 661.

7469. — Power of directors.]—The directors of a projected banking co., not being able to carry out the project to its full extent, determined upon winding up the affairs & returning to appts. for shares the full amounts of the deposits made by them. Deposits amounting in the whole to two-thirds of the amount deposited had been returned to the depositors, & the remainder was in course of payment. On bill filed by purchasers of shares or intended shares, who were dissatisfied with the termination of the affairs of the proposed co.:—*Held*: the directors were justified in the course they had taken, it being morally impossible that the project could have been carried out in its entirety from the events which had happened.—**SWITZERLAND BANK v. TURKEY BANK** (1861), 5 L. T. 549.

7470. Contributories—Who are.]—A., a share-

PART IV. SECT. 4.

s. Inspection of books prior to proceedings—When granted—Necessity for disinterested investigators.]—An inspection of the books of a banking co. prior to & in view of the appointment of official liquidators in winding-up proceedings was refused where there was no reason to believe that anything unsatisfactory would be found in the books relating to the individual transactions of the persons nominated. Where there is reason to believe that the affairs of a bank have been mismanaged, & that certain persons may be civilly or criminally liable therefor, there should be an inspection of the books, & an investigation of the affairs of the bank by independent persons. It is the duty of the liquidators to make such independent investigation. The *et.*, having reason to believe such an investigation necessary, will take care not to appoint as liquidators persons responsible for the past management of the bank.—**Re COLONIAL BANK OF NEW ZEALAND** (1896), 14 N. Z. L. R. 484.—N.Z.

t. Competency of winding-up order—After order already made by English court—Where head office but no banking business in England.]—The O. Bank Corpn. incorporated under royal charter in England to carry on banking business in Victoria & other colonies, had its directors, board of management & head office in England & carried on the business of exchange & remittance there, but did not carry on the general business or banking in England. It had several branches or agencies in India, Victoria & other colonies & its

shareholders & creditors were distributed throughout England, India & the colonies. The corpn. was not registered in England under the English Companies Act, 1862 nor in Victoria under "Companies Statute 1864" (No. 190):—*Held*: the corpn. could be wound up in Victoria under the latter Act on the petition of a creditor even if the English *cts.* had already made an order to wind it up in England.—**Re ORIENTAL BANK CORPN.** (1884), 10 V. L. R. 154.—AUS.

a. Effect of winding-up order—On ownership of corporate property.]—A winding-up order under Companies Statute, 1864 (No. 190) does not vest the property of the co. in the liquidator but merely enables him to recover it as a kind of agent of the co. suing in its name.—**Re ORIENTAL BANK CORPN.** (1884), 10 V. L. R. 154.—AUS.

b. Appointment of liquidator—Necessity for notice to creditors.]—Act of 1882, c. 23, s. 24, under which insolvent banking cos. were first enabled to be brought into liquidation enacts that a liquidator shall be appointed after previous notice given to creditors, *et.* in the proscribed manner. Where the only notice given was one in the newspapers as provided by s. 105:—*Held*: this provision did not apply to such a notice but is only sufficient as to the holder of banknotes in circulation; the appointment of the liquidator was therefore void.—**MOTT v. BANK OF NOVA SCOTIA, Re BANK OF LIVERPOOL** (1887), 14 S. C. R. 650.—CAN.

c. Contributories—Who are—As between transferors & transferees—Of shares transferred after winding-up pro-

ceedings begun.]—Transfers of the shares were made by appts. & registered in the transfer-books of the bank after the winding-up proceedings began, but before the winding-up order was made: & for some reason, the names of the transferees & not the names of appts., were inserted in the first list in contributories prepared by the liquidator & settled by the referee in the winding up. Afterwards, upon the application of the liquidator, the referee added appts'. names to the list:—*Held*: appts. could not escape liability by reason of the delay, or by virtue of a supposed election of the liquidator to look to the transferees, or by estoppel, or otherwise.—**Re ONTARIO BANK, MASSEY & LEE'S CASE** (1912), 27 O. L. R. 192; 4 O. W. N. 67; 8 D. L. R. 243.—CAN.

d. — Allottees of shares—Though company never started business.]—A bank was incorporated in 1905 but never secured the necessary capital stock & a winding-up order was made in 1908. Appts. signed applications under seal for shares & had shares allotted to them:—*Held*: the provisional directors had power to allot the shares to make the subscribers members of the corpn., & the names of appts. were properly placed upon the list of contributories although they never became actual "shareholders."—**Re MONARCH BANK OF CANADA** (1914), 32 O. L. R. 207.—CAN.

7470 i. — Liability to creditors is not the test of contribution under the Joint Stock Companies Winding up Acts, 1848 & 1849. Therefore, where the partnership deed of a

holder in a joint-stock banking co., established under Country Bankers Act, 1826 (c. 46), effectually assigned his shares in the co. more than three years prior to the winding up of such co. It appeared that there was at least one other former shareholder in the same situation:—*Held*: A. had been properly included in the list of contributories, & it was no objection that his name had been placed on the list upon notice given by a continuing shareholder.—*Re NORTH OF ENGLAND JOINT STOCK BANKING CO.* (1849), 1 Mac. & G. 49; 1 H. & Tw. 225; 41 E. R. 1180; *sub nom. Re NORTH OF ENGLAND JOINT STOCK BANKING CO.*, *Ex p. HAWTHORN*, 18 L. J. Ch. 179; 13 Jur. 158, L. C.

Annotations:—*Distd. Re North of England Joint Stock Banking Co.*, *Holme's Case* (1852), 2 De G. M. & G. 113. *Refd. Re Vale of Neath & South Wales Brewery Co.*, *Morgan's Case* (1849), 1 De G. & Sm. 750; *Re Monmouthshire & Glamorganshire Joint-Stock Banking Co.*, *Ex p. Cape's Exors.* (1852), 22 L. J. Ch. 601.

7471. ———.]—By the terms of a joint-stock banking co.'s deed of settlement, it was provided that nothing in the deed contained should release a retiring member from his share of the losses sustained by the co. up to the period of his retirement, & also that the half-yearly balance-sheets should, as between shareholders, be binding & conclusive. B., a shareholder, duly transferred his shares, & the two balance-sheets immediately preceding the transfer showed the affairs of the co. to be in a prosperous condition. Four months after the transfer, the bank suspended payment, & upwards of three years after that time an order was obtained for the winding up of the co. The person who prepared the balance-sheets deposed that there were in fact considerable losses sustained by the co. in the two years preceding the transfer:—*Held*: nevertheless, B. was not liable as a contributory.—*Re NORTH OF ENGLAND JOINT STOCK BANKING CO.*, *HOLME'S CASE* (1852), 2 De G. M. & G. 113; 22 L. J. Ch. 226; 19 L. T. O. S. 250; 16 Jur. 803; 42 E. R. 814, L. C.

Annotations:—*Appld. Re Portsmouth Banking Co.*, *Helby's Stokes' & Horsey's Cases* (1866), L. R. 2 Eq. 167. *Refd. Re Monmouthshire & Glamorganshire Joint-Stock Banking Co.*, *Ex p. Cape's Exors.* (1852), 22 L. J. Ch. 601.

7472. ——— **Extent of liability.**]—(1) A., the original holder of shares in a joint-stock banking co., died in 1842, possessed of shares, & B., his extrix., upon production of the probate of his will, received the dividends upon the shares from 1842 to 1846, & signed receipts for the same, as extrix. of A., the shares remaining in the name of A. An order being made for winding up the co., the master excluded B.'s name altogether from the list of contributories. The co.'s deed provided, that each shareholder should be liable to losses in proportion to his shares, & each shareholder covenanted for himself, his heirs, exors., etc., in respect of shares remaining part of his assets, to observe all the stipulations of the deed. Upon appeal, an order declaring that B. ought, either personally or as extrix., to be on the list of contributories, was affirmed.

(2) The limitation of three years, imposed by Country Bankers Act, 1826, (c. 46) s. 13, is con-

fined to a claim by a creditor against a retired shareholder, & does not apply to a claim by partners for contribution *inter se*.—*Re NORTH OF ENGLAND JOINT STOCK BANKING CO.*, *Ex p. GOUTHWAITE* (1851), 3 Mac. & G. 187; 20 L. J. Ch. 188; 16 L. T. O. S. 337; 15 Jur. 137; 42 E. R. 232, L. C.

Annotations:—*As to* (1) *Consd. Re Agriculturist Cattle Inscc.*, *Baird's Case* (1870), 5 Ch. App. 727, n. *Refd. Heward v. Wheatley*, *Ex p. Ogden* (1853), 3 De G. M. & G. 628; *Re Royal Bank of Australia* (1855), 3 Sm. & G. 272; *Houldsworth v. Evans* (1868), L. R. 3 H. L. 263.

See, also, BANKERS & BANKING, Vol. III., pp. 156–159.

Winding up of foreign & colonial banking companies.]—*See Part XII., Sect. 8, post.*

Winding up of companies, generally, *see Part III., Sects. 36, 37, ante.*

SECT. 5.—CONTRACTS FOR SALE OF SHARES IN JOINT STOCK BANKING COMPANIES.

See Banking Companies' (Shares) Act, 1867 (c. 29) (Leeman's Act).

Requisites of valid contract.]—*See Leeman's Act.*

7473. Whether valid contract within Leeman's Act.]—On Sept. 30, 1878, applt., through a broker, sold some shares in G. Bank on the G. Stock Exchange. The sale was entered in the transaction books of the respective brokers, & each entry specified the name of the broker for the other party & was initialled by him, Oct. 16 being stated as the settling day. At the time of the sale applt.'s name was verbally mentioned to the purchaser's broker, who, on the following day, informed applt.'s broker that the shares had been bought by the directors of the bank. On Oct. 2, the bank stopped payment, & on Oct. 5 the directors summoned a meeting of the shareholders to consider a resolution for a voluntary winding up. On Oct. 16 applt. tendered a deed of transfer to the secretary of the bank, but the directors refused to execute the deed or to register the transfer. At the meeting of shareholders held on Oct. 22 a voluntary winding up was agreed upon:—*Held*: applt. was liable as a contributory in the winding up of the co., & the directors had been guilty of no default or unnecessary delay within 1862 Act, s. 35, in refusing to execute the transfer of his shares.

Semble: there was no valid contract for the sale of the shares within Leeman's Act, s. 1.—*NELSON MITCHELL v. CITY OF GLASGOW BANK* (1879), 4 App. Cas. 624; 27 W. R. 875, H. L.

Annotation:—*Mentd. McEllistim v. Ballymacelligott Co-op. Agricultural & Dairy Soc.*, [1919] A. C. 548.

7474. Custom of Stock Exchange to disregard Leeman's Act—Validity of.]—Deft. instructed pltf's., who were stockbrokers at Bristol, to purchase for him shares in a joint-stock banking co. on the Stock Exchange. Pltf's. gave directions accordingly to their London agents, brokers on the Stock Exchange, who purchased the shares from jobbers on the Stock Exchange in the usual way, without having in the contract distinguishing

joint-stock bank provided that the transferor of shares should, from the date of the transfer, have no claim or demand whatsoever, either at law or in equity, upon or against the society, or any of the proprietors thereof, for the time being, other than the transferee, except for dividends declared previously to the transfer, & on payment of any further instalment or instalments which might have been previously called for, should be for ever discharged

from all further liabilities & obligations in respect of the shares transferred, & from all further claims and demands on account of the same:—*Held*: shareholders who had transferred their shares *bond fide* & for value, should not be placed on the list of contributories, although they were still liable to the creditors of the bank, the three years from the transfer within which creditors might proceed against them under 6 Geo. 4, c. 42, s. 9, not having expired.

—*Re TIPPERARY JOINT STOCK BANK*, *Ex p. STIRLING* (1857), 6 I. C. L. R. 180; 9 Ir. Jur. 403.—*IR.*

7472 i. ——— **Extent of liability.**]—Upon the winding up of a bank, the liquidator is entitled to place upon the list of contributories all the shareholders in respect of the double liability imposed upon them by Bank Act, R. S. C., c. 29, s. 125.—*Re BANK OF VANCOUVER*, [1917] 1 W. W. R. 163.—*CAN.*

Sect. 5.—Contracts for sale of shares in joint stock banking companies. Part V. Sect. 1.]

numbers of the shares, it not being the practice on the London Stock Exchange to specify the numbers or otherwise to comply with the above Act. By the rules of such Stock Exchange it is provided that the Stock Exchange shall not recognise in its dealings any other persons than its own members, such members, if they do not carry out contracts, being liable to be expelled from the Stock Exchange, & that no application to annul a contract shall be entertained by the committee of the Stock Exchange unless upon a specific allegation of fraud or wilful misrepresentation. Before the settling day deft. repudiated the contract, but the committee of the Stock Exchange refused to annul the contract, & therefore pltf. completed it, & paid the price of the shares. Deft. was ignorant of the usage of the London Stock Exchange with regard to dealings in shares of banking cos., & did not know that the purchasing broker was by such usage bound to perform a contract for the purchase of banking shares, though void at law under the above Act:—*Held*: pltf. were not entitled to recover from deft. the money paid by them as the price of the shares, since the usage of the Stock Exchange to disregard the above Act, & to recognise as valid a contract which was made contrary to that Act, was unreasonable as against strangers who did not know it, & therefore was not binding on deft.—*PERRY v. BARNETT* (1885), 15 Q. B. D. 388; 54 L. J. Q. B. 466; 53 L. T. 585; 1 T. L. R. 580, C. A.

7475. — — — — —.]—The jury have found that deft. did not know that these shares [which deft. had contracted to purchase in a banking co.] would be unnumbered shares. Pltf. have entered into a contract which the Act says shall be null & void, & before they have made any payment under the contract, deft. comes to them & says she will not ratify the contract. In view of the finding of the jury, pltf. cannot say: "We were justified in doing this because you knew what was intended." Therefore I must enter verdict for deft. (*VAUGHAN WILLIAMS, J.*).—*COATES, SON & CO. v. PACEY* (1892), 8 T. L. R. 351; *affd.*, 8 T. L. R. 474, C. A.

7476. — — — — — **Liability of broker on non-compliance with Act—Broker employed to sell.**—Deft., a stockbroker, who had undertaken to sell shares of a joint-stock bank for pltf., a shareholder, sold them to a jobber on the Stock Exchange & sent an advice note of such sale to pltf., but in accordance with the custom of the Stock Exchange, the bought & sold notes between deft. & the jobber omitted to state the name of the registered proprietor of the shares as required by the above Act, by reason of which the contract for sale was void, & the bank having stopped, & an order for its winding up having been made before the day on which the jobber was entitled to name the person willing to be the purchaser, the contract for sale was repudiated, & pltf. remained the holder of the shares:—*Held*: deft. had committed a breach of duty in not making a valid contract for sale, notwithstanding the custom of the Stock Exchange, to disregard the said Act, as such custom was both unreasonable & illegal, & for such breach of duty the pltf. was entitled to recover from deft. by way of damages the price at which the shares had been sold.—*NEILSON v. JAMES* (1882), 9 Q. B. D. 546; 51 L. J. Q. B. 369; 46 L. T. 791, C. A.

Annotation:—*Apld.* *Perry v. Barnett* (1885), 15 Q. B. D. 388.

7477.

Broker employed to buy.]

Deft. employed pltf., who were stockbrokers on the Stock Exchange, to buy shares in a joint-stock banking co. He had on many previous occasions employed pltf. to buy similar shares, & on none of those occasions did the contract or advice note forwarded to him specify the distinguishing numbers of the shares purchased. Pltf. purchased the shares from a jobber on the Stock Exchange in the usual way, & forwarded to deft. a contract note in the usual form, stating that the contract was made subject to the rules & regulations of the Stock Exchange. The contract was not made with reference to any distinguishing numbers of the shares, nor did the contract note specify any numbers. It is not the practice on the Stock Exchange to specify the numbers of the shares in dealing in bank shares. Deft. before the settling day wrote to pltf. repudiating the contract, on the ground that the numbers of the shares were not specified pursuant to the above Act. Notwithstanding such repudiation, pltf. completed the contract & paid for the shares. By the rules of the Stock Exchange the committee only recognise the members of the Stock Exchange as the parties to contracts, & if a member does not carry out a contract he may be declared a defaulter & expelled from the Stock Exchange, & no application, which has for its object to annul any bargain on the Stock Exchange, shall be entertained by the committee unless upon an allegation of fraud or wilful misrepresentation. Pltf. sued deft. to recover the price of the shares paid by them:—*Held*: on the authority of *Read v. Anderson* (1884), 13 Q. B. D. 779, pltf. were entitled to recover.—*SEYMOUR v. BRIDGE* (1885), 14 Q. B. D. 460; 54 L. J. Q. B. 347; 1 T. L. R. 236. *Annotations*:—*Distd.* *Perry v. Barnett* (1885), 15 Q. B. D. 388. *Mentd.* *North v. Walthamstow U. D. C.* (1898), 62 J. P. 836.

7478. — — — — —.]—*PERRY v. BARNETT*, No. 7474, *ante*.

7479. — — — — — **Transfer accepted by broker—Under authority from purchaser—Liability of purchaser to indemnify vendor.]**—D., having instructed his broker to purchase shares in a joint-stock bank, received a bought note from them, which, in accordance with the usual custom of the Stock Exchange, did not specify the registered numbers of the shares. Between the date of the purchase & the settling day a petition to wind up the bank was presented. Before the settling day D.'s solrs., by his instructions, wrote to the brokers formally repudiating the contract on his behalf, on the ground that the bought note was in contravention of the above Act, & warning them not to complete. On the same day D. wrote a private letter to the brokers, in which, after referring to the formal repudiation by his solrs., he in effect told them that whatever position they might have to assume with regard to these shares, he should consider himself bound to support them. D.'s name was subsequently sent in by the brokers to the vendor as the purchaser, & the money was paid by them to the vendor's brokers, & repaid with brokerage by D. A transfer was executed by the vendor to D., but not executed by D.; it was not, however, sent back to the vendor, but remained in the possession of D.'s brokers till the hearing of this action. On an action by the vendor against D. & the brokers, claiming indemnity in respect of these shares:—*Held*: the private letter to the brokers was in such uncertain terms as to be capable of two interpretations, & consequently might authorise the brokers to go on with or repudiate the contract as they thought best; the

brokers, having by their conduct adopted the former interpretation, it was not now competent for D. to repudiate the act of his agents, & say that he intended the letter to bear the latter interpretation; there being, therefore, an acceptance by D.'s authorised agents, he must be treated as the equitable transferee of the shares, & liable to indemnify the vendor, notwithstanding the

fact that he had never executed the transfer as transferee, & the transfer had not been registered.—*LORING v. DAVIS* (1886), 32 Ch. D. 625; 55 L. J. Ch. 725; 54 L. T. 899; 34 W. R. 701; 2 T. L. R. 645.

Annotations:—**Refd.** *Hardoon v. Belilios*, [1901] A. C. 118. **Mentd.** *Weigall v. Runciman* (1916), 115 L. T. 61.

See, generally, STOCK EXCHANGE.

Part V.—Insurance Companies.

SECT. 1.—IN GENERAL.

7480. Power of company to enforce contract—Although not executed by company.—A contract entered into "on behalf of" a joint-stock co., within 1844 Act, s. 44, means, a contract by which the co. contracts to do something; & that sect. does not prevent the co. from enforcing against third parties a contract which is unilateral only, & which, though they are expressed to be parties to it, has not been executed by the co.—*BRITISH EMPIRE ASSURANCE CO. v. BROWNE* (1852), 12 C. B. 723; 22 L. J. C. P. 51; 20 L. T. O. S. 67; 16 Jur. 1157; 138 E. R. 1088.

7481. Power of company to extend business—By creation of distinct departments with distinct shares.—A co. was established for effecting life insurances & insurances against such other kinds of risk as might thereafter be determined upon by general meeting. In Mar. 1872, a general meeting resolved that fire insurance & fidelity guarantees should be added to their business. New shares, called B. shares, were issued to provide for this new branch of business, which was to form a separate department. The co. were shortly afterwards advised that this proceeding was *ultra vires* & the B. shares invalid; & one of the B. shareholders obtained from the Ct. of Ch. an order removing his name from the register on that ground. An arrangement was accordingly made for starting a new co. to take up the fire & fidelity guarantee business. The assets of the fire & fidelity department were to be handed over to the new co., which was to undertake the fulfilment of the contracts of that department. The new co. was to issue to the B. shareholders shares credited with the amounts paid by them respectively on their B. shares, & the B. shares were to be cancelled. Applt., who was a B. shareholder, had shares allotted to him accordingly in the new co., & on Sept. 24, 1873, his B. shares were cancelled. On Apr. 25, 1874, a resolution was passed to wind up the old co. Applt., having been placed on the list of contributories, applied to have his name removed, which was refused:—**Held**: (1) the issue of B. shares was not *ultra vires*, & the B. shareholders effectually became shareholders in the co.; (2) a corpn. or co. has, as an incident to its existence, the same power of compromising claims made against it as an

individual has, & the cancellation of B. shares being made as part of a *bonâ fide* arrangement for compromising a dispute whether those shares had been legally issued, was valid; & applt., from the time of the resolution for cancellation of his shares, ceased to be a member of the co.; (3) as applt. had legally been a shareholder, the cancellation could not affect any rights previously acquired by creditors; & he must be on the list of contributories as a past member.—*Re NORWICH PROVIDENT INSURANCE SOCIETY, BATH'S CASE* (1878), 8 Ch. D. 334; 47 L. J. Ch. 601; 38 L. T. 267; 26 W. R. 441, C. A.

Annotations:—**As to** (2) **Refd.** *London Financial Assn. v. Kelk* (1884), 26 Ch. D. 107; *Holsworthy U. C. v. Holsworthy R. C.*, [1907] 2 Ch. 62. **As to** (3) **Refd.** *Re Norwich Provident Insce. Soc., Hesketh's Case* (1880), 13 Ch. D. 693.

7482. Power of company to alter bye-laws—To carry profits to reserve fund instead of dividing amongst policy-holders.—Resp. became a policy-holder in the participating branch of an assurance co. upon the terms that he would abide by the deed of settlement, bye-laws & regulations of the co. After distributing the profits arising from that branch among the participating policy holders for many years without deduction for a reserve fund the co. proposed to alter that practice by devoting part of the profits to a reserve fund & to alter the bye-laws accordingly. By the deed of settlement the co. had power to make alterations in the bye-laws. The policy holder having brought an action for an injunction against the co. on the ground that he had taken his policy upon the faith of a prospectus which stated the practice:—**Held**: there was no contract between the co. & the policy holder not to alter its practice in the distribution of profits & the action could not be maintained.—*BRITISH EQUITABLE ASSURANCE CO., LTD. v. BAILY*, [1906] A. C. 35; 75 L. J. Ch. 73; 94 L. T. 1; 22 T. L. R. 152; 13 Mans. 13, H. L.; *reversg.* S. C. *sub nom.* *BAILY v. BRITISH EQUITABLE ASSURANCE CO.*, [1904] 1 Ch. 374, C. A.

Annotations:—**Refd.** *British Murac Syndicate v. Alpertion Rubber Co.*, [1915] 2 Ch. 186. **Mentd.** *McEllistram v. Ballymacelligott Co-op. Agricultural & Dairy Soc.*, [1919] A. C. 548.

7483. Power of directors to contract—Directors interested in contract—Necessity for confirmation by shareholders.—In an action against a joint-stock

PART V. SECT. 1.

e. Liability of insurance company—To take out licence.—*GUARDIAN ASSURANCE CO., LTD. v. MATTHEW*, [1919] 1 W. W. R. 67.—**CAN.**

f. — — ——Applt. was resident at P., in the Cape of Good Hope Province, where he was branch manager

of the G. insurance co. B., a resident in the Orange Free State, received applications for insurance & insurance premiums from persons resident in that Province in respect of buildings situate in that Province. B. forwarded applications & premiums to applt. at P., where policies were issued & receipts made out. The G. co. had

not taken out the licence required by Ordinance 10 of 1903 (O. R. C.), s. 47, to be taken out by every insurance co. carrying on business in the Orange Free State. Applt. was charged with contravening the provisions of the Ordinance by carrying on business in the Orange Free State without a licence & was convicted:—**Held**: applt.

— **Marine insurance association—Association for acquisition of gain.]—**See Part III., Sect. 4, sub-sect. 1, *ante*.

— **Reconstituted from year to year.]—**See No. 253, *ante*.

SECT. 3.—ASSIGNMENTS OF AND CONFLICTING CLAIMS UNDER LIFE POLICIES.

See INSURANCE.

SECT. 4.—CONVERSION OF COLLECTING SOCIETIES INTO LIMITED COMPANIES.

See FRIENDLY SOCIETIES.

SECT. 5.—DEPOSITS TO BE MADE BY INSURANCE COMPANIES.

See Life Assurance Companies Act, 1870 (c. 61), s. 3; Assurance Companies Act, 1909 (c. 49), s. 2.

7488. What companies must make deposit—Company granting annuities to purchasers of goods becoming widows.]—Appls. were tea merchants, who, in order to advertise & extend their business, had since 1897 offered to pay an annuity to customers who had become widows, so long as they remained widows, provided that they had made consecutive purchases of tea for a certain time before the death of their husbands:—*Held*: applts. were a co. carrying on the business of life assurance within Life Assurance Companies Act, 1870 (c. 61), & as they had not fulfilled the conditions imposed by that Act on life assurance cos. they were liable to a penalty.—*NELSON & Co. v. BOARD OF TRADE* (1901), 84 L. T. 565; 65 J. P. 487; 49 W. R. 590; 17 T. L. R. 456; 45 Sol. Jo. 485, D. C.

Annotation:—*Refd.* *Hampton v. Toxteth Co-op. Provident Soc.*, [1915] 1 Ch. 721.

7489. — Issue of investment policies—Return of premiums in event of death before expiration of fixed period—Business of life insurance prohibited by memorandum.]—A co. was incorporated under the Cos. Acts. Its objects as stated in its memorandum of assocn. were “to carry on & transact every kind of insurance & guarantee business in all branches, except the business of life insurance,” & it was thereby expressly provided that “Nothing herein contained shall empower the co. to carry on the business of life assurance, or the granting of annuities within Life Assurance Companies Act 1870 (c. 61).” The co. had issued a number of investment policies which were all in one or other of two forms. The first form, called Policy Form A, was therein described as an investment policy, at a weekly premium of 6d. to secure £22 10s., namely £6 at the end of five years, £7 10s. at the end of ten years, & £9 at the end of fifteen years. The policy charged the assets of the co. with the payment to the assured or his representatives or assigns of the sums aforesaid & provided that in the event of the death of the assured before the fifth year all premiums paid would be returned in full, & after the fifth & tenth years all premiums paid since the last payment

made by the co. would be returned. The second form, called Policy Form B, differed slightly from Policy Form A. The policy purported to secure the payment of a certain sum at the end of a fixed term in consideration of a weekly premium & charged the funds of the co. with its payment, & provided that if the assured should die before the date on which the sum became payable a percentage of the premiums received on account should be payable to the representatives or assigns of the assured. The co. had not deposited £20,000 as required by Assurance Companies Act, 1909 (c. 49), s. 2:—*Held*: (1) both forms of policies were policies of insurance on human life, & the co. was therefore carrying on the business of life assurance contrary to the provisions of the memorandum of assocn., & the issue of the policies was accordingly *ultra vires* the co.; (2) the co. was carrying on “life assurance business” within the meaning of sect. 1 of the latter Act, & inasmuch as it had not made the deposit of £20,000 required by sect. 2 of that Act, the policies were illegal.—*JOSEPH v. LAW INTEGRITY INSURANCE Co., LTD.*, [1912] 2 Ch. 581; 82 L. J. Ch. 187; 107 L. T. 538; 20 Mans. 85, C. A.

Annotation:—*Generally*, *Mentd.* *Gould v. Curtis*, [1913] 3 K. B. 84.

7490. Issue by industrial society to members of share books & membership cards—Appropriation of funds for payments on death of member or wife or husband of member—No policies issued or premiums paid.]—Pltf. was a member of an industrial society, & had received from them a share book, a membership card, a purchase book, in all of which her name & address were given, & a copy of the rules of the society. By the rules as amended it was provided that the objects of the society should include power to carry on the business of insurance as provided in rule 14a. By rule 14a the committee of management were authorised to appropriate money, *inter alia*, “for providing a sum to be paid on the death of a member or the wife or husband of a member, such sum to be proportional to one year’s average purchase of the member from the society during the three years immediately preceding death.” The society advertised “free life assurance” as an inducement to persons to become members. Pltf. alleged that the society had paid large sums of money in respect of this life assurance, & that they were carrying on the business of life assurance within Assurance Companies Act, 1909 (c. 49), without having paid the deposit of £20,000 required by sect. 2 (1) of that Act, & brought an action to restrain them from doing so:—*Held*: the society had done nothing *ultra vires*; there had been no carrying on of life assurance business within the Act; policies must be in writing & no policy had been issued, no premium had been paid, there was no obligation on the society to appropriate any further sum to the insurance fund, & the arrangement might at any moment be terminated by a general meeting.—*HAMPTON v. TOXTETH CO-OPERATIVE PROVIDENT SOCIETY, LTD.*, [1915] 1 Ch. 721; 84 L. J. Ch. 633; 113 L. T. 62; 31 T. L. R. 314; 59 Sol. Jo. 397, C. A.

7491. Investment of deposit—In what securities.]—The ct. has power, under the Board of Trade

PART V. SECT. 5.

*m. Company’s capital not paid up—According to Act of incorporation—Before commencement of business.]—*An insurance co. was incorporated by statute with a capital of \$500,000, & by the Act it was provided that when

\$100,000 was subscribed & 10 per cent. paid up, a general meeting of the shareholders might be called & directors elected; but the co. was not to commence business until at least \$50,000 of its capital stock should be paid up. It appeared that the \$50,000 required by the Act had been paid into the

Minister of Finance, who had thereupon granted a license to the co. to transact insurance business, but that the money had been borrowed for the purpose of being so deposited; that the 10 per cent payment on stock subscribed for had not been made in cash, but notes of hand taken from

Sect. 5.—Deposits to be made by insurance companies. Sect. 6.]

Rules, 1872, to direct the investment of the deposit of £20,000 required by the Life Assurance Acts to be paid into court, in East Indian Railway Annuity B. Qu. : whether that security is within the investments permitted by R. S. C., Ord. 22, r. 17.—Re BLUE RIBBON LIFE ACCIDENT MUTUAL & INDUSTRIAL ASSURANCE CO. (1889), 59 L. J. Ch. 276 ; 61 L. T. 660 ; 38 W. R. 104 ; 6 T. L. R. 6.

7492. ——— Variation of investments.]—*Ex p. INDEPENDENT ORDER OF FORESTERS, No. 2 (1893), 37 Sol. Jo. 682, C. A.*

7493. ———.]—The Board of Trade Rules under Assurance Companies Act, 1909 (c. 49), do authorise under rule 4 (a) which deals with variations of investments the substitution of war loan for stocks or cash in ct. to the credit of the assurance assocn. in accordance with the Act, & they also authorise an order dealing with the method of payment out of the income but they do not authorise a direction as to variation of the investments from time to time standing to the credit of the assurance assocns. account in ct.—*Re ENGLISH & SCOTTISH LAW LIFE ASSURANCE ASSOCN. (1918), 119 L. T. 305 ; 34 T. L. R. 409 ; 62 Sol. Jo. 549.*

7494. ——— Application for payment of dividends—How made.]—*Re ROYAL EXCHANGE ASSURANCE CORPN., [1910] W. N. 211.*

7495. ———.]—An application for payment of dividend on the deposit paid into ct., under Life Assurance Companies Act, 1909 (c. 49), & the Board of Trade Order, 1910, rr. 2-4, may be made by summons under R. S. C. Ord. 55, r. 2 (3), & need not be made by petition.—*Re NEW YORK LIFE ASSURANCE CO. (1915), 60 Sol. Jo. 106.*

7496. Transfer of deposit—On sale of business—Subject to outstanding liabilities on policies issued by vendor company.]—Resp. co. agreed to sell its business to applt. co., including a sum of £20,000 deposited with the Paymaster-General under Assurance Companies Act, 1909 (c. 49), s. 2, as a condition of carrying on employers' liability insurance business :—*Held* : such deposit could only be transferred subject to the outstanding liabilities on policies issued by resp. co. in respect of employers' liability insurance business, & resp. co. was entitled to specific performance of the contract, although it could not give a clean transfer of the £20,000 deposit.—*UNITED LONDON & SCOTTISH INSURANCE CO. v. OMNIUM INSURANCE CORPN. (1915), 84 L. J. Ch. 777, H. L.*

Annotation :—Mentd. Fowler v. Willis, [1922] 2 Ch. 514.

7497. ——— Fund carried over to separate account—"In respect of life assurance business of vendor company now dissolved."]—Where an assurance co. sells its business & assets to another assurance co., & the vendor co. is dissolved & there are outstanding policies, such as paid-up policies, the holders of which have not novated with the purchaser co., the ct. will not order the £20,000 deposit of the vendor co. to be paid out to or transferred *simpliciter* to the account of the purchaser co., but will order a fund to be carried over to a separate account of the purchaser co.

several of the subscribers therefor ; & that the \$50,000 of the stock required by the statute to be paid up had not been so paid. One of the stockholders, who had paid his deposit in cash, thereupon filed a bill setting up these facts & seeking to restrain the co. from carrying on business under their charter until at least the \$50,000 was paid up. On demurrer :—*Held* : the bill was properly filed by the share-

holder alone, & need not be on behalf of himself & others, & the shareholders who had paid their deposits by promissory notes were not necessary parties.—*CASS v. OTTAWA AGRICULTURAL INSURANCE CO. (1875), 22 Gr. 512.—CAN.*

*n. Petition by shareholders for return of deposit—Whether entitled—Winding-up proceedings commenced in English court.]—*Policy holders peti-

"in respect of the life assurance business of the vendor co. now dissolved."—*Re CITY OF GLASGOW LIFE ASSURANCE CO., [1916] 2 Ch. 557 ; 86 L. J. Ch. 86 ; 115 L. T. 519.*

7498. Application of deposit on winding up.]—The objects of a co. were to sell tea & to pay weekly pensions to such of their customers as should become widows who bought tea from them for a certain period. By one of the arts. of assocn. the directors were to set aside three-fourths of the profits earned by the co. in each week as a fund to meet the liabilities of the co. in respect of the pensions, & the sum so set apart was to be applied in discharge of the current liabilities thereunder, & the co. was not to be under any liability in respect of the pensions beyond the amount of the three-fourths of the profits, & if in any week the three-fourths should be insufficient for the payment of the weekly pensions the same might be abated ratably. The co. deposited £20,000 as required by Life Assurance Companies Act, 1870 (c. 61), s. 3. The co. having been ordered to be wound up :—*Held* : the £20,000 was made, by sect. 4 of the above Act, & Life Assurance Companies Act, 1872 (c. 41), s. 1, a security for the policy-holders in addition to the three-fourths of the profits, but the general assets of the co., apart from the three-fourths of the profits, did not belong to them.—*Re NELSON & Co., LTD. (1906), 22 T. L. R. 406.*

Annotation :—Appld. Re British Union & National Insee., [1914] 2 Ch. 77.

7499. ———.]—A co. was formed to acquire the business & goodwill of a tea dealer & to effect insurance for life & to issue pensions. By the arts. of assocn. the directors were to set aside three-fourths of the profits earned by the co. in each week as a fund to meet the liability of the co., in respect of customers' pension cards, & the sum so set aside was to be applied in discharge of the co.'s liability thereunder, & so far as in any week the whole amount should not be distributed, the balance was to be carried forward & might be applied at the discretion of the directors in making good any deficiency in any future weeks in respect of such pensions ; but the co. were not to be liable in respect of the pensions beyond the amount of the three-fourths of the profits, & if the three-fourths should be insufficient to pay the weekly pensions in full, the pensions should abate. The co. issued cards to their customers, upon which the purchasers of tea were entered & each customer who became a widow was to be entitled to a weekly pension provided that she had purchased a certain quantity of tea for 52 weeks before widowhood. The co. deposited £20,000 in ct. under the Life Assurance Companies Act, 1870 (c. 61), s. 4. The co. having been ordered to be wound up :—*Held* : the £20,000 & the sum specially appropriated out of the profits to meet the pensions were available to satisfy the obligations of the co. to their pensioners & customers ; & further, as between the pensioners & the customers, the claims of the pensioners had priority.—*Re NELSON & Co., LTD. (1907), 24 T. L. R. 74, C. A.*

7500. ——— Costs of winding up.]—The £20,000

tioned for distribution of the deposit made by a foreign corpn., with the Minister of Finance under 31 Vict., c. 48, & 34 Vict., c. 9, the co. being insolvent :—*Held* : they were entitled to the relief asked, notwithstanding that proceedings to wind up the co. were pending before the English cts.—*Re BRITON MEDICAL & GENERAL LIFE ASSOCN., LTD. (1886), 12 O. R. 441.—CAN.*

required to be deposited in ct. by Life Assurance Companies Acts, 1870 (c. 61), & 1872 (c. 41), & Assurance Companies Act, 1909 (c. 49), is part of the general assets of the co., & is available for the general costs of the winding up & of deposits made by the liquidator as security for costs in proceedings which he has been authorised by the ct. to carry on, so far as the same costs & deposits relate to the business of life assurance for which the deposit was made.

Semble : the deposit would not be liable, for costs relating to other businesses carried on by the co.—*Re NATIONAL STANDARD LIFE ASSURANCE CORPN.*, [1917] 1 Ch. 193 ; 86 L. J. Ch. 172 ; 115 L. T. 751 ; 33 T. L. R. 65 ; 61 Sol. Jo. 146.

See, also, No. 7600, *post*.

7501. Return of deposit—Who may apply for.]—In the case of petition presented under the Life Assurance Companies Acts, 1870 (c. 61), & 1872 (c. 41), & the Board of Trade Rules made in pursuance of these Acts, praying for payment out “to the depositors” of the £20,000 required to be deposited in ct. by a foreign life assurance co. before commencing business in this country, the ct. will make the order prayed for, notwithstanding that Life Assurance Companies Act, 1870 (c. 61), s. 3, enacts that the deposit shall be returned “to the co.” The life assurance fund of £40,000 required by that sect. to have been accumulated prior to the return of the deposit may consist of accumulations already existing abroad, & arising from the original business of the co.—*Re COLONIAL MUTUAL LIFE ASSURANCE SOCIETY* (1882), 21 Ch. D. 837 ; 46 L. T. 282 ; 30 W. R. 458.

Annotation :—*Folld. Re Scottish Life Assce.*, [1887] W. N. 64.

7502. ———.]—*Re SCOTTISH LIFE ASSURANCE CO.*, [1887] W. N. 64.

7503. ——— When ordered—On accumulation of life assurance fund—Accumulations already existing abroad.]—*Re COLONIAL MUTUAL LIFE ASSURANCE SOCIETY*, No. 7501, *ante*.

7504. ——— Necessity for statement in petition that fund accumulated.]—Where a petition is presented, under Life Assurance Companies Acts, 1870 (c. 61), & 1872 (c. 41), for payment out of ct. to the co. of the statutory deposit of £20,000, the petition must contain a statement of rule 6 of the Board of Trade Rules, 1872, which provides for payment out of the deposit money so soon as it is proved to the satisfaction of the ct. that the life assurance fund of the co., in respect of which the deposit was made, amounts to the sum of £40,000.—*Re LE PHÉNIX* (1888), 58 L. T. 512.

7505. ——— Deposit required by Board of Trade in belief that life insurance contemplated—Subsequent decision by court that policies issued not insurance policies.]—*Re WOOL INDUSTRIES EMPLOYERS' INSURANCE ASSOCN., LTD.*, [1899] W. N. 259.

Annotation :—*Refd. Re Popular Life Assce.*, [1909] 1 Ch. 80.

7506. ——— On amalgamation with or transfer of business to another company—Life assurance fund not accumulated by transferring company.]—A life assurance society made the deposit of £20,000 required by the Life Assurance Companies Act, 1870 (c. 61), s. 3, but did not accumulate a life assurance fund out of premiums as mentioned in the sect. The society effected an amalgamation with a life assurance co., which had accumulated out of premiums previously received a fund exceeding £100,000. There were no creditors of the society other than the policyholders, nearly all of whom had agreed to accept the liability of the co. Upon a petition by the society & the co., for payment of the deposit to the

co. :—*Held* : as there had not been an accumulation of a life assurance fund out of the premiums received by the society, the above sect. had not been complied with, & the order could not be made.

The ct. allowed the petition to stand over generally, intimating that it might be brought on again, when the co. had accumulated out of the premiums to be received on all or any of their policies an additional life assurance fund amounting to £40,000.—*Ex p. SCOTTISH ECONOMIC LIFE ASSURANCE SOCIETY* (1890), 45 Ch. D. 220 ; 60 L. J. Ch. 14 ; 62 L. T. 926 ; 38 W. R. 684 ; 6 T. L. R. 386 ; 2 Meg. 271.

Annotations :—*Distd. Re Popular Life Assce.*, [1909] 1 Ch. 80. *Folld. Re Life & Health Assce. Asscn.*, [1910] 1 Ch. 458.

7507. ———.]—In 1904 the P. Life Assurance Co. was incorporated & made the statutory deposit of £20,000. It did not accumulate out of premiums any life assurance fund, & in 1906 it agreed to sell its business & assets to the U. Assurance Co. in consideration of shares in that co. The vendor co. passed resolutions for a voluntary winding up, & its property & policies had been transferred, the shares allotted, all claims on the vendor co. discharged, & the co. itself dissolved. The purchasing co. now petitioned for the payment out of ct. to them of the £20,000 deposited by the vendor co. :—*Held* : although the vendor co. had not accumulated a life assurance fund, yet, inasmuch as its obligations had come to an end on dissolution, the deposit ought to be paid out to petitioners as assignees.—*Re POPULAR LIFE ASSURANCE CO., LTD.*, [1909] 1 Ch. 80 ; 78 L. J. Ch. 37 ; 99 L. T. 909 ; *sub nom. Re UNITED PROVIDENT ASSURANCE CO., LTD., Re POPULAR LIFE ASSURANCE CO., LTD.*, 25 T. L. R. 58 ; 53 Sol. Jo. 47.

Annotations :—*Expld. Re City of Glasgow Life Assce.*, [1916] 2 Ch. 557. *Refd. Re Life & Health Assce. Asscn.*, [1910] 1 Ch. 458 ; *Re British Union & National Insee.*, [1914] 1 Ch. 724.

7508. ———.]—A life assurance assocn. which has not accumulated out of premiums a life assurance fund of £40,000 according to Life Assurance Companies Act, 1870 (c. 61), s. 3, & which has gone into voluntary liquidation & transferred its business to a purchasing co., is not entitled to a return of any part of the statutory deposit of £20,000 unless all its policy-holders have released & abandoned their claims against the assocn. & the deposit & accepted the liability of the purchasing co., such abandonment & acceptance being signified in writing, pursuant to Life Assurance Companies Act, 1872 (c. 41), s. 7.—*Re LIFE & HEALTH ASSURANCE ASSOCN., LTD.*, [1910] 1 Ch. 458 ; 79 L. J. Ch. 262 ; 102 L. T. 160 ; 26 T. L. R. 277 ; 54 Sol. Jo. 290 ; 17 Mans. 75.

Annotation :—*Refd. Re British Union & National Insee.*, [1914] 1 Ch. 724.

SECT. 6.—SEPARATE FUNDS.

See Life Insurance Companies Act, 1870 (c. 61), s. 4 ; Assurance Companies Act, 1909 (c. 49), s. 3.

7509. What are “receipts” capable of being carried to separate account—Company selling tea—& granting pensions to purchasers becoming widows.]—(1) A co. carrying on business as tea-dealers offered to customers who purchased tea from it consecutively for certain periods pensions payable during widowhood. In order to form the premium income to support the pension contracts, the price of the tea was loaded with a sum of 8d.

. 7: Sub-sect. 1.]

per pound, the total price per pound being 2s.

—*Held*: Life Assurance Companies Act, 1870 (c. 61), s. 4, was disregarded, for the 8d. per pound was not a separate sum capable of being carried to a separate fund appropriated for the exclusive benefit of the assured pensioners, as required by that sect. in the case of "a co. transacting other business besides that of life assurance," but the 2s. 4d. per pound was a contributory sum for securing two benefits, namely, the present receipt of one pound of tea, & the expectation of a future sum of money contingent upon widowhood.

(2) The co., which carried on the joint business of tea dealing & granting pensions to insured customers in case of widowhood, became insolvent & unable to pay the pensions. On a petition to wind up the co., the co. submitted, as an alternative to winding up, a scheme which involved that a new co. should sell its tea through the agents of the old co. to the insured customers, & should pay 75 per cent of the loading (6d. per pound) to the old co., which should, as between the two cos., be the insurer of the insured customers:—*Held*: the scheme, being a provision by which the insured customers were to enter into new contracts with a new co. & as a result, would be entitled to a reduced benefit from their contracts with the old co., was not authorised by sect. 22 of the above Act.

Seemle: although absolute arithmetical equality is not required by sect. 22, what the sect. allows is the reduction of all the contracts of the co. to the relief of the common debt, & a scheme which proceeds upon a principle of inequality of reduction is not within the Act.—*Re NELSON & Co.*, [1905] 1 Ch. 551; 74 L. J. Ch. 290; 92 L. T. 404; 53 W. R. 361; 21 T. L. R. 274; 12 Mans. 54.

Annotation:—As to (1) *Reid*. *Re British Union & National Insce.*, [1914] 1 Ch. 724.

7510. ——— **Form of scheme to carry out Life Assurance Companies Act, 1870 (c. 61), s. 4.**—A co. which carried on the business of selling tea combined with that of life assurance was ordered to be wound up. On appeal, a scheme having been prepared & approved by all parties enabling the co. to carry on its businesses separately, so as to comply with the above sect., & affording reasonable security to the assured, the ct. sanctioned the scheme & discharged the winding-up order, the co. undertaking to carry on its business in accordance with the scheme. Form of scheme.—*Re BRITISH WIDOWS ASSURANCE CO.*, [1905] 2 Ch. 40; 74 L. J. Ch. 525; 93 L. T. 38; 54 W. R. 53; 21 T. L. R. 519; 12 Mans. 407, C. A.

PART V. SECT. 7, SUB-SECT. 1.

7512 i. *What amounts to amalgamation or transfer—Treaties for reinsurance.*—The Toronto Mutual Fire Insurance Co. had divided their business into two branches, one being called the mercantile, in which both cash & mutual policies were effected. Deft. insured in the mercantile branch on the mutual principle. After the amalgamation of that co. with the Beaver Mutual Fire Insurance Asscn., the directors of the new co. transferred all cash system policies in their farmers' branch to the mercantile branch, crediting the latter branch at the time with the estimated value of all unexpired cash policies:—*Held*: this was unauthorised; & it was not a "reinsurance" with "any mutual or other insurance co." within the Acts; & deft. could not be assessed for losses on the policies so transferred. —*BEAVER & TORONTO MUTUAL FIRE*

INSURANCE CO. v. TRIMBLE (1873), 23 C. P. 252.—**CAN.**

o. ——— *Cancellation of life policies in transferor company—Issue of policies in transferee company in lieu.*—The directors of an insurance co. conducting an unprofitable life assurance business & which had power under its memorandum & arts. of asscn. to sell the business & property of the co. in consideration of payments in cash otherwise as directors might deem proper, entered into an agreement with another co. of greater financial stability in terms of which the life policies of the former co. were to be cancelled & policies of the latter co. issued in lieu. In a petition for sanction of this arrangement presented in the name of this co.:—*Held*: the proposed arrangement although it involved the cancelling of the old policies & the issuing of new policies was a transfer of business

SECT. 7.—AMALGAMATION AND TRANSFER OF INSURANCE COMPANIES.**SUB-SECT. 1.—IN GENERAL.**

7511. *What amounts to amalgamation or transfer—Uniting businesses—Adoption of common name & use of common office.*—Two insurance cos. may unite their businesses & adopt a common name & use a common office, & still remain two in the eyes of the law, with separate rights & separate liabilities.—*Re ANCHOR INSURANCE CO.*, *Ex p. HERON*, *Ex p. BADENOCH* (1870), 18 W. R. 542; *reversd.* on other grounds, 5 Ch. App. 632, L. C.

Annotations:—*Reid*. *Re Medical, Invalid, & General Life Assce. Soc.*, Griffith's Case (1871), 6 Ch. App. 378, n.; *Re Medical, Invalid, & General Life Assce. Soc.*, Spencer's Case (1871), 6 Ch. App. 362.

7512. ——— *Treaties for reinsurance.*—A fire insurance society being an unincorporated asscn., had powers of giving to, or taking from, other offices policies by way of guarantee for the purpose of dividing the risk of insurance, & also under their powers, entered into treaties with other cos. appointing them their agents in foreign lands, & agreeing to accept & enter upon the risk of one-eighth of every fire insurance policy of such cos. in force at the date of the treaty or effected or renewed after that date, & agreed to be on all risks simultaneously with the other cos., the other cos. agreeing to pay a proportion of the premiums, 20 per cent commission to be allowed on such premiums to the agents for the expenses of conducting the agency. The fire assurance society having gone into liquidation, the chief clerk allowed the claim of another co. for sums due to it in respect of guarantee & treaty business. On summons by the liquidator to vary the certificate:—*Held*: the treaty agreements did not constitute an amalgamation between the contracting cos., nor a partnership either *inter se* or as regarded third persons, but were agreements of agency; further, the society having had the benefit of these agreements, the burden of proof was upon it to show that the agreements were invalid. The treaty business was insurance business, being guarantee business carried on with a very unlimited faith in the agent; it was a reinsurance contract more wide & less prudent than an ordinary contract of reinsurance, but was within the powers of the society.—*Re NORWICH EQUITABLE FIRE ASSURANCE SOCIETY, ROYAL INSURANCE CO.'S CLAIM* (1887), 57 L. T. 241; 3 T. L. R. 781.

7513. ———.]—The L. Co. was incorporated in 1903 with a capital of £5,000 divided into 10,000 shares of 10s. each; 3,650 shares had been issued on each of which 6s. 3d. was paid. A pro-

within arts. of asscn. & it was within the powers of the directors to enter into such an arrangement.—*EMPIRE GUARANTEE & INSURANCE CORPN., LTD.*, *PETITIONERS*, [1911] S. C. 1296.—**SCOT.**

p. ——— *Whether all documents need be sent to shareholders.*—*CITY OF GLASGOW LIFE ASSURANCE CO. & SCOTTISH UNION & NATIONAL INSURANCE CO.*, *PETITIONERS* (1913), 50 Sc. L. R. 787.—**SCOT.**

q. *Whether notice of amalgamation should be published in newspapers—Prior to petition for sanction of court to amalgamation.*—On a petition for the sanction of the ct. to an arrangement between two assurance cos. for the transfer of the business of the one co. to the other, the ct. holding that it was not necessary that the notice in the "Gazette" should be published prior to the presentation of the petition, & following the English & Irish practice,

visional agreement for the sale of the L. Co.'s undertaking to the N. Co. was made on June 9, 1909, but not carried out owing to the opposition of certain shareholders. The N. Co. purchased 2,843 shares in the L. Co., & 300 shares to qualify their nominees as directors of the L. Co. whose existing directors retired. The N. Co. guaranteed the policies of the L. Co., & the two cos. entered into a treaty of mutual reinsurance. On July 17, 1911, a petition to wind up the N. Co. was presented & a compulsory order made. On Sept. 18, 1911, the N. Co. presented a petition alleging that the L. Co. was a subsidiary co. & the N. Co. a principal co. within Assurance Companies Act, 1909 (c. 49), s. 16;—*Held*: neither a treaty of mutual reinsurance nor a guarantee of policies is a transfer of assurance business, & the N. Co. had not made out a case under the above sect.—*Re LANCASHIRE PLATE GLASS, FIRE & BURGLARY INSURANCE CO., LTD.*, [1912] 1 Ch. 35; 81 L. J. Ch. 199; 105 L. T. 570; 56 Sol. Jo. 13; 19 Mans. 149.

7514. — Guarantee of policies.—*Re LANCASHIRE PLATE GLASS, FIRE & BURGLARY INSURANCE CO., LTD.*, No. 7513, *ante*.

7515. What companies may amalgamate or transfer—Mutual insurance society.—(1) An agreement between cos. A. & B., neither of them being registered under 1862 Act, for the transfer of the business of A. to B., was held to be *ultra vires* on the part of A., there being no power in its deed of settlement authorising such an agreement. Nevertheless A. co. having been registered under the Act, & resolutions for winding up voluntarily passed, & the transfer, carried out according to the terms of the agreement, under sect. 161, the transaction was upheld.

A mutual insurance co. may be amalgamated with, & its business transferred to another company, under 1862 Act, s. 161.

(2) A clause in an agreement for the amalgamation of two cos., provided that part of the purchase-money should be paid to the directors of the selling co. by way of bonus:—*Held*: this did not invalidate the amalgamation.—*SOUTHALL v. BRITISH MUTUAL LIFE ASSURANCE SOCIETY* (1871), 6 Ch. App. 614; 40 L. J. Ch. 698; 19 W. R. 865, L. J.J.

Annotation:—As to (2) *Consd. Kaye v. Croydon Tram. Co.*, [1898] 1 Ch. 358.

7516. — Company with no power to transfer—Life Assurance Companies Act, 1870 (c. 61), s. 14 not enabling Act.—A life insurance co. was incorporated in 1845 under a deed of settlement which contained no provision for the sale or transfer of its business. In 1865 the co. took over the business of an annuity co., & covenanted, by deed, in 1866, to guarantee the payment of certain annuities. In Aug. 1887, a petition for the compulsory winding up of the co. was presented, which stood over in the hopes that some scheme of arrangement might be adopted. In July, 1889, a scheme was proposed by the policy-holders for transferring the policies, *en bloc*, to another co., on terms advantageous to the policy holders, but involving a reduction of the amounts originally assured. The proposed scheme made no provision for the annuitants claiming under the deed

of 1866. On the petition coming on again for hearing, application was made by the directors, at the instance of the policy-holders, for leave to present a petition under the above sect. to obtain the sanction of the ct. to the proposed scheme, & that in the meantime the hearing of the petition might again be postponed. The annuitants objected to the scheme, as did also the shareholders:—*Held*: (1) that sect. conferred no power on an assurance co. to transfer its business to another co.; (2) assuming a co. had power to transfer, the sect. only contemplated a transfer of the whole of the assurance business as a going concern without any reduction in the policies, or any fresh contracts with the policy-holders; (3) the annuitants under the deed of 1866 were "policy-holders" within the definition given by sect. 2 of the above Act, whose dissent, as representing more than one-tenth of the total amount assured, would, under sect. 14, be fatal to the scheme, & the scheme was therefore impossible, & as the co. was hopelessly insolvent, the winding-up order must be made.

Semble: the dissent of one policy-holder would invalidate such a scheme as proposed.—*Re SOVEREIGN LIFE ASSURANCE CO.* (1889), 42 Ch. D. 540; 58 L. J. Ch. 811; 61 L. T. 455; 38 W. R. 58; 5 T. L. R. 702.

7517. What business may be transferred—Must be whole business without reduction in policies.—*Re SOVEREIGN LIFE ASSURANCE CO.*, No. 7516, *ante*.

7518. Validity of amalgamation or transfer—Ultra vires transaction—Acquiescence.—Although an amalgamation & purchase of the business & liabilities of one joint-stock co. by another established for similar purposes may be *ultra vires*, as a transaction not within the general scope & purpose of the business of such a co., & unauthorised by the deed of settlement, there may have been such an amount of subsequent acquiescence as to render the attempted amalgamation though invalid in its inception, binding as between the two cos.—*Re ERA ASSURANCE CO., WILLIAMS' CASE, ANCHOR CASE* (1862), 1 Hem. & M. 672; 7 L. T. 595; 11 W. R. 204; 71 E. R. 295; *sub nom. Re SAXON LIFE ASSURANCE SOCIETY, ANCHOR ASSURANCE CO.'S CASE, ERA ASSURANCE SOCIETY'S CASE, Re ERA ASSURANCE SOCIETY, WILLIAMS' CASE, ANCHOR ASSURANCE CO.'S CASE*, 32 L. J. Ch. 206.

7519. — Provision for payment of bonus to directors of amalgamated company.—*SOUTHALL v. BRITISH MUTUAL LIFE ASSURANCE SOCIETY*, No. 7515, *ante*.

7520. — Provisions in deed of settlement for making new laws & regulations.—By the deed of settlement of the A. Insurance Co. power was given to the directors to call an extraordinary meeting of the co. for the purpose of making new laws & regulations. By laws & regulations made accordingly several years afterwards power was given to the directors to make a junction with any other co. By a private Act of Parliament, shareholders who had executed transfers were to continue liable until their transfers were inrolled in

allowed notice under the Assurance Cos. Act, 1909, s. 13, of the presentation of the petition to be inserted in the "Edinburgh Gazette" concurrently with the intimation of the petition on the walls & in the minute-book, & ordered answers within eighteen days after such intimation & notice.—*UNITED SICKNESS & ACCIDENT GENERAL INSURANCE CO., LTD., PETITIONERS*, [1920] S. C. 295.—*SCOT.*

r. What business may be transferred—Fire insurance.—The European Assurance Society, through their confidential agent, C., negotiated with the Etna Insurance Co., through their confidential agent, O., a transfer by the former of their fire insurance business & good-will to the latter, who also subsequently agreed, in consideration of £15,000, to assume their corresponding liabilities. The directors of

the Etna, who had been duly authorised thereto, agreed to pay C., as a commission or bonus for his services in the first transaction, a sum of £1,000, which he had secretly promised O. to divide with him; & for the second he claimed a similar sum of £2,000, which latter having been refused, he contrived that the purchase-money to be paid by his employers should be raised to £17,000, out of which the Etna

Sect. 7.—Amalgamation and transfer of insurance companies: Sub-sects. 1 & 2.]

Chancery, but were to be reimbursed out of the funds of the co. for all losses sustained in consequence thereof, nor were they to be liable for any debt for which they would not have been liable as partners, nor could anything be recovered from them which could not have been recovered if the Act had not been passed. With a view to an amalgamation with the B. Insurance Co., the greater number of shareholders in the A. Co. agreed to transfer their shares to a trustee for the B. Co. The A. Co. then ceased to carry on business. Thirteen years afterwards the A. Co. was ordered to be wound up. There were claims by policy-holders whose policies were granted before the alteration in the laws & regulations:—*Held*: as the deed of settlement to which the policy-holders were subject provided for making new laws & regulations, they were bound by these new laws & regulations when made.

Semble: the amalgamation between the cos. was not *ultra vires*.—*Re EUROPEAN ASSURANCE SOCIETY ARBITRATION ACTS, DOMAN'S CASE* (1876), 3 Ch. D. 21; *Re EUROPEAN ASSURANCE SOCIETY ARBITRATION ACTS, Re EUROPEAN LIFE ASSURANCE & ANNUITY CO., DOMAN'S CASE*, 45 L. J. Ch. 801; 34 L. T. 929, L. C. & L. JJ.

Annotations:—*Folld. Re Argus Life Assee.* (1888), 39 Ch. D. 571. *Consd. Re Barrow Hematite Steel Co.* (1888), 39 Ch. D. 582. *Mentd. Barnard v. Tomson*, [1894] 1 Ch. 374.

7521. Cancellation of shares under compromise of dispute as to validity of issue of shares.]—*Re NORWICH PROVIDENT INSURANCE SOCIETY, BATH'S CASE*, No. 7481, *ante*.

7522. — Agreement for purchase of risks of transferor company.]—*Re ABSOLUTE LIFE ASSURANCE CO., LTD.* (1903), 47 Sol. Jo. 749.

7523. Effect of amalgamation or transfer—Right of transferee company to enforce contract between third party & transferor company.]—An insurance co. lent money on the security of a bond given by three obligors to two of the directors & of a policy effected with the co. by one of the obligors on his own life, & deposited as a collateral security. By the terms of the policy the insurance money was charged on funds & property of the co. only. The condition of the bond was for payment of the money lent, with interest, & of the premiums upon the policy. The insurance co. was dissolved, their funds distributed, & their business transferred to another co. to whom the obligees assigned the bond. One of the obligors who had not effected the insurance having died, & the policy having become forfeited for non-payment of the premiums, the assignees of the bond-debt sought to prove in the master's office under a decree for the administration of the estate of the deceased obligor:—*Held*: the proof ought to be admitted to the extent of an unpaid premium, which became payable before the dissolution of the co., although the dissolution took place long before the end of the year for which the premium was paid; but no proof could be admitted for any premium the time for payment of which had not arrived when the co. was dissolved.—*ATKINSON*

Directors privately agreed to pay him the £2,000. C. having assigned his interest in these two agreements to S., the latter on foot thereof drew three bills for £1,000 each on the Etna Co., two of which O. discounted, subsequently receiving £500 from the co. in part payment of them, together with a renewal bill for £500. Both cos. having afterwards gone into liquidation, & O. having made a claim on

foot of the above acceptances for £500 & £1,000 on the winding up of the affairs of the Etna:—*Held*: having regard to O.'s confidential relation to the Etna Co., the first bill for £1,000 was, in his hands, only good to the extent of £500, & that sum having been already paid by the co., he could, therefore, sustain no further claim thereon; since no evidence had been adduced of the European Society's

v. GYLBY (1852), 2 De G. M. & G. 670; 42 E. R. 1034, L. JJ.

7524. — Right of transferor company to enforce reinsurance contract in respect of payments made by transferee company.]—*NEPEAN v. MARTEN* (1895), 11 T. L. R. 480, C. A.

— *On policy-holders.]—See Sect. 7, sub-sect. 2, post.*

— *On shareholders.]—See Sect. 8, sub-sect. 3, post.*

Payment out of deposit on transfer.]—See Nos. 7507, 7508, ante.

Reconstruction & amalgamation of cos., generally, *see* Part III., Sect. 37, sub-sect. 13; Sect. 39, *ante*.

SUB-SECT. 2.—EFFECT ON POLICY-HOLDERS.

7525. General rule.]—A. effected a policy "upon, & for twenty years continuance of, the life of himself" with an assurance co. By the terms of the policy it was provided that "the capital stock & other securities, funds, & property of the co. remaining at the time of any claim or demand unapplied & undisposed of, & inapplicable to prior claims & demands in pursuance of the provisions of the deed of settlement, should alone be liable to answer & make good all claims & demands upon the said co., or otherwise, under or by virtue of that policy"; & that no director, officer, or shareholder should be individually or personally liable, etc. The deed of settlement entitled policy-holders to participate in profits; & also contained provisions enabling the directors in certain events to dissolve the co. The directors having, not in strict accordance with their powers to dissolve the co., transferred its funds & property to another co. who were to take their liabilities, A. brought an action against the co. (his assurers), charging them with having wrongfully aliened & transferred their property, & ceased to carry on business, whereby he lost the moneys & profits he would otherwise have made from the continuance of the contract:—*Held*: (1) there was no implied contract on the part of the co. to continue to carry on the business; (2) if there were, there was no evidence of any breach of it, inasmuch as if the transfer was properly made, there was no cause of action, & if not warranted by the deed of settlement, it was *ultra vires*, & void; (3) pltf. had commenced his action before he had sustained any injury.—*KING v. ACCUMULATIVE LIFE FUND & GENERAL ASSURANCE CO.* (1857), 3 C. B. N. S. 151; 27 L. J. C. P. 57; 30 L. T. O. S. 119; 3 Jur. N. S. 1261; 6 W. R. 12; 140 E. R. 696.

Annotations:—*As to* (2) *Refd. Aldebert v. Leaf* (1864), 3 New Rep. 455. *Generally, Refd. Re Sovereign Life Assee.*, [1892] 3 Ch. 279.

7526. —.]—*Re EUROPEAN ASSURANCE SOCIETY, POWNALL'S CASE* (1872), *European Arbitration*, L. T. 8; Reilly, 8.

7527. Right of company to transfer business without consent of policy-holders—Company empowered to dissolve & transfer business—Rights of

having been privy to the agreement for paying the additional £2,000 to C., the present demand on foot of the second bill for £1,000 must also be disallowed, but without prejudice to O.'s making any future claim thereon in the event of the £2,000 or any part thereof being recovered by the Etna in the winding up of the European Society.—*Re ETNA INSURANCE CO., Re OWENS* (1873), 1 R. 7 Eq. 424.—*IR.*

policy-holders reserved in deed of settlement.]—The deed of settlement of the I. Life Insurance Co. provided that in a certain event a general meeting of the co. might resolve on its dissolution, & that in such a case proper measures should be taken for effecting such dissolution, without prejudice to the rights of the parties then insured, & thereupon the affairs of the co. should with all convenient speed be wound up, & the liabilities of the co. be satisfied or otherwise sufficiently provided for by reinvestment or by transfer to other existing & approved assurance offices. In accordance with this provision a resolution was passed to dissolve the co., & the business & assets were transferred to the E. Co. Petitioner, who had purchased an annuity on his life from the I. Co., refused to assent to the transfer of his policy to the E. Co.; but he received payment of his annuity from the E. Co. till it was wound up. He then presented a petition to wind up the I. Co.:—*Held*: (1) although the dissolution & transfer of the business of the I. Co. were perfectly valid, yet the words in the deed of settlement reserving the rights of the parties assured were conclusive in showing that there could be no novation of the contract with the policy-holders without their consent; (2) the acceptance of the payment of the annuity from the E. Co. was no evidence that petitioner had adopted the E. Co. as his debtors, & he was still a creditor of the I. Co.—*Re INDIA & LONDON LIFE ASSURANCE CO.* (1872), 7 Ch. App. 651; 27 L. T. 191; 20 W. R. 790; *sub nom. Re INDIA & LONDON LIFE ASSURANCE CO., DYKE'S CASE*, 41 L. J. Ch. 601, L. J.

7528. ———.]—By the deed of settlement of the A. Insurance Co. it was provided that the funds & property of the co. should alone be answerable for claims on the co.; provision was also made for enabling the proprietors to dissolve the co., & thereupon the directors were to obtain from some other co. an undertaking to pay the claims on the A. Co., & were to transfer to that other co. a sufficient amount of the assets of the A. Co. The A. Co. was accordingly dissolved, & a portion of its funds was transferred to the B. Co., which covenanted to satisfy the liabilities of the A. Co. Full notice of this transaction was sent to the policy-holders of the A. Co.; & in the policies of that co. it had been declared that the funds & property of the co. should alone be liable to make good the claims under the policy, & the deed of settlement was also referred to. Both cos. were wound up, & came under the European Assurance Society Arbitration Acts:—*Held*: the A. Co. had, without the consent of the policy-holders, a right to dissolve itself & transfer its liabilities to the B. Co., & a policy-holder could claim only against the B. Co.

On such a policy the holder could not have sued the shareholders separately; nor, after the co. was dissolved, would there have been any means of compelling the shareholders to pay calls on their shares, the co. being unincorporated, & having been formed before the passing of the Joint-Stock Companies Acts & the Winding up Acts; nor had the passing of those Acts affected the rights & liabilities of the parties (*MELLISH, I.J.*).—*Re EUROPEAN ASSURANCE SOCIETY, HORT'S CASE, GRAIN'S CASE* (1875), 1 Ch. D. 307; 33 L. T. 766, C. A.

Annotations:—**Folld.** *Re European Assce. Soc. Arbitration Acts & Industrial & General Life Assce. & Deposit Co., Cocker's Case* (1876), 3 Ch. D. 1; *Re European Assce. Soc., Dowse's Case* (1876), 3 Ch. D. 384. **Refd.** *Re Argus Life Assce.* (1888), 39 Ch. D. 571. **Mentd.** *Midland Coal, Coke, & Iron Co., Craig's Case* (1894), 71 L. T. 329.

7529. ———.]—By the deed of settlement of the N. Society, it was provided that the funds & property of the society should alone be answerable for claims on the society, & there were provisions enabling the society to make over its business to another co. The society granted an annuity to D. by a deed executed by three directors, which declared that the stocks & funds of the society should during the life of D. be liable to pay the annuity. Some years after this the N. Society made over its business to the E. Society in manner authorised by the deed of settlement. Both societies being under winding up, D. claimed against the N. Society:—*Held*: D. could only claim against the E. Society.—*Re EUROPEAN ASSURANCE SOCIETY, DOWSE'S CASE* (1876), 3 Ch. D. 384; 46 L. J. Ch. 402; 35 L. T. 653, C. A.

7530. ———.]—By the deed of settlement of the I. Insurance Co. it was provided that the funds & property of the co. should alone be answerable for claims on the co.; provision was also made for enabling the proprietors to dissolve the co., & thereupon the directors were to obtain from some other co. an undertaking to pay the claims on the I. Co., & were to transfer to such other co. so much of the assets as should be agreed upon as sufficient to meet such claims. The I. Co. was accordingly dissolved, & a portion of its funds transferred to the E. Co., which covenanted to satisfy the liabilities of the I. Co. C. was a policy-holder of the I. Co. on the non-participating scale, & as such was not entitled to a vote at the meetings of members. His policy was made subject to the conditions of the deed of settlement. He had notice of the intended amalgamation, but had no formal notice of the completion of the amalgamation, nor was his policy indorsed by the E. Co. He, however, paid the premiums & took receipts in the name of the E. Co. for fifteen years, after which both cos. were ordered to be wound up, & came under the European Assurance Society Arbitration Acts:—*Held*: (1) there was no obligation on the I. Co. to see that the assets transferred to the E. Co. were appropriated for the payment of the claims on the I. Co.; (2) the amalgamation, being *intra vires*, was binding on the policy-holders; (3) even if it had not been binding on the policy-holders generally, C. was bound by his conduct, & had accepted the liability of the E. Co.—*Re EUROPEAN ASSURANCE SOCIETY ARBITRATION ACTS & INDUSTRIAL & GENERAL LIFE ASSURANCE & DEPOSIT CO., COCKER'S CASE* (1876), 3 Ch. D. 1; 45 L. J. Ch. 822; 35 L. T. 290, C. A.

Sec, now, Assurance Companies Act, 1909 (c. 49), s. 13, & *generally*, as to novation, *CONTRACT*, Vol. XII., pp. 599-602, Nos. 4969-4988.

7531. Transfer in violation of deed of settlement.]—*KING v. ACCUMULATIVE LIFE FUND & GENERAL ASSURANCE CO., No. 7525, ante.*

7532. ———.]—Where a policy made the funds of a co. liable to pay the sum insured, & certain shares of profit by way of bonus:—*Held*: the policy-holder was entitled to an injunction to restrain the co. from transferring its business & assets to another co. contrary to the provisions of the deed of settlement, & without making provision out of its own assets for payment of pltf.'s policy.—*KEARNS v. LEAF, ALDEBERT v. KEARNS* (1864), 1 Hem. & M. 681; 3 New Rep. 455; 10 L. T. 185; 12 W. R. 462; 71 E. R. 299.

Annotations:—**Consd.** *Re Argus Life Assce.* (1888), 39 Ch. D. 571. **Refd.** *Re International Life Assce., McIver's Claim* (1870), 18 W. R. 539; *Cummins v. Perkins*, [1899] 1 Ch. 16. **Mentd.** *Moss S.S. Co. v. Whitney*, [1912] A. C. 254.

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7533. No provision for sale or transfer in deed of settlement—Company empowered to alter deed of settlement—Alteration of deed of settlement giving power to sell & transfer—Validity of subsequent sale & transfer.]—The deed of settlement of an unincorporated life assurance co. contained no provision for the sale or transfer of its business. But it provided that the proprietors might alter, amend or repeal the laws, regulations & provisions of the co. Resolutions were passed with due formalities to take power to sell & transfer the business:—*Held*: a sale & transfer of the business was *intra vires*.—*Re ARGUS LIFE ASSURANCE CO.* (1888), 39 Ch. D. 571; 58 L. J. Ch. 166; 59 L. T. 689; 37 W. R. 215; 4 T. L. R. 746.

Annotation:—*Mentd.* *Christie v. Northern Counties Permanent Benefit Bldg. Soc.* (1889), 61 L. T. 796.

7534. Action by policy-holder—For wrongful transfer—Action begun before any injury sustained by policy-holder.]—*KING v. ACCUMULATIVE LIFE FUND & GENERAL ASSURANCE CO.*, No. 7525, *ante*.

7535. — For injunction to restrain transfer—When interim injunction granted.]—A bill was filed by a policy-holder "with participation of profits" in a life insurance co. to restrain such co. from carrying out an arrangement for a transfer of the funds, assets, etc., of that co. to another co., by way of amalgamation; for an account of the assets & liabilities of such first-mentioned co., & for a receiver. On motion for an injunction:—*Held*: the ct., considering that the policy-holder would not be damnified by the proceedings for the amalgamation remaining *in statu quo* until the hearing of the cause, would decline to grant an injunction as prayed, the principal part of the arrangement having been carried out.—*BISHOP v. SCOTT* (1862), 7 L. T. 570.

See, generally, INJUNCTION.

7536. Action against member of mutual insurance company—Insurance by unstamped policies—Defendant acting as member of transferee company—Estopped from challenging validity of transfer or policies.]—Where a member of a mutual insurance co., afterwards converted into a limited co., had vessels on its books as insured, & paid calls & otherwise acted as if he were a member of the co.:—*Held*: he was, in any action brought against him by the limited co. for calls on losses, estopped from denying his liability & from setting up either any irregularity on the transfer from the one co. to the other, or that the losses were paid without any stamped policies being entered into, in contravention of 30 & 31 Vict. c. 23, s. 7.—*BARROW MUTUAL SHIP INSURANCE CO., LTD. v. ASHBURNER* (1885), 54 L. J. Q. B. 377; 54 L. T. 58; 5 Asp. M. L. C. 527, C. A.

7537. Indemnity given by transferee company to transferor company against liabilities—Winding up of both companies—Against which company policy-holders must prove.]—*Re EUROPEAN ASSURANCE SOCIETY, LINE'S & LEAH'S CASES, DEAS'S CASE* (1874), *European Arbitration*, L. T. 167.

7538. — Winding up of transferee company—Policy-holder in transferor company also shareholder in transferee company—Right to claim on policy against transferor company.]—Where, on the amalgamation of two insurance cos., an agreement is entered into by which the A. Co. undertakes to indemnify the W. Co. against all claims & demands out of the funds & assets of the A. Co., a policyholder in the W. Co., who happens to have been a shareholder in & a director of the W. Co., & to have exchanged his W. shares for shares in the

A. Co., is not on the winding up of the A. Co., precluded from claiming on his policy against the W. Co.—*Re WESTERN LIFE ASSURANCE SOCIETY, FRERE'S CASE* (No. 3), *COCK'S CASE, SHAYLER'S CASE* (1872), 16 Sol. Jo. 501.

Winding up of insurance cos., generally, *see* Sect. 8, *post*.

SUB-SECT. 3.—WHERE SANCTION OF COURT REQUIRED.

See Life Assurance Companies Act, 1870 (c. 61), s. 14; Assurance Companies Act, 1909 (c. 49), s. 13 (4).

7539. Service of notice to each policy-holder—When dispensed with—Policy-holders abroad—Holders of less than one-tenth of total amount insured.]—It appearing upon a petition under Life Assurance Companies Act, 1870 (c. 61), s. 14, for the sanction of a transfer of the business of one life insurance co. to another, that the proper notices have been served upon the policy-holders of the transferring co. but two, who were interested to the extent of less than one-tenth of the total amount assured in the co., & were resident out of the jurisdiction, the ct. dispensed with such service & granted the petition, being of opinion that the rights of the two policy-holders were sufficiently protected by Life Assurance Companies Act, 1872 (c. 41), s. 7.—*Re LONDON & SOUTHWARK INSURANCE CORPN., LTD.* (1880), 42 L. T. 247; 28 W. R. 565.

7540. — — — — —.]—When a petition is presented by a life assurance co. under Life Assurance Companies Act, 1870 (c. 61), for the confirmation of a conditional agreement to transfer its business to another co., sect. 14 of the Act will have been sufficiently complied with if all the notices required by that sect. to be given to each policyholder of the transferred co., are given before the hearing, though some of them may have been given after the presentation, of the petition.

I cannot make an order confirming the transfer, as the notices required by sect. 14 of the Act have not been given to the Canadian policy-holders. The Act must be followed strictly & it will not be sufficient to produce consents from those policyholders to the registrar (*NORTH, J.*).—*Re BRITON LIFE ASSOCN.* (1887), 56 L. J. Ch. 988; 35 W. R. 803.

7541. — — — — — Holders of policies coming into existence between petition & hearing.]—*Re UNIVERSAL LIFE ASSURANCE SOCIETY* (1901), 18 T. L. R. 198.

7542. — — — — — Numerous small policy-holders—Other steps taken to give holders opportunity of objecting.]—On an amalgamation or transfer under Assurance Companies Act, 1909 (c. 49), s. 13, the ct. will, where the policies are very numerous & of small value, dispense with the statutory notice to small policy-holders, but this will only be done where other steps are taken to inform the policy-holders of the proposed arrangement & to give them an opportunity of objecting to the same.—*Re HEARTS OF OAK & GENERAL ASSURANCE CO.* (1914), 58 Sol. Jo. 433.

7543. — — — — — Time for—Before hearing of petition.]—*Re BRITON LIFE ASSOCN.*, No. 7540, *ante*.

7544. Dissent of "policy-holders"—Includes dissent of annuitants.]—*Re SOVEREIGN LIFE ASSURANCE CO.*, No. 7516, *ante*.

7545. Duty of court—On hearing unopposed petition.]—Under Assurance Companies Act, 1909 (c. 49), s. 13, the ct. has the duty of considering objections to the transfer of one assurance co. to another, whether there is or is not any opposition

to the petition for a transfer.—*Re* HEARTS OF OAK, ETC. ASSURANCE CO., LTD. (1914), 30 T. L. R. 436.

7546. Form of order sanctioning scheme.]—*Re* UNIVERSAL LIFE ASSURANCE SOCIETY (1901), 18 T. L. R. 198.

7547. ———.]—NEW ERA ASSURANCE CORPN., LTD. (1909), 53 Sol. Jo. 743.

SECT. 8.—WINDING UP.

SUB-SECT. 1.—IN GENERAL.

7548. What companies may be wound up—Unregistered company.]—The effect of Joint Stock Companies Act Amendment Act, 1875 (c. 80), was to leave 1844 Act, repealed as to insurance cos. formed in the interval between the passing of 1856 Act, & the passing of the Act of 1857; & therefore such cos. were not required to be registered; & they may be wound up as unregistered cos. under 1862 Act.—*Re* BANK OF LONDON & NATIONAL PROVINCIAL INSURANCE ASSOCN. (1871), 6 Ch. App. 421; 19 W. R. 484; *sub nom.* *Re* BANK OF LONDON & NATIONAL INSURANCE ASSOCN., DURHAM'S PETITION, 40 L. J. Ch. 562, L. C.

———.]—*Compare* No. 7552, *post*.

7549. ———. Unregistered mutual marine insurance association.]—*Semble*: (1) a mutual marine insurance assocn. is an assocn. for the acquisition of gain so as to require registration under 1862 Act, if it consists of more than twenty members; (2) a co. which ought to be, but is not, registered under the above Act, is not an "unregistered co.," that can be wound up under sect. 199.—*Re* ARTHUR AVERAGE ASSOCN. FOR BRITISH, FOREIGN & COLONIAL SHIPS, *Ex p.* HARGROVE & CO. (1875), 10 Ch. App. 542; *sub nom.* *Re* ARTHUR AVERAGE ASSOCN., *Ex p.* CORY & HAWKSLEY, 44 L. J. Ch. 569; 32 L. T. 713; 23 W. R. 939; 2 Asp. M. L. C. 570, L. J.J.

Annotations:—As to (1) *Dttd.* *Smith v. Anderson* (1880), 15 Ch. D. 247. *Appld.* *Re Padstow Total Loss & Collision Assce. Asscn.* (1882), 45 L. T. 774. From the loss of the ship petitioner got that which was a gain to himself, & this fulfilled the meaning of sect. 4 of the Act. No association, therefore, of which the law could take cognisance has existed, & no winding-up order could be made. In *Smith v. Anderson*, No. 3044, *ante*, I expressed an inclination of opinion to the contrary, but, after full argument, I feel that that opinion cannot be sustained (BRETT, L.J.). *Refd.* *Sykes v. Beadon* (1879), 11 Ch. D. 170; *Wigfield v. Potter* (1881), 45 L. T. 612. *As to* (2) *Consd.* *Re South Wales Atlantic S.S. Co.* (1876), 2 Ch. D. 763; *Re Padstow Total Loss & Collision Assce. Asscn.* (1882), 45 L. T. 774. *Refd.* *Re Haycock's Policy* (1876), 1 Ch. D. 611; *Re National Debenture & Assets Corpn.* (1891), 60 L. J. Ch. 533. *Generally, Mentd.* *Marine Mutual Insee. Asscn. v. Young* (1880), 43 L. T. 441.

7550. ———.]—*Re* PADSTOW TOTAL LOSS & COLLISION ASSURANCE ASSOCN., No. 8587, *post*.

7551. ———. Unregistered mutual life assurance society.]—(1) The ct. has, by virtue of Life Assurance Companies Act, 1870 (c. 61), s. 2, jurisdiction

to wind up an unregistered mutual life assurance society under 1862 Act.

(2) *Semble*: the holders of policies in such a society are not liable to contribute to the payment of any debts; & all that can be done in the winding up is, after payment of the costs, to distribute the funds of the society among the policy-holders in proportion to the amount of their respective claims.

(3) When a co., resp. to a winding-up petition, disputes the validity of petitioner's debt, it must adduce on the hearing, such evidence as will show the ct. that there is a question to be tried. If it fail to do this, a winding-up order ought to be made.

Two petitions having been presented by policy-holders for the winding up of a mutual life assurance society, the society admitted their insolvency, & a winding-up order was made on the second petition, on the ground that the validity of first petitioner's debt was disputed. But liberty was given to first petitioner to apply for the costs of her petition, if her claim should be ultimately established. She appealed, & before the appeal came on for hearing a committee of policy-holders was formed, who desired that the ct. should exercise the power given to it by sect. 22 of the above Act, of reducing the amount of the contracts of the society instead of making a winding-up order.—*Held*: (1) this power could not be exercised so long as the winding-up order remained, & the order ought to be discharged; a meeting of the policy-holders summoned in order to ascertain their wishes, & the further hearing of the appeal adjourned until after the meeting should have been held.—*Re* GREAT BRITAIN MUTUAL LIFE ASSURANCE SOCIETY (1880), 16 Ch. D. 246; 51 L. J. Ch. 10; 43 L. T. 684; 29 W. R. 202, C. A.; *subsequent proceedings* (1882), 20 Ch. D. 351, C. A.

——— **Illegal associations.]—***See* Part XIII., Sect. 2, sub-sect. 2, *post*.

SUB-SECT. 2.—PETITION.

See Life Assurance Companies Act, 1870 (c. 61), s. 21; Assurance Companies Act, 1909 (c. 49), s. 15.

7552. Who may petition—Not company never registered under 1862 Act—Either solely or with contributory.]—An insurance co., registered under 1844 Act, had resolved upon a voluntary winding up prior to 1862 Act, under which it had never been registered.—*Held*: such co. was precluded by 1862 Act, s. 209, from presenting a petition to wind up, either solely or in conjunction with a contributory.—*Re* WATERLOO LIFE, ETC., ASSURANCE CO. (No. 1) (1862), 31 Beav. 586; 1 New Rep. 157; 32 L. J. Ch. 370; 7 L. T. 459; 9 Jur. N. S. 291; 11 W. R. 134; 54 E. R. 1266; *subsequent proceedings*, 31 Beav. 589.

PART V. SECT. 8, SUB-SECT. 1.

a. What companies may be wound up—Foreign company—Foreign winding up.]—A fire insurance co. incorporated in N. Y., U.S.A., & carrying on business in this province, cannot be allowed to do so after proceedings have been taken, according to the law of its domicile, with a view of winding up the affairs of the co., & that irrespective of what the result of the proceedings may be as to solvency or insolvency of the co.—*DOUGLAS v. ATLANTIC MUTUAL LIFE INSURANCE CO. OF ALBANY, NEW YORK* (1878), 25 Gr. 379.—CAN.

t. ———. Company insolvent before passing of 45 Vict., c. 23 (D).]—The H.

Co. being in insolvent circumstances a bill was filed in Chancery by W. as a creditor & a decree for the winding up of the co. was made. B. one of the contributories placed on the list settled in the winding up made application to stay all proceedings in the winding up upon the ground that 45 Vict., c. 23 (D) under which the order was made was not retrospective & only applied to cos. becoming insolvent after the passing of the Act.—*Held*: the application of the Act under sect. 1 extended to incorporated insurance cos. "which are insolvent," language comprehensive enough to embrace the co. in question.—*WYLD v. HAMILTON MUTUAL INSURANCE CO.* (1883), 6

O. R. 118.—CAN.

a. When winding-up order made—Company insolvent.]—A co. incorporated by provincial legislation to carry on the business of life insurance & other business is subject to Dominion Winding-up Act, 1906, c. 144; & an order should be made, under sect. 11 of the Act, when it is shown that the co. is insolvent; that its capital stock is impaired to the extent of 25 per cent thereof; & that the lost capital will not probably be restored within one year; or that it is just & equitable that the co. should be wound up.—*Re* CANADA PROVIDENT INSURANCE & INVESTMENT CORPN. (1913), 26 W. L. R. 326.—CAN.

Sect. 8.—Winding up : Sub-sects. 2 & 3.]

7553. Policy-holders whose debts less than £50.]—A petition was presented by two policy-holders to wind up compulsorily an insurance co., which was being wound up voluntarily, containing charges of false representations & insolvency:—*Held*: (1) where a co. was being wound up voluntarily it was unnecessary to consider whether a *prima facie* case was stated, nor to order security for costs under Assurance Companies Act, 1870 (c. 61), ; (2) policy-holders might present a petition under the above Act, although their debts did not amount to £50 ; (3) a statement that under the circumstances the co. was “admittedly insolvent” was a sufficient statement that it could not pay its debts ; (4) the allegations of false representations, & the appointment of the secretary as provisional liquidator, were sufficient to render it just & equitable to make a winding-up order ; (5) upon demurrer to a petition, counsel for petitioner must open his case.—*Re BRITISH ALLIANCE ASSURANCE CORPN.* (1878), 9 Ch. D. 635 ; 38 L. T. 600 ; 26 W. R. 628.

7554. — Investment bondholder.]—The owner of an investment bond issued by an assurance co. who, upon making periodical payments to the co., will at a future date become entitled to the payment of a certain sum of money is a “contingent or prospective creditor” of the co. within 1908 Act, 2. 137, & can, under that sect. petition for the winding up of the co. *Seem*: such a bondholder will, by virtue of Assurance Companies Act, 1909 (c. 49), be deemed to be a policy-holder for the purposes of sect. 15 of that Act, which limits the rights of policy-holders to present a winding-up petition.—*Re BRITISH EQUITABLE BOND & MORTGAGE CORPN., LTD.*, [1910] 1 Ch. 574 ; 79 L. J. Ch. 288 ; 102 L. T. 421 ; 17 Mans. 177.

7555. Necessity for establishing *prima facie* case before leave to present petition granted—Inability to meet claims unlikely to arise for many years.]—A *prima facie* case of insolvency within Life Assurance Companies Act, 1870 (c. 61), will not be considered as made out, simply because the co. has not at present the means of meeting all the claims which might be brought against it. It is necessary to consider that such claims might not arise for many years, & that new shares might be issued or new capital brought in.—*Re LONDON & MANCHESTER INDUSTRIAL ASSOCN.* (1875), 1 Ch. D. 466 ; 45 L. J. Ch. 170 ; 33 L. T. 685 ; 24 W. R. 386.

7556. — Inability to meet current demands of creditors.]—In determining whether an insurance co. has an uncalled capital sufficient with future premiums to make the actual invested assets equal to the estimated liabilities, for the purpose of suspending proceedings on a winding-up petition under Life Assurance Companies Act, 1870 (c. 61), s. 21, the ct. will have regard, not merely to the nominal amount of uncalled capital, but to the amount which upon the evidence can in fact be realised. The insolvency which is to be the ground of a winding-up order under that sect. is insolvency in the ordinary sense, that is, inability

to meet the current demands of creditors.—*Re NATIONAL FUNDS ASSURANCE CO., LTD.* (1876), 24 W. R. 1066 ;

7557. — Resolution for voluntary winding up.]—*Re BRITISH ALLIANCE ASSURANCE CORPN.*, No. 7553, *ante*.

7558. Form & contents of petition—Must be entitled in matter of Assurance Companies Acts—Petition by shareholder.]—*Re BRITISH ALLIANCE ASSURANCE CORPN.*, [1877] W. N. 261.

7559. — Sufficiency of statement of company's inability to pay debts.]—*Re BRITISH ALLIANCE ASSURANCE CORPN.*, No. 7553, *ante*.

7560. Service of petition—Mutual company with no place of business—No directors—Service on secretary & agents.]—Where it appeared that a mutual co., which was being wound up, had no place of business & no directors, but that there was a secretary, though it was not known where he lived, & that there were agents of the co. whose office was known:—*Held*: service of the proceedings must be effected on the secretary of the co. & the agents.—*Re THAMES MUTUAL CLUB INSURANCE CO.* (1866), 15 L. T. 263.

7561. Hearing of petition—Who entitled to begin.]—*Re BRITISH ALLIANCE ASSURANCE CORPN.*, No. 7553, *ante*.

7562. Grounds for granting or refusing petition—Allegations of false representations—& appointment of secretary as provisional liquidator.]—*Re BRITISH ALLIANCE ASSURANCE CORPN.*, No. 7553,

SUB-SECT. 3.—CONTRIBUTORIES.

7563. Who are—Mutual insurance society—Mortgagee of insured ship.]—The rules of an unregistered mutual marine insurance co. provided that where any ship insured with the co. was mortgaged, the mtgee. should give a guarantee for the payment of all averages & contributions due, or to become due, in respect of the ship:—*Held*: a mtgee. who had given such a guarantee to the co. was not a contributory within 1862 Act, s. 200.—*Re SHIELDS MARINE INSURANCE ASSOCN., LEE & MOOR'S CASE* (1868), L. R. 5 Eq. 368 ; 16 W. R. 685.

7564. — — Holder of unstamped policy.]—S. agreed by writing to become a member of an assocn., each member of which on effecting an insurance on his own ship became bound to contribute to the loss of any other member. S. agreed to become a member in respect of an insurance for £300 on his own ship, but no stamped policy was ever executed. He contributed to the losses of other members, & his own ship having been injured he made a claim in respect of it, but before anything had been paid, the assocn. was ordered to be wound up:—*Held*: under 35 Geo. 3, c. 63, no agreement for insurance of ships can be valid unless duly stamped according to that Act, therefore there was no evidence of a binding mutual contract for insurance having been entered into, & S. was not a contributory.—*Re LONDON MARINE*

PART V. SECT. 8, SUB-SECT. 3.

b. Who are—Subscribers for stock.]—K. signed a stock-book headed as follows: “We, the undersigned, do hereby subscribe for shares of the capital stock of the Alliance Insurance Co., & agree to take the number of shares & for the amount set opposite our respective signatures, & to pay on account thereof to the secretary of

the said co. 10 per cent of the amount of stock subscribed by us respectively within thirty days from the day of our several subscriptions.” The Act incorporating the Alliance Co. vested the shares of the co. in the persons who should subscribe for the same. No subscription to stock was however to be legal or valid until 10 per cent should have been actually & *bond fide* paid thereon. The Alliance Co. was

amalgamated with the Standard Fire Insurance Co. & when the latter was being wound up applts. were placed on the list of contributories:—*Held*: K., & others who had subscribed for stock but paid nothing thereon were improperly made contributories.—*Re STANDARD FIRE INSURANCE CO., KELLY'S CASE* (1885), 12 A. R. 486.—**CAN.**

INSURANCE ASSOCN., SMITH'S CASE (1869), 4 Ch. App. 611; 38 L. J. Ch. 681; 21 L. T. 97; 33 J. P. 643; 17 W. R. 941; 3 Mar. L. C. 280, L. JJ.

Annotations :—**Distd.** *Re* Albert Average Asscn., Blyth & Co.'s Case (1872), L. R. 13 Eq. 529; *Re* Teignmouth & General Mutual Shipping Asscn., Martin's Claim (1872), L. R. 14 Eq. 148. **Consd.** *Re* Arthur Average Asscn. (1876), 45 L. J. Ch. 346; Marine Mutual Insce. Asscn. v. Young (1880), 43 L. T. 441. **Distd.** Barrow-in-Furness Mutual Ship Insce. v. Ashburner (1884), 52 L. T. 898. **Folld.** *Re* Premier Underwriting Asscn. (1912), 134 L. T. Jo. 7. **Mentd.** *Re* Arthur Average Asscn., *Ex p.* Cory & Hawksley (1875), 44 L. J. Ch. 569.

7565. ——— **Holder whose liability compromised by payment to secretary—Money not paid over by secretary.**—By the rules of a mutual insurance assocn. it was provided that the members should, severally, not jointly or in partnership, & each in proportion to the amount of his own insurance, insure the ships of the other members for a year certain, & so on from year to year, unless notice to the contrary should be given; & that this & the other rules should be read with the policy, & be as binding on all parties as if the same were actually therein inserted. The affairs of the assocn. were to be managed by a committee; & all moneys of the assocn. were to be kept in their name at a bankers'. All sums to be paid by the assocn. to a suffering member were to be ascertained & settled by the committee, & to be drawn for on the members at two months' date. Defaulting members were to be liable to a deduction on the amounts of their policies; but were nevertheless to be liable to contribute to all losses occurring during the continuance of their policies. In case of loss, the owner of the lost ship was to remain a member of the assocn. for a period, if not already fulfilled, of six months; in case of sale, his liability was to cease from the date of the transfer. A person desirous of insuring his ship used to send a written application to the secretary, authorising him to insure the ship, & to underwrite all policies of insurance upon all ships that might from time to time be approved by the committee, & undertaking to accept & pay all drafts for losses & contributions that should be drawn, or ordered to be paid, by the committee. Upon this application being accepted, appct. became a member. Generally he executed a power of attorney, whereby the executing parties empowered the secretary to recover & receive from all persons liable to pay or to contribute the same all sums which were or should become due to the executing parties, or any of them, or to the assocn. collectively. The assocn. was never incorporated or registered. Upon its being wound up, there were placed on the list of contributories members who had settled accounts with the secretary, & received from him a receipt in full of all demands; members who had sustained losses, & afterwards sold their vessels; members who had sustained losses, & were claimants for costs; & members who were claimants for losses. The official liquidator proposed to make a call for the purpose of satisfying claims by suffering members on account of sums which had been received by the secretary, & not paid over by him; claims by suffering members on account of sums not yet paid to the secretary; outside debts; & costs of the winding up. On adjourned summons:—**Held**: (1) the propriety of a winding-up order, as applicable to an assocn. of this kind, could not, on this proceeding, be called in question; (2) the winding-up order did not displace or alter the terms of the contract between the parties; (3) the liability of each member of the assocn. extended only to the payment of such proportions as the rules prescribed

of the various losses that occurred during the subsistence of his policy; (4) payment to the secretary discharged the paying member to the extent of such payment; (5) outside creditors were creditors, not of the assocn., nor of the members collectively, but of the persons individually who ordered the particular goods or services; (6) the costs were to be borne by payers & receivers *pro rata* according to the amounts to be paid or received by them respectively.—**Re** LONDON MARINE INSURANCE ASSOCN., ANDREWS' & ALEXANDER'S CASE, CHATT'S CASE, COOK'S CASE, CREW'S CASE (1869), L. R. 8 Eq. 176; 20 L. T. 943; 17 W. R. 784.

Annotations :—**As to** (1) **Consd.** *Re* Arthur Average Asscn. for British, Foreign & Colonial Ships, *Ex p.* Hargrove (1875), 10 Ch. App. 545. n.; *Re* Haycock's Policy (1876), 1 Ch. D. 611. **Refd.** *Re* Queen Average Asscn. *Ex p.* Lynes (1878), 26 W. R. 432. **As to** (5) **Consd.** *Re* Arthur Average Asscn. (1876), 3 Ch. D. 522.

7566. ——— **Holder of stamped policy—Contract contained in unstamped letter.**—B. & Co., by letter, authorised the managers of a mutual marine insurance assocn. to insure a ship with the assocn., & undertook to abide by the rules & regulations thereof. By the rules, each insurer became liable to contribute to the losses of any other insurer in certain proportions. In pursuance of the authority given by B. & Co., a duly stamped policy was issued to them, which, however, contained no reference to the rules:—**Held**: the letter, although not stamped, was admissible in evidence, & B. & Co. were contributories.—**Re** ALBERT AVERAGE ASSOCN., BLYTH & CO.'S CASE (1872), L. R. 13 Eq. 529; 20 W. R. 504.

7567. ——— **Participating policy-holders.**—An unlimited assurance co. was formed upon the mutual principle for granting assurances upon lives with or without participation in profits with a capital stated by the memorandum of assocn. to be divided between shareholders. The arts. of assocn. provided that the co. should at first consist of two classes of members, namely, shareholders, so long as there should be any shareholders, & assurance members, defined to mean policy-holders with participation in profits & registered as members of the co.; & when the shareholders should be paid off under the scheme provided for, then the co. was to consist of assurance members only, who were entitled to equal powers of electing & of becoming directors; but no person to be entitled to be registered in respect of any policy until he should have signed an agreement to become a member. The payment of a premium was to entitle a policy-holder, if registered, to be a member. W. signed a proposal in May, 1873, for a policy with profits, which was to be the basis of the policy, & thereby she agreed to execute the arts. of assocn. when required. The policy recited the proposal, & that W. had agreed to become a member upon the basis of that contract, & that the policy was to be subject to the arts. of assocn. Premiums were regularly paid till the co. was wound up in 1878, but W.'s name was not entered on the register:—**Held**: (1) by the terms of the proposal which engrafted the arts. of assocn., & by signing the policy, & by the payment of premiums, W. had acceded to the arts. & had agreed to become an assurance member of the co.; (2) the ct. had power to rectify the omission upon the register of the co., & to place her name thereon & on the list of contributories; (3) there was nothing in 1862 Act, or in the memorandum of assocn., which precluded the introduction by the arts. of two classes of members, viz., shareholders, & assurance members not holding shares.—**Re** ALBION ASSURANCE SOCIETY, WINSTONE'S CASE

Sect. 8.—Winding up: Sub-sect. 3.]

(1879), 12 Ch. D. 239; 48 L. J. Ch. 607; 40 L. T. 838; 27 W. R. 752.

Annotations:—As to (1) Reifd. Re Albion Assce. Soc., Ex p. Brown (1881), 50 L. J. Ch. 714; Re Albion Assce. Soc., Sanders' Case (1882), 51 L. J. Ch. 579. As to (3) Consd. Ashbury v. Watson (1884), 28 Ch. D. 56. As to (3) Reifd. Re Albion Life Assce. Soc., (1880), 15 Ch. D. 79; Re Albion Life Assce. Soc., (1880), 16 Ch. D. 83.

7568. ————.]—The arts. of assocn. of an unlimited mutual insurance society provided that the co. should at first consist of two classes of members, namely, shareholders, so long as there should be any, & assurance members, who were policy-holders with participation in the profits & registered as members; & that when the shareholders should be paid off under the scheme provided for, then the co. should consist of assurance members only. The shareholders were to have £6 per cent. on their paid-up calls, & every three years the profits were to be calculated, & one-fourth paid to the shareholders, & the other three-fourths carried to the assurance fund & appropriated by way of bonus to the policies of the participating policy-holders who had paid five years' premium. The co. was wound up before the shareholders had been paid off, & the participating policy-holders were declared by the ct. to be contributories:—*Held*: (1) although the participating policy-holders were members & contributories under the special terms of the arts., they could not be called upon to contribute until the shareholders had been exhausted; (2) the presumption of law that in the absence of express stipulation partners must share losses in the same proportion as they share profits, did not apply to such a case, the assured members having no direct participation in profits.—*Re ALBION LIFE ASSURANCE SOCIETY (1880), 16 Ch. D. 83; 49 L. J. Ch. 593; 43 L. T. 523; 29 W. R. 109, C. A.*

7569. ————.]—**Assignment of policy.**—It having been held in *Re Albion Life Assurance Society, No. 7568, ante*, that assurance members, being participating policy-holders of the society, were contributories in the winding up of the co.:—*Held*: a policy-holder who had assigned his policy ceased to be liable as a contributory, although no other person had been made liable to contribute in respect of his policy in his stead.—*Re ALBION LIFE ASSURANCE SOCIETY, BROWN'S CASE (1881), 18 Ch. D. 639; 50 L. J. Ch. 714; 45 L. T. 269; 30 W. R. 30.*

7570. ————.]—Under the arts. of assocn. of an assurance society, "members" included "the holders of participating policies duly registered," & payment of premium was to be deemed an agreement to become a member. The directors of the co. had power to require evidence of the assignment of policies before registering the assignees as members. A participating policy had been assigned, & the assignee had paid a premium on it five months before the winding up of the co., but no evidence of the assignment had been offered to or required by the directors; & the name of the assignee was not entered upon the register of members:—*Held*: the assignee was not a contributory.—*Re ALBION LIFE ASSURANCE SOCIETY, SANDERS' CASE (1882), 20 Ch. D. 403; 51 L. J. Ch. 579; 47 L. T. 112.*

7571. ————.]—*Re GREAT BRITAIN MUTUAL LIFE ASSURANCE SOCIETY, No. 7551, ante.*

7572. ————.]—*Re PREMIER UNDERWRITING ASSOCN., LTD. (1912), 134 L. T. Jo. 7.*

7573. ————.]—**Fixed premium policy-holders.**—*Held*: (1) on the construction of the P. Underwriting Assocn.'s memorandum, the liability of holders of mutual insurance policies issued by the

assocn. was limited to £5 in respect of each policy; (2) the assocn. could validly issue fixed premium policies, but the holders of these policies had not by taking them out thereby agreed to become members of the assocn. & therefore they were not properly put on the list of contributories in the winding up of the assocn.—*CORFIELD (W. R.) & Co. v. BUCHANAN, CORY (JOHN) & SONS, LTD. v. MARITIME INSURANCE Co., LTD. (1913), 29 T. L. R. 258; 6 B. W. C. C. N. 76, H. L.*

7574. ————.]—**Liability of members on B. list.**—1862 Act, s. 38, which is reproduced in 1908 Act, s. 123, applies to all cos. formed under the Act. Therefore the past members of a co. limited by guarantee, as well as the past members of a co. limited by shares, who have ceased to be members, within a year before the commencement of the winding up of the co., are not liable to contribute to the assets of the co. unless it appears to the ct. that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act.—*Re PREMIER UNDERWRITING ASSOCN., LTD. (No. 1), [1913] 2 Ch. 29; sub nom. Re PREMIER UNDERWRITING ASSOCN., LTD., Ex p. GREAT BRITAIN MUTUAL MARINE INSURANCE ASSOCN., LTD., 82 L. J. Ch. 383; 108 L. T. 824; 57 Sol. Jo. 594; 20 Mans. 189.*

7575. ————.]—**Directors "ex officio members"**—**Not being policy-holders.**—The memorandum of an insurance co. limited by guarantee & not having a capital divided into shares followed 1862 Act, s. 9 (4), & limited the liability of its members to £5 per policy. Its arts. provided that the co. should consist of the several persons who for the time being should have insured or should have agreed to insure in the co.; that every person who insured with the co. should as from the date of such insurance be deemed to have been a member of the co., & every such person should be deemed to have ceased to be a member so soon as he should be no longer insured in the co.; that each member for the time being of the directors should "ex officio be a member of the co."; that the first directors should be the subscribers of the memorandum, but that directors should not "necessarily be members other than ex officio members." Then followed usual provisions for the election of directors at annual general meetings of the co., one third of the directorate for the time being retiring in rotation every year, but being eligible for re-election. Four of the original directors were signatories to the memorandum, & from time to time at annual general meetings of the co. retired in rotation from the directorate & were re-elected, & were directors when the co. went into liquidation. Their names never were on the register of members & they never insured with the co., but they represented limited cos. whose names were on the register & who insured with the co. The liquidator placed on the list of contributories the four directors in their character of directors, & also the cos. they represented, as members liable to contribute to the assets of the co.:—*Held*: (1) the four directors were not liable as such to contribute as members to the assets of the co. & were therefore entitled to have their names removed from the list; (2) when a person, whose name has been placed on the list of contributories in a particular character, successfully applies to have his name removed from the list in that character, it is not open to the liquidator, on the same application, to contend that he is entitled to retain the name of the appct. on the list in another character.—*Re PREMIER UNDERWRITING ASSOCN., LTD. (No. 2), CORY'S*

CASE, [1913] 2 Ch. 81 ; 82 L. J. Ch. 378 ; 108 L. T. 826 ; 57 Sol. Jo. 594 ; 20 Mans. 183.

7576. — **After amalgamation or transfer of company.**—Two insurance cos., the A. Co. & the B. Co., amalgamated, the terms being that the business, property, & effects of the A. Co. should be transferred to the B. Co., & that the shareholders of the A. Co. should become shareholders of the B. Co., & should execute a deed of settlement of the latter society ; & that thereupon the said shareholders should, out of the funds & property of the B. Co., be indemnified against all claims in respect of the A. Co., & that such shareholders as should fail to execute the deed of settlement should be precluded from the benefit of such amalgamation. The B. Co. being wound up, the official manager sought to place one of the shareholders of the A. Co., who had not executed the deed of the B. Co., upon the list of contributories :—*Held* : the application must be dismissed with costs.—*Re BRITISH PROVIDENT LIFE & FIRE ASSURANCE SOCIETY, Ex p. WEBSTER* (1864), 10 L. T. 288 ; 12 W. R. 677.

7577. — ——.]—Upon an amalgamation, in 1858, between A. Co. & B. Co., it was agreed that A. Co. should pay, for the purchase of B. Co.'s business, £16,000 in cash & £20,000 in 53,334 £1 shares, on which 7s. 6d. should be considered to have been paid, to the directors of B. Co. or its allottees. H., the solr. to A. Co., & a holder of 1,000 shares disapproved of the amalgamation, &, without opposition by the directors, transferred his shares, as part of the 53,334 shares, to members of B. Co. Calls were subsequently made upon the shares, the notice of such calls being sent to the transferees of H. who were treated as the holders of the shares. In 1861 A. Co. was wound up :—*Held* : in the absence of any evidence to impeach the amalgamation as being a device by A. Co. for ridding itself of valueless shares, the transfer by H. was *bonâ fide*, & he was not now liable as a contributory in respect of the transferred shares, especially after the length of time during which the transaction had remained unquestioned.—*Re STATE FIRE INSURANCE CO., HORN'S CASE* (1864), 12 W. R. 904.

7578. — ——.]—The arts. of the C. & C. Assurance co. contained the following clause as to the powers of the directors : " They may also, with the consent of an extraordinary general meeting, transfer & sell the business of the co., or purchase or amalgamate with the business of any other co. of a like nature." A. & B. became registered members of the co. in Oct. 1866. The general objects of the co. were to insure against loss by fire, & to effect insurances on lives. The general objects of the E. Assurance Corp'n. were to purchase the business of other assurance cos. ; the business of life & fire insurance in all its branches ; the business of a loan co. in all its branches ; to guarantee or become surety for any person or persons, partnerships, etc. ; the advancement of moneys to shareholders & others upon the security of, or to enable the borrower to erect, purchase, or enlarge dwelling-houses & business premises ; & to purchase the fee simple or obtain interests in freehold, copyhold, or leasehold property. The directors of the E. co. contracted to purchase the business of the C. & C. Assurance co. upon certain terms. A. & B. were no parties to this contract, except so far as they might be bound by a resolution of the latter, confirming the contract. Both cos. were in course of winding up, & the names of A. & B. were put upon the register of the E. co. :—*Held* : (1) the powers of the directors of the C. & C. Assurance co. did not

authorise them to amalgamate with the E. co., & the names of A. & B. were removed from the register ; (2) effect of the word " amalgamate " discussed.—*Re EMPIRE ASSURANCE CORPN., Ex p. BAGSHAW* (1867), L. R. 4 Eq. 341 ; 36 L. J. Ch. 663 ; 16 L. T. 346 ; 15 W. R. 889.

Annotation :—*As to* (2) *Reid*. *New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock*, [1894] 1 Q. B. 622.

7579. —.]—B. Co., with limited liability carrying on the business of marine insurance only, & having no power to sell its business, entered into an agreement with P. Co., being an unlimited co., & carrying on business of life, fire, & marine insurance, for the transfer of its business to that co., in consideration of a sum of money, & of so many shares in P. Co., to be issued to members of B. Co. In order to carry out this agreement, B. Co. was wound up voluntarily under an order of the ct., & the sanction of the ct. was obtained to the agreement. Letters were sent by the manager of P. Co. to the shareholders of B. Co., asking them to exchange their shares in B. Co. for shares in P. Co. in pursuance of the agreement, & enclosing forms of application for shares in P. Co. :—*Held* : (1) shareholders of B. Co., who signed & returned such forms of application to the manager of P. Co., had entered into a binding contract to take shares in that co., notwithstanding they had received no notice of allotment of the shares ; (2) the agreement for the amalgamation between the two co.'s having been sanctioned by the ct. under the winding up of B. Co., was not *ultra vires*, & therefore not invalid.—*Re UNITED PORTS & GENERAL INSURANCE CO., BROWN'S CASE, TUCKER'S CASE* (1871), 41 L. J. Ch. 157 ; 25 L. T. 654 ; 20 W. R. 88.

Annotations :—*As to* (1) *Consd.* *Portal v. Emmens* (1876), 45 L. J. Q. B. 305 ; *Re Metropolitan Fire Insce., Wallace's Case* (1900), 69 L. J. Ch. 777.

7580. — ——.]—*LEE'S CASE (ALBERT ARBITRATION)* (1871), Reilly, 1.

Annotation :—*Distd.* *Re European Assee. Soc. Arbitration Acts, Re British Commercial Assee., Rivington's Case* (1876), 34 L. T. 926.

7581. — ——.]—A co. agreed, under circumstances which made it doubtful whether the agreement was binding on the shareholders, to transfer its business to a new co., one of the terms of the agreement being, that each shareholder in the old co. should become a shareholder in the new co. The shareholders in the old co. were accordingly registered as having transferred their shares to the new co. & share certificates in the new co. were sent to each shareholder in the old co. Both the cos. were afterwards wound up :—*Held* : (1) a shareholder who had acknowledged the receipt of certificates & had retained them, was a shareholder in the new co. ; (2) a shareholder who had taken no notice of the communication, & had done nothing in relation to the agreement, was not a shareholder in the new co.—*Re EMPIRE ASSURANCE CORPN., CHALLIS'S CASE, SOMERVILLE'S CASE* (1871), 6 Ch. App. 266 ; 23 L. T. 882 ; 19 W. R. 453, L. C. ; *sub nom.* *Re EMPIRE ASSURANCE CORPN., CHALLIS'S CASE, FORDYCE'S CASE, SOMERVILLE'S CASE*, 46 L. J. Ch. 431.

Annotations :—*As to* (1) *Reid*. *Re Bank of Hindustan, China & Japan, Campbell's Case, Hippisley's Case, Allison's Case* (1873), 9 Ch. App. 1 ; *Re Empire Assee. Corp'n., Dougan's Case* (1873), 8 Ch. App. 540.

7582. — ——.]—*Re UNITED PORTS & GENERAL INSURANCE CO., WYNNE'S CASE*, No. 1673, *ante*.

7583. — ——. **Amalgamation not completed.**]—The S. Insurance Co., which was a Scottish co., was empowered by its arts. of assocn. to sell & dispose of its business to any other co. ; but the

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arts. contained no express power to amalgamate with another co. By an agreement between the S. Co. & the E. Co., the S. Co. agreed to transfer its business to the E. Co. on the terms that the shareholders in the S. Co. should receive shares in the E. Co. in exchange for their shares in the S. Co. The agreement was approved by the shareholders of the S. Co., at a general meeting, & a deed of transfer was executed by the co. & sent to the E. Co., but before its execution by the E. Co. had been completed according to the formalities of Scottish law, a petition was presented under which the E. Co. was wound up. D., a shareholder & director of the S. Co., sent in his share certificates to the secretary of his co. to be exchanged, & certificates of shares in the E. Co. were forwarded to him in exchange, but he did not answer the letter or sign the receipt for the shares; & after the petition for winding up the E. Co. had been presented he returned the certificates & refused to accept the shares:—*Held*: (1) the amalgamation was *ultra vires*, not being a sale within the powers of the S. Co.; (2) if it had been *intra vires*, it was never completed; (3) although D. had taken a prominent part in the negotiations, his sending in his certificates was conditional on the amalgamation being valid & finally completed; & that, having entered into no personal negotiation with the E. Co., he was not bound to be a shareholder in that co. His name, therefore, should be removed from the list of contributories.—*Re EMPIRE ASSURANCE CORPN., DOUGAN'S CASE* (1873), 8 Ch. App. 540; 42 L. J. Ch. 460; 28 L. T. 649; 21 W. R. 495, L. J.J.

Annotations:—As to (3) *Consd. Re United Ports & General Insce., Beck's Case* (1874), 29 L. T. 907. *Refd. Re United Ports & General Insce., Beck's Case* (1874), 30 L. T. 346.

7584. ———. *Re UNITED PORTS & GENERAL INSURANCE CO., BECK'S CASE, No. 1674, ante.*

7585. ———. *Amalgamation by transfer of shares—Transfer not enrolled.*—The B. C. Insurance Co., established in 1821, was never registered as a joint-stock co., but by a private Act of Parliament the shares were made transferable subject to provisions that a memorial of each transfer should be enrolled in Chancery, & that until enrolment the members whose names appeared on the last enrolled memorial should remain liable for the debts of the co. In 1860, for the purpose of carrying out an arrangement for the transfer of the business of the co. to, & an amalgamation with, the B. N. Co., a large majority of the shareholders in the B. C. Co. agreed to sell their shares to a trustee for the B. N. Co., & R., a shareholder in the B. C. Co., executed a transfer of his shares to the trustee in consideration of £250, which was in fact paid out of the transferred assets of the B. C. Co., though there was no evidence to show that R. knew from what source the money was derived. The transfer was registered in the proprietor's ledger of the B. C. Co. on the day of its execution, but was not enrolled till 1865, after the execution of a deed transferring all the assets of the B. C. Co. to the B. N. Co. The B. C. Co. was ordered to be wound up in 1872:—*Held*: R. was not liable as a contributory of the B. C. Co.—*Re EUROPEAN ASSURANCE SOCIETY ARBITRATION ACTS, RIVINGTON'S CASE* (1876), 3 Ch. D. 10; *sub nom. Re EUROPEAN ASSURANCE SOCIETY ARBITRATION ACTS & BRITISH COMMERCIAL*

INSURANCE CO., RIVINGTON'S CASE, 45 L. J. Ch. 804; 34 L. T. 926, C. A.

Annotations:—*Consd. Re European Assce. Soc., Arbitration Acts, Doman's Case* (1876), 3 Ch. D. 21; *Re European Soc. Arbitration Acts, Ex p. British Nation Life Assce. Asscn., Liquidators* (1878), 5 Ch. D. 679.

7586. ———. *Re B. N. Co.* was a life & fire insurance co., with a capital divided into £10 shares. By its deed of settlement it was provided that the capital & funds of the co. should alone be answerable for claims on the co., & that members should not be liable beyond the amount of their shares. There was provision enabling two general meetings to alter & extend the objects of the asscn., & enabling an extraordinary general meeting to acquire the business of any other asscn. of a similar nature. The co. passed a resolution to acquire the business of the B. C. Asscn., which was a co. of similar objects, with a capital divided into £50 shares, on which £5 per share had been paid up. The deed of settlement of the B. C. Asscn. contained no power to transfer its business, so the purchase was completed by certain trustees on behalf of the B. N. Co. taking assignments of the shares in the B. C. Asscn. from the individual proprietors. By a subsequent deed these trustees purported to transfer the shares to the B. N. Co., taking a covenant from the B. N. Co. to indemnify them from all liability. The B. N. Co. was thereupon entered on the list of shareholders in the B. C. Asscn. This deed was never submitted to the sanction of a general meeting. The B. C. Asscn. was subsequently wound up:—*Held*: the transfer of the shares to the co. was *ultra vires*, & the co. could not be put on the list of contributories.—*Re EUROPEAN SOCIETY ARBITRATION ACTS, Ex p. BRITISH NATION LIFE ASSURANCE ASSCN. (LIQUIDATORS)* (1878), 8 Ch. D. 679; *sub nom. Re EUROPEAN ASSURANCE SOCIETY ARBITRATION, BRITISH COMMERCIAL INSURANCE CO. v. BRITISH NATION LIFE ASSURANCE ASSCN.*, 48 L. J. Ch. 118; 39 L. T. 136; 27 W. R. 88, C. A.

Annotation:—*Refd. Re Cardiff Savings Bank, Davies' Case* (1890), 45 Ch. D. 537.

7587. ———. *Re NORWICH PROVIDENT INSURANCE SOCIETY, BATH'S CASE, No. 7481, ante.*

7588. ———. *Re METROPOLITAN FIRE INSURANCE CO., WALLACE'S CASE, No. 1630, ante.*

———. *Illegal marine insurance association.*—*See No. 8590, post.*

———. *See, generally, Part III., Sect. 36, sub-sect. 10, E.; Sect. 37, sub-sect. 7, C., ante.*

Liability of.—*See Sub-sect. 4, C., post.*

SUB-SECT. 4.—RIGHTS OF POLICY-HOLDERS.

A. *Inter se.*

7589. Holders of matured policies—Whether priority over holders of policies not matured.—

(1) A fund which had been collected by the official manager was ordered to be distributed *pari passu* between all the policy-holders & general creditors of the co.

(2) The charge created by a policy of insurance upon the funds of an insurance co. enables the holders of such policies to apply for a receiver to prevent the assets from being wasted.

(3) Policy-holders whose claims against the co. have arrived at maturity have no priority over

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c. *Distribution of deposits & trust assets—Dominion Insurance Act.*—*Re MUTUAL LIFE ASSCN., WELLINGTON'S CLAIM* (1909), 18 O. L. R. 411; 13 O. W. R. 1109.—CAN.

other policy-holders whose claims have not arrived at maturity; they will take *pari passu*.

(4) The costs of the appearance of policy-holders in a co. which has been amalgamated with the principal co., their claims not being disputed, will not be allowed.

(5) In the winding up of an insurance co., the policy-holders who have a charge on the property of the co. by virtue of their policies will not be preferred to the general creditors.—*Re STATE FIRE INSURANCE CO.* (1863), 1 De G. J. & Sm. 634; 2 New Rep. 565; 33 L. J. Ch. 123; 9 L. T. 108; 11 W. R. 1011; 46 E. R. 251, L. JJ.

Annotations:—*As to* (2) **Distd.** *Re* Marine Mansion Co. (1867), L. R. 4 Eq. 601. **Consd.** *Re* British Imperial Insee. Corp., Farr's & Whittall's Claims (1878), 47 L. J. Ch. 318; *Re* Alliance Soc. (1885), 28 Ch. D. 559; *Sovereign Life Assce. v. Dodd*, [1892] 2 Q. B. 573. **Refd.** *Re* *Sovereign Life Assce.*, [1892] 3 Ch. 279. *As to* (3) **Consd.** *Re* *Professional Life Assce.* (1867), 17 L. T. 631. *As to* (5) **Consd.** *Kearns v. Leaf*, *Aldebert v. Kearns* (1864), 1 Hem. & M. 681. **Refd.** *Re* *International Life Assce.*, *McIver's Claim* (1870), 18 W. R. 539.

7590. —.—.]—The policies of a life assurance co. provided that the funds & property of the co., "after satisfying all assurances granted by the society previously payable, & all other prior charges on such funds & property," should alone be liable for payment of the sum assured, & that no member of the co. should be liable for it beyond the amount unpaid on his shares. An order having been made for winding up the co.:—**Held**: a sum which had become payable on a policy before the commencement of the winding up, but had not been paid, had no priority over the claims of policy-holders, the moneys assured by whose policies had not become payable.

The costs of the appearance of a creditor's representative will not be allowed, except in special cases.—*Re INTERNATIONAL LIFE ASSURANCE SOCIETY*, *McIVER'S CLAIM* (1870), 5 Ch. App. 424; 23 L. T. 38; 18 W. R. 794, L. J.

7591. —.—.]—(1) In the winding up of a life assurance co., a policy-holder will be allowed to prove for such sums as would be charged for the issue of a policy on the same terms as the old policy was held on, by a co. whose rates of premium & circumstances are as nearly as possible the same as those of the co. in liquidation.

(2) Participating policy-holders are to have the benefit of any bonus declared before the winding up; but in estimating the value of their policies, they are not to be considered entitled to future gains.

(3) The time of claim being sent in is to fix the value of each debt. If an assured life drops after claim sent in, the death of the assured may be used as evidence of the value of the policy at the time of claim.

(4) A policy-holder whose debt has matured before the winding up, but has not been paid, is not entitled to priority.

(5) The liability of the shareholders in an insurance co. on the policies they issued, was limited, by the terms of the policies, to the subscribed capital:—**Held**: the cessation of business & winding up of the co. was not a breach of contract, so as to make the shareholders liable in full as for damages for the value of such policies.

(6) The shareholders in such a co. are liable in full for the costs of winding up, & though the policy-holders have no charge upon the funds of the co., the shareholders are liable to pay such costs entirely by additional contributions.—*Re ALBERT LIFE ASSURANCE CO.*, *BELL'S CASE*, *KERR'S & STUBBS' CASES*, *BLEACKLEY'S CASE*, *CRAIG'S EXECUTORS' CASE*, *WILSON'S CASE* (1870), L. R. 9

Eq. 706; 39 L. J. Ch. 539; 22 L. T. 697; 18 W. R. 688, 784.

Annotations:—*As to* (1), (2) & (3) **Fold.** *Re* *International Life Assce.*, *Warner's Claim* (1870), 18 W. R. 1097. **Consd.** *Re* *English Assce.*, *Holdich's Case* (1872), L. R. 14 Eq. 72; *Re* *Law Car & General Insee. Corp.*, *King's Case*, *Old Silkstone Collieries' Case*, [1913] 2 Ch. 103. **Refd.** *Re* *Albert Life Assce.*, *Parlby's Case* (1871), 19 W. R. 382. *As to* (4) **Refd.** *Re* *Sovereign Life Assce.*, [1892] 3 Ch. 279. **Generally, Mentd.** *Re* *British Imperial Insee. Corp.*, *Farr's & Whittall's Claims* (1878), 47 L. J. Ch. 318.

7592. Mutual marine insurance association.] —*Re* *LONDON MARINE INSURANCE ASSOCN.*, *ANDREWS' & ALEXANDER'S CASE*, *CHATT'S CASE*, *COOK'S CASE*, *CREW'S CASE*, No. 7565, *ante*.

7593. —.—.]—A mutual marine insurance assocn. was incorporated under 1862 Act, as an assocn. limited by guarantee. The memorandum of assocn. declared that every member undertook to contribute to the assets of the assocn., in the event of its being wound up, a sum not exceeding £5 for the payment of the debts & liabilities of the assocn., & the costs, charges, & expense of winding it up, & for the adjustment of the rights of contributories amongst themselves. Deft. entered his ship to be insured in the assocn., & by the rules he, by so doing, also became an insurer of the ships of other members who entered their ships in the same class. While deft. continued to be a member, the assocn. was wound up. In an action brought, pursuant to the rules, to recover from deft. a sum of £35, as contribution towards losses incurred by other members insured in the same class as that in which he had entered his ship, deft. contended that his liability was limited by the memorandum of assocn. to a sum of £5:—**Held**: the limit of £5, only applied to the liabilities incurred by deft. as a member of the assocn. to the assocn., & his liability as an insurer towards the other members who entered their ships in the assocn. was not limited to that amount.—*LION INSURANCE ASSOCN. v. TUCKER* (1883), 12 Q. B. D. 176; 53 L. J. Q. B. 185; 49 L. T. 674; 32 W. R. 546, C. A.

Annotations:—**Expld.** *United Kingdom Mutual Steamship Assce. Asscn. v. Nevill* (1887), 19 Q. B. D. 110. **Consd.** *Re* *Bangor & North Wales Mutual Marine Protection Asscn.*, *Baird's Case*, [1899] 2 Ch. 593.

— **Generally.**—*See* *INSURANCE*.

B. As against Creditors.

7594. Liability to policy-holders limited—Participating & non-participating policies issued.]—

An assurance society granted policies both in the participating & non-participating form. The former class stipulated that the funds & property of the society should, subject to the deed of settlement, be liable to pay the sum assured, with such further sum as should, pursuant to the rules of the society, be appropriated by way of bonus or addition, with a proviso declaring that the funds of the society should alone be liable, & negating personal liability. The latter class stipulated that the funds & property of the society should, subject to the deed, be liable to pay the sum assured, with a proviso that the funds of the society, by the deed applicable to the payment of policies, should alone, subject to prior claims thereon, pursuant to the deed, be liable, & negating personal liability.

The deed provided that the actuary should estimate the amount of profits, that this estimate might be rejected or reduced by a meeting of shareholders, & that six-tenths of the divisible profits so ascertained should be apportioned by the actuary, as he thought, fair, among the participating policy-holders:—**Held**: (1) such

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policy-holders were not partners; (2) claimants under both classes of policies were entitled to be paid out of the assets, the co. being in course of winding up, *pari passu* with general creditors as to whom the liability of the shareholders was unlimited; (3) the assets in hand being insufficient to provide for all claims, the general creditors were entitled, in the first instance, to be paid *pari passu* with the policy-holders, notwithstanding the possibility of their recovering further sums from individual shareholders & the question of marshalling did not at that stage arise.—*Re ENGLISH & IRISH CHURCH & UNIVERSITY ASSURANCE SOCIETY* (1863), 1 Hem. & M. 85; 2 New Rep. 107; 8 L. T. 724; 11 W. R. 681; 71 E. R. 38.

Annotations:—As to (1) Refd. Holme v. Hammond (1872), L. R. 7 Exch. 218; *Pooley v. Driver* (1876), 5 Ch. D. 458. *As to (3) Foll. Re State Fire Insee.* (1863), 2 New Rep. 230

7595. Whether policy-holders entitled to have assets marshalled—So as to entitle policy-holders to participate in proceeds—Of subsequent call made for benefit of general creditors.]—(1) The S. F. Insurance Co. issued policies, providing that the capital stock & funds of the co. should be liable to make good the damage by fire sustained by the insured, & should alone be liable for all demands under the policies, & that the shareholders should not in any event be liable in respect of any claim upon the co. beyond the amount of their interest in the capital stock of the co. at the time when such claim might arise. The co. was wound up, & it having been held that the policies did not create such a charge upon the stock & funds of the co. as to give the policy-holders any claim upon its assets in preference to the general creditors, calls to the amount of the whole nominal capital were made, & the proceeds were distributed amongst the policy-holders & general creditors *pari passu*. A further call was made under the winding up, & the official manager proposed to divide the proceeds amongst the general creditors, to the exclusion of the policy-holders. The policy-holders contended that the proceeds of this call must be marshalled, & so much must be recouped to the previous fund as would enable the policy-holders to receive on the whole an equal dividend with the general creditors:—*Held*: the doctrine of marshalling did not apply, & the proceeds of the further call must be distributed amongst the general creditors only.

(2) An additional call was, however, directed to be made for the purpose of providing for the general costs of the winding up, leaving the capital stock & funds to bear only the cost of their realisation.—*Re STATE FIRE INSURANCE CO.* (1865), 4 New Rep. 458; 34 L. J. Ch. 436; 10 Jur. N. S. 1015.

Annotations:—As to (1) Foll. Re Professional Life Assoc. (1867), L. R. 3 Eq. 668. *As to (2) Consd. Re Professional Life Assoc.* (1867), 3 Ch. App. 167; *Re Agriculturist Cattle Insee., Ex p. Official Manager* (1874), 10 Ch. App. 1. *Generally. Mentd. Re Barned's Banking Co., Ex p. Andrews* (1867), 36 L. J. Ch. 802; *Re West London & General Permanent Benefit Bldg. Soc., [1894] 2 Ch. 352.*

7596. —.]—*Re PROFESSIONAL LIFE ASSURANCE CO.*, No. 7629, *post*.

7597. — So as to throw debt on unlimited assets.]—The directors of an insurance co., the liability of whose members was unlimited except as to the claims of policy-holders, borrowed money for the purposes of the co.'s business from the co.'s bankers, & gave the bankers as security a charge upon some calls which had been made upon the members. Before the calls had been paid the co. was ordered to be wound up. In the

winding up the debt to the bankers was paid off out of the limited assets:—*Held*: the policy-holders had no equity to have the assets marshalled, so as to throw any part of the bankers' debt upon the unlimited assets.—*Re INTERNATIONAL LIFE ASSURANCE SOCIETY* (1876), 2 Ch. D. 476; 45 L. J. Ch. 766; 34 L. T. 782; 24 W. R. 627, C. A. —.]—*See, also*, No. 7589, *ante*.

7598. —.]—*Re NELSON & CO., LTD.*, No. 7509, *ante*.

7599. Company carrying on several kinds of insurance business—Rights of policy-holders—& depositors.]—In a suit for winding up the affairs of a mutual co., which was formed for the purposes, among others, of insuring the payment of sums of money during the sickness & on the death of its members, & of receiving deposits at interest, & the rules of which as well as the terms of its policies provided that the funds of the society should alone be answerable for the claims of insurers, a decree was made which, among other things, declared that the insurers had a charge on so much of the capital & funds as was attributable to the insurance branch; & the decree contained directions for the valuation of immature assurances. On appeal the decree was varied, & as varied declared that the capital & funds ought to be applied to answer the claims of the insurers & depositors. But it was not disturbed as to the direction for valuation. Form of decree in such a case.—*EVANS v. COVENTRY* (1857), 8 De G. M. & G. 835; 26 L. J. Ch. 400; 29 L. T. O. S. 118; 22 J. P. 19; 3 Jur. N. S. 1225; 5 W. R. 436; 44 E. R. 612, L. J.

Annotations:—Consd. Re State Fire Insee. (1863), 1 De G. J. & Sm. 634. *Reid. Re Athenæum Soc., & Prince of Wales Soc., Durham's Case* (1858), 4 K. & J. 517; *Salisbury v. Met. Ry.* (1870), 22 L. T. 839; *Re National Funds Assoc.* (1878), 10 Ch. D. 118; *Re Exchange Banking Co., Flitcroft's Case* (1882), 21 Ch. D. 519; *Coxon v. Gorst, [1891] 2 Ch. 73*; *Re Sharpe, Re Bennett, Masonic & General Life Assoc. v. Sharpe, [1892] 1 Ch. 154. Mentd. Re Mercantile Trading Co., Stringer's Case* (1869), 4 Ch. App. 479, n.; *Re Montrotier Asphalt Co., Perry's Case* (1876), 34 L. T. 716; *Re Oxford Benefit Bldg. & Investment Soc.* (1886), 35 Ch. D. 502; *Cullerne v. London & Suburban General Permanent Bldg. Soc.* (1890), 25 Q. B. D. 485; *Re Bennett, Masonic & General Life Assoc. v. Sharpe* (1891), 8 T. L. R. 194.

7600. Rights of fire accident policy-holders—Against life assurance deposit.]—(1) In the winding up of an insurance co. transacting life assurance & other business:—*Held*: the holders of fire & accident policies had no claim upon the statutory deposit of £20,000, made in respect of the life assurance business in priority to the claims of general creditors.

(2) The co. by deed had agreed to pay an annuity to a former manager of their life insurance department in satisfaction of a claim for breach of contract to employ:—*Held*: the manager was an "annuitant" within the meaning of Assurance Companies Act, 1909 (c. 49), s. 30 (b), & could claim priority for his annuity out of the statutory deposit as a life policy-holder over the general creditors.—*Re BRITISH UNION & NATIONAL INSURANCE CO., LTD.*, [1914] 2 Ch. 77; 83 L. J. Ch. 596; 111 L. T. 357; 30 T. L. R. 520; 21 Mans. 297, C. A.

7601. Who is "policy-holder"—"Annuitant"—Former manager of company—To whom annuity granted in satisfaction of claim for damages.]—*Re BRITISH UNION & NATIONAL INSURANCE CO., LTD.*, No. 7600, *ante*.

7602. Contract with insurers for creation of fund for policy-holders—By investment of proportion of premiums—Legality.]—*Re BRITISH IMPERIAL INSURANCE CORPN., FARR'S & WHITTALL'S CLAIMS*, No. 7618, *post*.

C. As against Shareholders.

7603. Right to share in surplus.]—*Re LONDON & WESTMINSTER MUTUAL LIFE ASSURANCE CO.* (1850), 15 L. T. O. S. 431; 14 Jur. 929.

7604. Limitation of shareholders' liability—To amount unpaid on shares—Amount of capital misrepresented in policy.]—(1) A policy of assurance granted by the A. Co. provided that the capital stock of £100,000, & other the property of the co. remaining at the time of the claim unapplied & inapplicable to prior claims, should alone be liable to pay the sums assured, & that no shareholder, should be liable beyond the amount unpaid of his shares in the capital stock. Not more than £49,000 out of the £100,000 was ever subscribed for. The life having dropped, the assured claimed the sum payable under the policy; & an order having been made for winding up the co., a claim for the amount was carried in & disallowed, upon which the assured sued the official manager at law, & obtained judgment, the jury finding that there was sufficient property of the co. applicable to pay the demand:—*Held*: by the special contract contained in the policy, the liability of the individual shareholders was effectually limited to the amount remaining unpaid on their respective shares, & they could not be made further liable either on the ground that the policy contained an engagement that the property of the co. should be applied in due course in payment of the sum assured by the policy & that the judgment established the existence of capital sufficient to pay it, or on the ground that the policy contained an untrue representation that the capital was £100,000, which representation the persons making it were bound to make good; or on the ground that the official manager represented the shareholders in the action.

(2) The costs of the action were, however, allowed as a general debt against the contributories, on the ground that they were part of the necessary expenses of the winding up.—*Re ATHENÆUM LIFE ASSURANCE CO., Ex p. PRINCE OF WALES LIFE, ETC. CO.* (1859), 3 De G. & J. 660; 28 L. J. Ch. 335; 33 L. T. O. S. 3; 5 Jur. N. S. 558; 7 W. R. 300; 44 E. R. 1423, L. J. J.; *subsequent proceedings*, John, 633.

Annotations:—As to (1) *Distd. Re State Fire Insce., Ex p. Meredith's & Conner's Claim* (1863), 1 New Rep. 510. *Consd. Lethbridge v. Adams, Ex p. International Life Assce. Soc.'s Liquidator* (1872), L. R. 13 Eq. 547. *Refd. Re State Fire Insce.* (1863), 1 De G. J. & Sm. 634.

7605. ———.]—A policy of insurance, headed "Capital £100,000" provided that such capital & other the property of the insurance society remaining at the time of any claim should alone be liable to make good all claims upon the society under the policy; & that no shareholder should, by reason of the policy, be in anywise individually or personally liable to any such claims or be in anywise charged by reason thereof, beyond the amount unpaid of his shares in the said capital. An application by the assured for leave under Joint-Stock Companies Winding up Amendment Act, 1857 (c. 78), s. 7, to issue execution or take proceedings against an individual shareholder, who had paid in full upon his shares, in respect of the amount the assured had recovered in an action on the policy against the official manager of the society, was refused with costs, the ct. being

of opinion that the terms of the policy precluded the assured from any remedy at law against an individual shareholder; that, even if, upon the construction of the co.'s deed of settlement, the policy was in this respect less favourable to the assured than the deed required, that circumstance could not be insisted upon for the benefit of the assured, his rights being defined by the contract into which he had actually entered; & that, assuming the mention made in the policy of the capital stock of £100,000 to be equivalent to a representation that the society's capital actually amounted to £100,000 & to be a fraud on the part of the directors, the capital subscribed for at the date of the policy not exceeding £44,000 that circumstance would not entitle the assured to have execution against an individual shareholder.—*Re ATHENÆUM SOCIETY & PRINCE OF WALES SOCIETY, DURHAM'S CASE* (1858), 4 K. & J. 517; 32 L. T. O. S. 195; 70 E. R. 216; *sub nom. Re ATHENÆUM LIFE ASSURANCE CO., Ex p. PRINCE OF WALES LIFE INSURANCE CO.*, 27 L. J. Ch. 798; 4 Jur. N. S. 1137; 6 W. R. 765.

Annotations:—*Apld. Lethbridge v. Adams, Ex p. International Life Assce. Soc.'s Liquidator* (1872), L. R. 13 Eq. 547. *Refd. Re Sovereign Life Assce.*, [1892] 3 Ch. 279. *Mentd. Re Athenæum Life Assce., Ex p. Eagle Insce.* (1858), 27 L. J. Ch. 829.

7606. ——— To amount of shares—Breach of contract—Ceasing to carry on business.]—An unregistered assurance society issued policies under which the assets of the co. alone were liable. The co., being insolvent, was registered as an unlimited co., under 1862 Act, & immediately afterwards ordered to be wound up: *Held*: the shareholders were liable beyond the amount of their shares for the expenses of the winding up; but there was no liability beyond the amount of the shares for any breach of contract involved in ceasing to carry on business.—*LETHBRIDGE v. ADAMS, Ex p. INTERNATIONAL LIFE ASSURANCE SOCIETY (LIQUIDATOR)* (1872), L. R. 13 Eq. 547; 41 L. J. Ch. 710; 26 L. T. 147; 20 W. R. 352.

— *Costs of winding up.]—See Sub-sect. 6, post.*

7607. ——— Distinct departments with distinct shares.]—A fire & life insurance co. established distinct departments, with distinct shares for each class of business, & contracted with its life & fire policy-holders that they should respectively have the right of resort to the fire or life assets respectively alone. In the winding up of the co. the resources of the existing fire shareholders were exhausted. The liquidator having made a call on the past fire shareholders in respect of the unsatisfied fire liabilities, although there were existing solvent life shareholders:—*Held*: whatever the equities between the fire & life shareholders and their respective creditors might ultimately be *inter se*, no call could in the first instance be made on past fire shareholders until all the existing solvent life members had been exhausted.—*Re NORWICH PROVIDENT INSURANCE SOCIETY, HESKETH'S CASE* (1880), 13 Ch. D. 693; 49 L. J. Ch. 288; 42 L. T. 135; 28 W. R. 401, C. A.; *revsg. S. C. sub nom. Re NORWICH PROVIDENT INSURANCE SOCIETY, BATH'S CASE* (1879), 11 Ch. D. 386.

7608. ——— Shareholder not individually liable to policy-holders—Liability to contribute to company's funds—To meet claims of policy-holders.]—

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7603 i. Right to share in surplus.]—*DUFF v. CANADIAN MUTUAL INSURANCE CO.* (1881), 6 A. R. 238.—CAN.

d. Right to share in general assets of company—Unless deposit

*fund can satisfy claims.]—*Canadian policy holders petitioned for distribution of the deposit made by the co., a foreign corpn., with the Minister of Finance under 31 Vict. c. 48 (D.), & 34 Vict. c. 9 (D.), the co. being insolvent:—*Held*: for any balance of

their claims not covered by the deposit, Canadian policy holders would be entitled to rank upon the general assets of the co.—*Re BRITON MEDICAL & GENERAL LIFE ASSOCN., LTD.* (1886), 12 O. R. 411.—CAN.

Sect. 8.—Winding up: Sub-sect. 4, C.; sub-sect. 5,

In 1847 an insurance co. was completely registered, & policies granted by it, in which policies a proviso limiting the responsibility of shareholders to the amount of their shares was inserted. The shares were fixed by the co.'s deed at 20,000 at £25 each, & provision was made by the deed for the mode in which the calls from time to time should be made. A. subscribed for 1,000 shares, & executed the deed. In May, 1848, the co. was declared insolvent, under 1844 Act, it having been previously determined by the Ct. of Q. B. that A. was not individually liable to the claims of the policy-holders. The policy-holders proved their claims under the bkpcy. In Dec. 1850, an order to wind up the co. was made, & the names of A. & twelve others who had executed the deed were placed on the list of contributories. To discharge the debts proved against the co. the master made a call upon the contributories of £25 per share, the amount agreed to be subscribed. A. moved to discharge this order, but the ct. refused the motion.—*Re MERCHANT TRADERS' SHIP, LOAN, ETC. INSURANCE CO., TALBOT'S (LORD) CASE* (1852), 5 De G. & Sm. 386; 21 L. J. Ch. 846; 18 L. T. O. S. 328; 16 Jur. 855; 64 E. R. 1165.

Annotations:—Consd. Re Sea Fire & Life Assoe., Greenwood's Case (1854), 3 De G. M. & G. 459; *Re Athenæum Soc. & Prince of Wales Soc., Durham's Case* (1858), 4 K. & J. 517. *Refd. Re Royal Bank of Australia* (1855), 3 Sm. & G. 272; *Robson v. McCreight* (1858), 25 Beav. 272; *Re Sovereign Life Assoe.*, [1892] 3 Ch. 279.

7609. — Mutual marine insurance association—Limited by guarantee.]—A member of a mutual insurance assocn., limited by guarantee under 1862 Act, may be liable to be sued, as a debtor to the co. or to the other members, for his proportion of losses in respect of vessels insured, to an amount exceeding that limited by the memorandum of assocn. as the extent of his guarantee; but he cannot be placed on the list of contributories in respect of such excess.—*Re BANGOR & NORTH WALES MUTUAL MARINE PROTECTION ASSOCN., BAIRD'S CASE*, [1899] 2 Ch. 593; 68 L. J. Ch. 521; 80 L. T. 870; 47 W. R. 695; 43 Sol. Jo. 605; 7 Mans. 160.

Mutual marine insurance associations generally, see INSURANCE.

SUB-SECT. 5.—PROOF BY POLICY-HOLDERS.

A. Who may Prove.

7610. Annuitant.]—Under a winding up, subsequent to Joint-Stock Companies Winding up Amendment Act, 1857 (c. 78), & prior to 1862 Act:—*Held*: on the co. being found to be insolvent, an annuitant was entitled to prove under the winding up for the estimated value of

the annuity, without taking any preliminary proceedings to establish the amount as a debt.—*Re ENGLISH & IRISH CHURCH & UNIVERSITY ASSURANCE SOCIETY* (1862), 1 Hem. & M. 79; 1 New Rep. 192; 7 L. T. 669; 11 W. R. 225; 71 E. R. 35.

7611. — Former manager of company—To whom annuity granted in satisfaction of claim for damages.]—*Re BRITISH UNION & NATIONAL INSURANCE CO., LTD.*, No. 7600, *ante*.

7612. Holders of unstamped policy.]—A. insured a ship in a mutual marine insurance assocn. in 1863, & the policy, which was not stamped, was annually renewed up to the year ending Mar. 1868. In Feb. 1868, the ship, with A. on board, was lost at sea. The loss of the ship was reported to the assocn., & it appeared from entries in the minute books that the money due upon the policy was raised by order of the committee, but retained by the secretary until a personal representative to A. had been appointed. The co. was ordered to be wound up in Jan. 1870, & A.'s widow obtained letters of administration to him in Dec. 1871. Upon a claim by the widow under the winding up for the amount secured by the policy:—*Held*: there was a sufficient admission of liability in the books of the co. to enable the widow to recover as a creditor for the amount secured by the policy, although, from the absence of a stamp, the policy itself, upon which the claim arose, could not be given in evidence.—*Re TEIGNMOUTH & GENERAL MUTUAL SHIPPING ASSOCN., MARTIN'S CLAIM* (1872), L. R. 14 Eq. 148; 41 L. J. Ch. 679; 26 L. T. 684; 1 Asp. M. L. C. 325.

B. For What Amount.

7613. Holder of life policy—Sum for which new policy could be obtained.]—In the winding up of a life assurance co., a policy-holder will be allowed to prove for such a sum as would be charged for the issue of a new policy, on the terms the old policy was held on, by a solvent company, whose rates of premium & circumstances are as nearly as possible the same as those of the co. in liquidation.—*Re INTERNATIONAL LIFE ASSURANCE CO., WARNER'S CASE* (1870), 39 L. J. Ch. 736; 18 W. R. 1097, L. J.

Annotation:—Refd. Re Albert Life Assoe., Bell's Case, Kerr's & Stubbs' Cases, Bleackley's Case, Craig's Exors.' Case, Wilson's Case (1870), L. R. 9 Eq. 706.

7614. — —.]—*Re ALBERT LIFE ASSURANCE CO., BELL'S CASE, KERR'S & STUBBS' CASES, BLEACKLEY'S CASE, CRAIG'S EXECUTORS' CASE, WILSON'S CASE*, No. 7591, *ante*.

7615. — —.]—In estimating the value of a current policy in a life assurance co. in course of liquidation, the measure of proof is the sum which would be required in each particular case to purchase a policy of the same amount at the

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e. Whether non-payment of calls disentitles assured to prove in winding up.]—Certificates of life insurance issued by a benefit society provided that in case of total disability, one-half the amount of the insurance should be payable to insured. This was subject to the following conditions, among others:—"3. If assured shall, at any time within thirty days after receiving due notice, fail to pay the assessments then the assocn. shall not be liable for payment of any sum whatever, & this certificate shall cease & determine." "7. In every case when this certificate shall cease & determine all payments thereon shall be forfeited to the assocn." A call was made by the assocn. on Mar. 1, 1897, payable on Apr. 1, & notice given to T., who was

then a member in good standing. On Mar. 10, he made a claim for total disability; & made default in paying the call on Apr. 1. Further notice was given him by letter on Apr. 9, by which he was to pay in fifteen days, but he failed to do so; & afterwards, upon a reference for the winding up of the co., sought to prove a claim:—*Held*: he was not entitled to do so.

B. made a claim for total disability on Feb. 18, 1897, & put in the usual proofs, but no response was made by the assocn. He paid the call due on Apr. 1, & no further call was made till June 1:—*Held*: his right of action vested before any subsequent call was made, & it was not essential for him to continue his membership after default arose on the part of the assocn. to pay his claim; & therefore there

was no bar to his establishing his claim upon the reference.—*Re MASSACHUSETTS BENEFIT LIFE ASSOCN., JUNKIN'S CASE, BABCOCK'S CASE, PALFRAMAN'S CASE* (1899), 30 O. R. 309.—CAN.

f. Accident to employee after commencement of winding-up proceedings—Whether employer can prove in winding up.]—*Re LIFE & HEALTH ASSURANCE ASSOCN., LTD., BERRY'S CLAIM*, [1913] 2 Ch. 137.—SCOT.

g. Discharge by lump sum of liability to employees—Proof lodged for larger sum in winding up—Whether Assurance Companies Act, 1909, applies.]—EMPIRE GUARANTEE & INSURANCE CORPN., LTD. (LIQUIDATORS) v. OWEN & SONS, LTD. (1915), 52 Sc. L. R. 720.—SCOT.

same premium in a solvent office.—*Re* ENGLISH ASSURANCE CO., HOLDICH'S CASE (1872), L. R. 14 Eq. 72; 42 L. J. Ch. 612; 26 L. T. 415; 20 W. R. 567.

Annotation:—*Reid*. *Re* Law Car & General Insee. Corp'n., [1913] 2 Ch. 103.

7616. —.]—When a life assurance co. is being wound up, the method of estimating the claims on ordinary annuity contracts & policies, that are still subsisting, is as follows: The time as from which the valuation is to be made is the date of the order to wind up. The claim on an annuity contract is to be estimated at the then present value of the annuity according to certain tables. With regard to policies, the then present value of the reversion in the sum assured is to be ascertained according to certain tables & the then present value of the future annual premiums, taking into consideration the pure premiums only, & the difference between these two sums is to be the value of the claim on a policy. In no case is there to be a re-examination of the life assured.—*Re* ALBERT LIFE ASSURANCE CO., LANCASTER'S CASE (1871), L. R. 14 Eq. 72, n.; 16 Sol. Jo. 103.

Annotations:—*N.F.* *Re* English Assce., Holdich's Case (1872), L. R. 14 Eq. 72. *Consd.* *Re* Law Car & General Insee. Corp'n., [1913] 2 Ch. 103.

See, now, Assurance Companies Act, 1909 (c. 49), Sched. VI., r. (A.).

7617. — **Damages for breach of contract with policy-holder—Non-payment of premiums by policy-holder.**—The winding up of an insurance co. renders it impossible for the co. to perform its contract with the policy-holder, who is therefore entitled to claim damages for the breach of such contract; & such claim is unaffected by the non-payment on his part of the premiums payable after the presentation of the petition.—*Re* ALBERT LIFE ASSURANCE CO., COOK'S POLICY (1870), L. R. 9 Eq. 703; 39 L. J. Ch. 257; 22 L. T. 92; 18 W. R. 426.

7618. — **Sum payable on winding up stated in policy.**—(1) The rules of Life Assurance Companies Act, 1872 (c. 41), for valuing policies, do not apply where under the contract of insurance a stated sum is at the winding up payable on the policy.

(2) A contract by an insurance co. with insurers that a certain proportion of their premiums shall be invested & appropriated for payment of their claims in priority to general liabilities of the co. is legal & enforceable by the policy-holders upon the co.'s insolvency.—*Re* BRITISH IMPERIAL INSURANCE CORPN., FARR'S & WHITTALL'S CLAIMS (1878), 47 L. J. Ch. 318.

7619. — **Participating policy.**—*Re* LION LIFE INSURANCE CO., LTD. (1886), 2 T. L. R. 269, C. A.

7620. **Holder of fire policy—Fire during winding up.**—The holder of a fire policy issued by a fire insurance co. is entitled, upon the co. being ordered to be wound up, to prove in the winding up for the full amount of loss covered by the policy & sustained by him through a fire which has occurred in the course of the winding up, although after the date of the winding-up order, & whether the time limited for sending in claims in the winding up has expired or not. *A fortiori*, a claim on account of a fire which has occurred after the presentation of the petition but before the order to wind up, is entitled to proof.—*Re* NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE CO., MACFARLANE'S CLAIM (1880), 17 Ch. D. 337; 50 L. J. Ch. 273; 44 L. T. 299.

Annotations:—*Consd.* *Re* United London & Scottish Insee., Newport Navigation Co.'s Claim, [1915] 2 Ch. 12. *Reid.* *Re* Northern Counties of England Fire Insee. (1885), 1 T. L. R. 629; Sovereign Life Assce. v. Dodd, [1892] 2 Q. B. 573; *Re* Law Car & General Insee. Corp'n., [1913]

2 Ch. 103. *Mentd.* *Re* Bridges, Hill v. Bridges (1881), 17 Ch. D. 342; *Re* Panther Lead Co., [1896] 1 Ch. 978; Ellis' Trustee v. Dixon-Johnson (1923), 40 T. L. R. 177.

7621. **Premiums from date of winding-up order to expiration of policy.**—The assets of a fire insurance co. are not liable for the proportion of premiums which covered the date of the winding-up order & that of the expiration of the policy.—*Re* NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE CO. (1885), 1 T. L. R. 629.

7622. — **What is "fire policy."**—A policy insuring a ship while on the Great Lakes "against the risk of fire only, including general average & salvage charges resulting therefrom," was drawn in such a form that it was doubtful whether it was a marine policy limited to fire, or a fire policy with marine incidents contractually attached. The ship was totally destroyed by fire a few days after a winding up of the insurance co.:—*Held*: on the construction of the policy, it was a fire policy with marine incidents contractually attached, so that it was a fire policy within Assurance Cos. Act, 1909 (c. 49), & the shipowners could only prove for the unexpired portion of the premium.

Semle: a marine policy limited to the risk of fire only would be a fire policy within that Act, even though it were also a marine policy within the Marine Insurance Act, 1906 (c. 41).—*Re* UNITED LONDON & SCOTTISH INSURANCE CO., NEWPORT NAVIGATION CO.'S CLAIM, [1915] 2 Ch. 12; 84 L. J. Ch. 544; 113 L. T. 400; 31 T. L. R. 424; 59 Sol. Jo. 529; 13 Asp. M. L. C. 170; 20 Com. Cas. 296, C. A.

7623. **Holder of employers' liability policy.**—(1) A policy-holder who is insured against risks under Employers' Liability Act, 1880 (c. 42), & Workmen's Compensation Acts, may prove in the liquidation of the insurance co. for ascertained amounts due at the date of the winding-up order from the co. to the assured under the policy; for liabilities in the shape of weekly payments which had emerged before the date of the winding-up order, such weekly payments to be valued according to the rule prescribed by Sched. VI. (D) to Assurance Companies Act, 1909 (c. 49); & for the value of the policy as a contract of indemnity in respect of the risk of fresh liabilities emerging after the date of the winding up & during the unexpired period of the policy, such valuation to take place as at the date of the winding-up order not on the basis of an estimate of the contingencies, but upon the basis of a partial return of premium. He is not entitled to prove in addition in respect of liabilities which may have emerged under the policy between the date of the winding-up order & the date of proving.

(2) The policy-holder in such a case is not entitled to prove by way of damages for the difference between the estimated cost of reinsuring the same risks for the same period in another office & the amount of premiums he would have paid under his policy.—*Re* LAW CAR & GENERAL INSURANCE CORPN., [1913] 2 Ch. 103; 108 L. T. 862; *sub nom.* *Re* LAW CAR & GENERAL INSURANCE CORPN., KING (J. J.) & SON'S, LTD. CLAIM, 82 L. J. Ch. 467; 29 T. L. R. 532; 57 Sol. Jo. 556; 6 B. W. C. C. N. 100; 20 Mans. 227, C. A.

Annotations:—*Generally*, *Reid.* *Re* United London & Scottish Insee., Newport Navigation Co.'s Claim, [1915] 2 Ch. 12. *Mentd.* Ellis' Trustee v. Dixon-Johnson (1923), 40 T. L. R. 177.

C. Set-off.

7624. **Of claim on policy against money due to company.**—A policy-holder borrowed, from the co. in which his life was insured, a sum of money, &

Sect. 8.—Winding up: Sub-sect. 5, C. & D.; sub-sect. 6. Sect. 9.]

deposited his policy with the co. as security for the amount so borrowed. The co. having been ordered to be wound up:—*Held*: the claims of the policy-holder against the co. in respect of his policy could not be set off against the claim of the co. to have the loan repaid.—*Re ALBERT LIFE ASSURANCE CO., PARLBY'S CASE* (1871), 23 L. T. 841; 24 L. T. 226; 19 W. R. 382; *on appeal*, 40 L. J. Ch. 340, L. JJ.

7625. ———.]—A policy-holder in a life assurance co. borrowed money from the co. on his policy. Before the death of the assured the co. was wound up, & an estimated value was put upon the policy. Afterwards the policy-holder filed a petition in bkpcy., & a trustee was appointed. The official liquidators of the co. proved against the estate of the policy-holder for the amount advanced to him, & the trustee claimed to set off the estimated value of the policy:—*Held*: there were no mutual debts or mutual dealings within Bkpcy. Act, 1869 (c. 61), s. 39, & no set-off could be allowed.—*Re LANKESTER, Ex p. PRICE* (1875), 10 Ch. App. 648; 33 L. T. 113; 23 W. R. 844, L. JJ.

Annotations:—Distd. Sovereign Life Assce. v. Dodd, [1892] 2 Q. B. 573. Follid. Paddy v. Clutton, [1920] 2 Ch. 554. Refd. Re Daintrey, Ex p. Mant, [1900] 1 Q. B. 546.

7626. ———.]—Deft. in 1879 effected with pltfs. two policies of life insurance for £1,000 each upon his own life, from the date thereof to May 7, 1888, by which policies pltfs. contracted that in the event of deft. being alive on that day they would then pay the moneys assured to deft. In Apr. & June, 1887, the deft. obtained two loans of £570 & £600 respectively from pltfs. upon mtge. of the policies. In Aug. 1887, a petition was presented for the winding up of pltf. co., & a provisional liquidator was appointed. Deft. continued to pay to pltfs. the premiums upon the policies down to May 7, 1888; but the moneys assured by the policies were never paid to him. In July, 1889, a winding-up order was made. In Apr. 1890, an arrangement under the Joint-Stock Companies Act, 1870 (c. 104), was entered into between pltf. co. & the Sun Life Assurance co., whereby it was provided that the policies of pltf. co. should be transferred to the Sun co., & that the holders of policies in pltf. co. should, in full satisfaction of all claims upon pltfs., accept certain reduced payments from the Sun co. A meeting of policy-holders was summoned under sect. 2 of the Act, at which a statutory majority agreed to the arrangement, but deft. did not himself assent to it; it was in June, 1890, duly sanctioned by the ct. In Dec. 1890, pltfs. brought an action against deft. to recover the amount of the loans, & deft. sought to set off against pltfs.' claim the sums which, but for the winding up, would have been payable to him upon the policies:—*Held*: deft. was entitled to the set-off.—*SOVEREIGN LIFE ASSURANCE CO. v. DODD*, [1892] 2 Q. B. 573; 62 L. J. Q. B. 19; 67 L. T. 396; 41 W. R. 4; 8 T. L. R. 684; 36 Sol. Jo. 644; 4 R. 17, C. A.

Annotations:—Consd. Re Daintrey, Ex p. Mant, [1900] 1 Q. B. 546. Refd. Paddy v. Clutton, [1920] 2 Ch. 554.

7627. ———.]—A holder of a policy payable at the end of 28 years borrowed money from the assurance co. on his policy. Before the years expired an order was made to wind up the co., & the policy was valued under Assurance Companies Act, 1909 (c. 49). The policy-holder then, by leave of the ct., brought an action for redemption against the co., claiming to set off the value of the policy against his debt:—*Held*: Bkpcy. Act, 1914 (c. 59), s. 31, did not apply &

no set-off could be allowed.—*PADDY v. CLUTTON*, [1920] 2 Ch. 554; 90 L. J. Ch. 19; 123 L. T. 808; [1920] B. & C. R. 113.

D. After Amalgamation or Transfer of Company.
See Nos. 7537, 7538, ante.

SUB-SECT. 6.—COSTS.

7628. Liability of shareholders—Liability to policy-holders limited.]—Re ATHENÆUM LIFE ASSURANCE CO., Ex p. PRINCE OF WALES LIFE, ETC. CO., No. 7604, ante.

7629. ———.]—(1) The deed of settlement of a co. formed under 1844 Act, contained a provision that each shareholder, as between him & the other shareholders, should be liable to the debts of the co. in proportion to his interest in the property of the co., but not further or otherwise, & a covenant that if any shareholder should pay a debt due from the co., the debt should be divided into as many parts as there were shares, & each shareholder should pay one or more such parts in proportion to his interest in the capital of the co., such interest to be determined by the number of his shares. It was also provided that if the co. was indebted to a shareholder, the directors should pay him as if he was not a shareholder:—*Held*: on the winding up of the co., the shareholders, who were creditors of the co., were entitled to be paid in full like other creditors, by means of a call on the shareholders, they being debited with the call in respect of their own shares, & if any of the shareholders could not pay the call, the deficiency must be made up by the others.

(2) The co. granted policies of assurance, by the terms of which the assured had no claim against the shareholders beyond the amount unpaid on their shares. Under the winding up, the assets of the co., including the full amount payable on the shares, were applied in paying the policy-holders & the general creditors *pro rata*. It was decided that the balance remaining due to the general creditors, & the costs of the winding up, must be raised by a call on the shareholders. On appeal motion to vary this decision by making the costs of realising the assets a deduction from the assets, so as to throw a share of such costs on the policy-holders:—*Held*: the costs of realising the assets, in the course of a winding up by the ct., ought to be treated as part of the costs of the winding up, & to be borne wholly by the shareholders.—*Re PROFESSIONAL LIFE ASSURANCE CO.* (1867), 3 Ch. App. 167; 17 L. T. 631; 16 W. R. 295, L. J.

Annotations:—As to (1) Refd. Re Maria Anna & Steinbank Coal & Coke Co., McKewan's Case (1877), 6 Ch. D. 447. *As to (2) Consd. Re Oriental Hotels Co., Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126. *Appld. Re International Life Assce. Soc.* (1877), 47 L. J. Ch. 88. *Refd. Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352. *Generally, Mentd. Re Albion Life Assce. Soc., Winstone's Case* (1879), 40 L. T. 838.

7630. ———.]—*Re ALBERT LIFE ASSURANCE CO., BELL'S CASE, KERR'S & STUBBS' CASES, BLEACKLEY'S CASE, CRAIG'S EXECUTORS' CASE, WILSON'S CASE*, No. 7591, *ante*.

7631. ———.]—By the deed of settlement of an unregistered life assurance co. it was provided that the liability of the shareholders in respect of policies should be limited to the subscribed capital. At the time of the winding up of the society, which happened in 1869, £9 per share of the subscribed capital remained uncalled up, & in 1870, a call of this £9 per share was made. In 1873, a further call of £12 per share was made, it having been ascertained that a call to that

amount would, with the £9 per share, pay the debts of the society. Compromises were entered into by the liquidator with certain of the contributories who were unable to pay the calls in full:—*Held*: where the compromise was for £9 per share or less, the whole of the sum received by way of compromise was to be carried to the account of policy-holders, & where the sum received by way of compromise amounted to more than £9 per share, then a sum equivalent to £9 per share was to be carried to the account of the policy-holders, & the residue was to be applied to payment of the general creditors of the society.—*Re INTERNATIONAL LIFE ASSURANCE SOCIETY* (1877), 47 L. J. Ch. 88; 36 L. T. 914.

7632. ———.]—An insurance co. of unlimited liability, formed under 1844 Act, granted policies of insurance, by the terms of which the insured had no claim against the shareholders beyond the amounts unpaid on their shares. The co. was ordered to be wound up, & the assets of the co., including the full amount payable on the shares, were applied in paying the policy-holders & the general creditors *pro rata*; & the balance due to the general creditors was paid by additional calls on the shareholders:—*Held*: the costs of calling up the unpaid capital, as well as the general costs of the winding up, must be borne wholly by the shareholders, & no part was payable out of the limited fund applicable to the claims of the policy-holders.—*Re AGRICULTURIST CATTLE INSURANCE CO., Ex p. OFFICIAL MANAGER* (1874), 10 Ch. App. 1; 44 L. J. Ch. 108; 31 L. T. 710; 23 W. R. 219, L. C. & L. JJ.

Annotation:—*Refd.* *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352.

7633. ———.]—In the case of an insurance co. in liquidation whose assets are limited as regards policy-holders & unlimited as regards other creditors, 1862 Act, s. 38 (6), is only intended to protect the contributories as against the claims of the policy-holders, & does not affect the liability of contributories who have not compromised their liabilities, under 1862 Act, s. 160, to pay the whole of the costs of the liquidation, although the whole of the nominal share capital has been called up. The deed of settlement of an insurance co. registered in 1854 under 1814 Act, provided that every policy issued by the co. should contain a proviso limiting the claims of the policy-holder to the amount of the share capital, but left the liabilities of the shareholders in other respects unlimited. All the policies issued by the co. contained the required proviso; in 1868 the co. was ordered to be wound up. During the liquidation the whole of the nominal share capital was called up, & several of the contributories compromised their liabilities by agreements with the liquidator in manner provided by 1862 Act, s. 160. The liquidator having, for the purpose of raising a fund for the payment of the past & future costs of the liquidation, made a further call on those contributories who had not compromised:—*Held*: those contributories were not entitled to require that the amounts received under the compromise should be marshalled between the liability for costs & the liability under policies; & the contributories who had not compromised alone remained liable for the costs of the liquidation.—*Re ACCIDENTAL DEATH INSURANCE CO.* (1878), 7 Ch. D. 568; 47 L. J. Ch. 396; 26 W. R. 473.

Annotation:—*Refd.* *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352.

7634. Right of policy-holders in amalgamated company to costs—Claims not disputed.]—*Re STATE FIRE INSURANCE CO.*, No. 7589, *ante*.

7635. Division of costs *pro rata* between payers & receivers—Mutual insurance association.]—*Re LONDON MARINE INSURANCE ASSOCN., ANDREWS' & ALEXANDER'S CASE, CHATT'S CASE, COOK'S CASE, CREW'S CASE*, No. 7565, *ante*.

7636. Whether life assurance fund available.]—*Re NATIONAL STANDARD LIFE ASSURANCE CORPN.*, No. 7500, *ante*.

7637. What are costs of winding up—Costs of action by policy-holder against company.]—*Re ATHENÆUM LIFE ASSURANCE CO., Ex p. PRINCE OF WALES LIFE, ETC. CO.*, No. 7604, *ante*.

7638. ——— Costs of realising assets.]—*Re PROFESSIONAL LIFE ASSURANCE CO.*, No. 7629, *ante*.

7639. ——— Calling up unpaid capital.]—*Re AGRICULTURIST CATTLE INSURANCE CO., Ex p. OFFICIAL MANAGER*, No. 7632, *ante*.

SECT. 9.—REDUCTION OF CONTRACTS.

See Life Assurance Companies Act, 1870 (c. 61), s. 22; Assurance Companies Act, 1909 (c. 49), s. 18.

7640. Power of court—To make order for reduction after winding-up order made.]—*Re GREAT BRITAIN MUTUAL LIFE ASSURANCE SOCIETY*, No. 7551, *ante*.

7641. ——— To discharge winding-up order—& direct ascertainment of policy-holders' wishes.]—*Re GREAT BRITAIN MUTUAL LIFE ASSURANCE SOCIETY*, No. 7551, *ante*.

7642. ——— To adjourn winding-up petition—& direct reference to chambers.]—On a petition for winding up an insolvent life assurance co. it was suggested that there should be an order for the reduction of the amount of the contracts of the co. under Life Assurance Companies Act, 1870 (c. 61), s. 22, instead of a winding-up order. The matter was referred to chambers so that steps might be taken, by holding meetings or otherwise, to ascertain what course ought to be adopted, & the petition directed to stand over generally for the meetings to be held, the meetings of the policy-holders & shareholders to be separate.—*Re BRITON MEDICAL & GENERAL LIFE ASSURANCE CO., LTD.* (1886), 54 L. T. 14.

7643. Date of operation of scheme.]—A petition having been presented for the winding up of a life assurance co., an order was made under Life Assurance Companies Act, 1870 (c. 61), s. 22, directing a scheme to be prepared for the reduction of the contracts of the co.:—*Held*: in the absence of special circumstances the contracts to be included in a scheme for reduction are to be ascertained, not at the time of settling the scheme, nor at the date of the order directing a scheme, but at the date of the presentation of the winding-up petition, so that no persons whose contracts have not matured into debts until after the presentation of the petition are entitled to be paid in full.—*Re GREAT BRITAIN MUTUAL LIFE ASSURANCE SOCIETY* (1882), 20 Ch. D. 351; 51 L. J. Ch. 506; 46 L. T. 73, 616; 30 W. R. 374, C. A.

7644. Requisites of scheme.]—*Re BRITON MEDICAL & GENERAL LIFE ASSOCN.* (1887), 3 T. L. R. 670.

7645. ———.]—*Re NELSON & Co.*, No. 7509, *ante*.

Part VI.—Companies Registered Under Repealed Statutes.

7646. Are “unregistered companies” within 1862 Act, Part VIII.]—The above part includes & applies to all cos. which had been registered other than, as well as, cos. registered under that Act itself. “Registered companies” there means registered under that Act itself; “unregistered companies,” all those which had been registered under other Acts antecedently to its passing:—*Held*: therefore, an insurance co. which was formed in 1852, & registered under 1844 Act, & which ceased to carry on business in 1855, was capable of being made the subject of a winding-up order under 1862 Act.—*BOWES v. HOPE, ETC. SOCIETY* (1865), 11 H. L. Cas. 389; 35 L. J. Ch. 574; 12 L. T. 680; 11 Jur. N. S. 643; 13 W. R. 790; 11 E. R. 1383, H. L.; *revsg. S. C. sub nom. Re HOPE MUTUAL LIFE ASSURANCE CO.* (1863), 1 New Rep. 542, L. JJ.

Annotations:—*Consd. Re General Co. for Promotion of Land Credit* (1869), 5 Ch. App. 367, n. *Refd. Re Brighton Hotel Co.* (1868), 37 L. J. Ch. 915; *Re Western of Canada Oil, Lands & Works Co.* (1873), L. R. 17 Eq. 1; *Re Chapel House Colliery Co.* (1883), 24 Ch. D. 259; *Re Crigglestone Coal Co.*, [1906] 2 Ch. 327. *Mentd. Re Inventors’ Asscn.* (1865), 12 L. T. 840; *Re London India Rubber Co.* (1866), 1 Ch. App. 329; *Re St. Thomas Dock Co.* (1875), 24 W. R. 544; *Re United Stock Exchange* (1884), 51 L. T. 687; *Re Baker, Nichols v. Baker* (1890), 59 L. J. Ch. 661; *Re Krasnapolsky Restaurant & Winter Garden Co.* (1892), 61 L. J. Ch. 593; *Re Manchester, Middleton & District Tram. Co.*, [1893] 2 Ch. 638; *Re Globe Trust* (1915), 84 L. J. Ch. 903.

Necessity for registration.]—See Part III., Sect. 4, sub-sect. 1, *ante*.

Effect of registration.]—See Part III., Sect. 4, sub-sect. 5, *ante*.

Jurisdiction of court to sanction alteration of memorandum of company registered under repealed statute.]—See Nos. 4335–4339, *ante*.

7647. Substitution of memorandum & articles for deed of settlement—Confirmation of special resolution—No change in objects of company.]—Where a co. constituted by a deed of settlement has passed a special resolution to alter the form of its constitution by substituting a memorandum & arts. for the deed of settlement, pursuant to 1908 Act, s. 264, the special resolution requires to be confirmed by the ct. under that sect., even if the memorandum does not make any change in the objects of the co.—*Re BRAINTREE & BOCKING GAS CO., LTD.*, [1920] 2 Ch. 12; 89 L. J. Ch. 624; 123 L. T. 266; 84 J. P. 117.

7648. Power of company to make contract not under seal—Contract signed by agent.]—The power of making contracts in writing, signed by their agents, conferred by 1856 Act, s. 41, upon cos. registered under that Act, is “a right or privilege acquired under” that Act within 1862 Act, s. 206, & is consequently not affected by the repeal of the former Act.—*PRINCE v. PRINCE* (1866), L. R. 1 Eq. 490; 35 Beav. 386; 35 L. J. Ch. 290; 14 L. T. 43; 12 Jur. N. S. 221; 14 W. R. 383; 55 E. R. 945.

Part VII.—Unregistered Companies.

SECT. 1.—IN GENERAL.

Necessity for registration.]—See Part III., Sect. 4, sub-sect. 1.

7649. Company deemed to be registered at principal place of business.]—*Re FAMILY ENDOWMENT SOCIETY*, No. 7663, *post*.

7650. Chairman agent of company—Where authorised by statute—To sue & be sued in his name.]—A statute authorising an unincorporated co. to sue & to be sued in the name of its chairman, constitutes the chairman, when so suing or so sued, an agent for the members of the co. in the affairs of the co. The members of a co. formed for the purpose of carrying on business in a colony, are not discharged from liability on judgments obtained in the colony against the chairman, by reason of their having been resident in England, not being served with process, & having received no notice of the proceedings.—*BANK OF AUSTRALASIA v.*

HARDING (1850), 9 C. B. 661; 19 L. J. C. P. 345; 14 Jur. 1094; 137 E. R. 1052.

Annotations:—*Consd. Copin v. Adamson, Copin v. Strachan* (1874), L. R. 9 Exch. 345. *Mentd. Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *Kelsall v. Marshall* (1856), 1 C. B. N. S. 241; *Barber v. Lamb* (1860), 8 C. B. N. S. 95; *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; *Thelwall v. Yelverton* (1864), 16 C. B. N. S. 813; *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600; *Risdon Iron & Locomotive Works v. Furness*, [1906] 1 K. B. 49.

7651. Debts of—Incurred before registration—Liability of members retiring before registration.]—A shareholder in an unregistered co., which, after such shareholder has parted with all his shares, becomes a registered joint-stock co., cannot, upon the winding up of such registered co., be made a contributory thereof, but remains liable for all debts incurred by the unregistered co., whilst he was a shareholder therein.—*LANYON v. SMITH* (1863), 3 B. & S. 938; 2 New Rep. 118; 32

PART VII. SECT. 1.

h. Liability of member—For acts of agent of company—Appointed without assent of member.]—Under Mining Cos. Limited Liability Act, 1864, Amendment Act (No. 324), s. 9, a member of an unregistered mining co. is not liable upon a contract made by a manager or agent of the co. to whose appointment he did not assent, & to whom

he did not give any authority in writing.—*RENWICK v. BARKAS* (1876), 2 V. L. R. 269.—*AUS.*

pay for services rendered before becoming member—Benefit of services adopted.]—Where certain members of an unincorporated asscn. acted under & received the benefit of a constitution & bye-laws, framed by a person employed before

they became members, they were held liable in an action brought for services performed in preparing such constitution & bye-laws.—*Ex p. THEAL* (1874), 2 Pug. 349.—*CAN.*

1. Power of company—To make bye-law—Imposing penalties on employee of another company.]—The W. Exchange, an unincorporated asscn., by its constitution had power to make all

L. J. Q. B. 212 ; 8 L. T. 312 ; 9 Jur. N. S. 1228 ; 11 W. R. 665 ; 122 E. R. 351.

7652. S. P. HARVEY v. CLOUGH (1863), 2 New Rep. 204 ; 8 L. T. 324 ; 11 W. R. 667, n.

7653. Clause limiting liability of members—Effect of.]—The clause [in the deed of an unregistered co.] intimating that each subscriber is only to be liable to the extent of his share is not enough to make the assocn. illegal ; such a regulation is wholly nugatory, indeed, as between the co. & strangers & can serve no purpose whatever, unless to give notice (LORD BROUGHAM, L.C.).—**WALBURN v. INGILBY** (1833), 1 My. & K. 61 ; *Coop. temp. Brough.* 270 ; 3 L. J. Ch. 21 ; 39 E. R. 604, L. C.

Annotations :—**Mentd.** *Murray v. Walter* (1839), Cr. & Ph. 114 ; *Wallworth v. Holt* (1841), 4 My. & Cr. 619 ; *Gloucester Corpn. v. Wood* (1843), 3 Hare, 131 ; *Houghton v. Reynolds* (1843), 2 Hare, 264 ; *Suisse v. Lowther* (1843), 7 Jur. 808 ; *Hunter v. Daniell* (1845), 14 L. J. Ch. 194 ; *Bagshaw v. Eastern Union Ry.* (1850), 6 Ry. & Can. Cas. 152 ; *Swift v. Grazebrook* (1850), 3 Mac. & G. 6 ; *Glyn v. Caulfield* (1851), 3 Mac. & G. 463 ; *Re City & County Bank* (1875), 32 L. T. 589 ; *Kearsley v. Philips* (1882), 10 Q. B. D. 36 ; *Bradford v. Young, Re Falconar's Trusts* (1884), 28 Ch. D. 18 ; *Williams v. Ingram* (1900), 16 T. L. R. 451.

SECT. 2.—WINDING UP.

SUB-SECT. 1.—IN GENERAL.

7654. Power of court—Under Companies Acts—Discretionary.]—On a shareholder's petition to wind up a co. not registered under Cos. Acts, the ct. may in its discretion refuse to make any order, notwithstanding that there is no other way in which such a co. can be wound up under those Acts.—*Re SECOND COMMERCIAL BENEFIT BUILDING SOCIETY, LTD.* (1879), 48 L. J. Ch. 753.

7655. — In equity—To wind up company unable to be wound up as unregistered company.]—The Winding up Acts, although providing a remedy for the more speedy winding up the affairs of joint-stock cos. & other assocns., do not oust the jurisdiction of the Ct. of Ch. in such cases : where, therefore, a demurrer was filed to a bill for an account on this ground :—*Held* : such a demurrer was not tenable.—**CLEMENTS v. BOWES** (1852), 17 Sim. 167 ; 21 L. J. Ch. 306 ; 18 L. T. O. S. 220 ; 16 Jur. 96 ; 60 E. R. 1092.

Annotations :—**Appld.** *Ward v. Sittingbourne & Sheerness Ry.* (1874), 9 Ch. App. 490, n. **Mentd.** *Hallows v. Fernie* (1868), 3 Ch. App. 467.

7656. — — — — —.]—By Act of Parliament in 1866 the S. Ry. Co., incorporated by Act of Parliament in 1856, was to be amalgamated with the D. Ry. Co., subject to landowners' & mtgees.' claims, but free from other liabilities of the S. Co., & the Act provided that when the affairs of the S. Co. were wound up, & notice thereof advertised in the London Gazette, the S. Co. should be dissolved, & thenceforth wholly cease to exist. Immediately after the Act the S. Co. transferred their undertaking to the D. Co., & carried on business only for the purpose of winding up its affairs, but no notice appeared in the Gazette.

proper & needful bye-laws, not contrary to law, to provide for the carrying out of its objects, one of which was to secure to all its members a uniform & minimum commission & to amend such bye-laws from time to time. By an amendment it was made an offence punishable by fine & expulsion for any member, who should be a shareholder, officer or employee of any joint-stock co., which, whether a member of the Exchange or not, should charge or offer to charge less as commission than the rates of commission provided for in

the bye-laws :—*Held* : this amendment, because it provided for the penalties in the case of an employee of a joint-stock co. which should offend against it, went beyond what was proper & needful in carrying out the objects of the Exchange, & was unreasonable & altogether void ; & the pltf., a member of the Exchange, although he was the manager of a co. that had violated the rules of the Exchange to the knowledge of pltf., was entitled to an injunction to prevent the officers & other members of

W., a shareholder in the S. Co., had been its solr. since its incorporation until 1872, & had large claims for bills of costs against the co. In 1873 W. filed a bill against the S. Co., stating that the co. could not pay its debts, & that the assets were in danger of being squandered, & prayed that it might be wound up by order of the ct., & a receiver appointed :—*Held* : on demurrer, the S. Co. was not a going concern under 1862 Act, s. 199, & W. could sustain his bill.—**WARD v. SITTINGBOURNE & SHEERNESS RY. CO.** (1874), 9 Ch. App. 488 ; 43 L. J. Ch. 533 ; 30 L. T. 450 ; 22 W. R. 565, L. JJ.

7657. Discretion of court—Assets unsaleable.]—A co. or fraternity of free fishermen existed from time immemorial within the manor of F., all the members of which were admitted tenants of the manor, & took an oath of homage to the lord. No grant to the co. as a corpn. was in existence, but from numerous ancient documents it appeared that the co. had the exclusive right of dredging for oysters & taking other kinds of fish within the manor, for which it paid a rent of £1 3s. 4d. to the lord. By an Act passed in 1840 it was recognised as a co. in the nature of a prescriptive corpn., & it was recited that the members had time out of mind dredged oysters exclusive of all other persons, & that the fishery was of great benefit to the public ; it was thereby enacted that the co. might exercise all the powers then vested in it, & fresh powers of raising money & charging the profits of the fishery by way of mtge. were given it, the form of mtge. containing no power of sale. Rules were laid down for the management of the co., but it was provided that nothing in the Act should be construed to incorporate the co. The co. made bye-laws for the regulation of the dredging of oysters, & subject to these bye-laws, the privilege of dredging & fishing was enjoyed by the members for their own benefit. A petition having been brought by a creditor for winding up the co. :—*Held* : the co. was a corpn. in which the exclusive right of fishing within the manor was vested ; but the corpn. held the right on a condition or trust for the individual members ; & if the co. was wound up this right of fishing could not be sold by the liquidator, & therefore the winding-up order would be useless. The ct. accordingly refused to make any order for winding up.—*Re FREE FISHERMEN OF FAVERSHAM (CO. OR FRATERNITY OF)* (1887), 36 Ch. D. 329 ; 57 L. J. Ch. 187 ; 57 L. T. 577 ; 3 T. L. R. 797, C. A.

Annotations :—**Distd.** *Re South London Fish Market Co.* (1888), 39 Ch. D. 324. **Expld. & Distd.** *Re Barton-upon-Humber & District Water Co.* (1889), 42 Ch. D. 585. **Reid.** *Re London Health Electrical Institute* (1897), 76 L. T. 98.

SUB-SECT. 2.—COMPANIES WHICH MAY BE WOUND UP AS UNREGISTERED COMPANIES.

A. In General.

7658. " Unregistered company "—Whether company not registered under 1862 Act included.]—*Re TORQUAY BATH CO., No. 6831, ante.*

the Exchange from enforcing the penalty of a fine imposed upon him under such amendment.—**MATHESON v. KELLY** (1913), 26 W. L. R. 475.—CAN.

m. Proceedings under Foreign Companies Ordinance.]—The incapacity of an unregistered foreign co. to maintain an action under Foreign Cos. Ordinance, s. 10, must be raised by defence, & cannot be a ground for setting aside a default judgment obtained by it.—**WESTERN CANADA RANCHING CO. v. BEGG**, [1919] 2 W. W. R. 861.—CAN.

Sect. 2.—Winding up: Sub-sect. 2, A., B., C. & D.; sub-sects. 3 & 4.]

7659. ———.] — *BOWES v. HOPE, ETC. SOCIETY, No. 7646, ante.*

7660. ———.] — *Re LONDON INDIARUBBER Co., No. 6832, ante.*

7661. ———.] *Re ARTHUR AVERAGE ASSOCN. FOR BRITISH, FOREIGN & COLONIAL SHIPS, Ex p. HARGROVE & Co., No. 7549, ante.*

7662. ——— **Applicable only to trading associations.]**—1862 Act, s. 199, which deals with the winding up of unregistered cos., is only applicable to trading assocns., inasmuch as such unregistered cos. are to be wound up at their "place of business," & "business" must ordinarily be trading under the Act.—*Re BRISTOL ATHENÆUM (1889), 43 Ch. D. 236; 59 L. J. Ch. 116; 61 L. T. 795; 38 W. R. 396; 6 T. L. R. 83; 1 Meg. 452.*

Annotations:—Consd. Re Jones, Clegg v. Ellison, [1898] 2 Ch. 83; Re Russell Institution, Fliggins v. Baghino, [1898] 2 Ch. 72

B. Companies Incorporated by Special Act.

See Part IX., Sect. 15, post.

C. Chartered Companies.

See Part X., post.

D. Other Companies.

7663. Company dissolved before 1862 Act—Assets transferred to another company.]—An unregistered co. was dissolved, its place of business abandoned, & its assets & liabilities transferred to another co., before the passing of the above Act. In 1869 a petition was presented by a creditor, whose debt was still unsatisfied, to wind up the co.:—*Held:* the co. was carrying on business for the purpose of winding up its affairs within sect. 199 (1), of the above Act, & a winding-up order was accordingly made.

An unregistered co. is to be deemed to have been registered at its principal place of business.—*Re FAMILY ENDOWMENT SOCIETY (1870), 5 Ch. App. 118; 39 L. J. Ch. 306; 21 L. T. 775; 18 W. R. 266, L. C. & L. J.*

Annotations:—Mentd. Re Manchester & London Life Assee. & Loan Asscn. (1870), 5 Ch. App. 640; Re National Provincial Life Assee. Soc. (1870), L. R. 9 Eq. 306; Re National Provincial Life Assee. Soc., Fleming's Case (1870), 23 L. T. 770; Re Times Life Assee. & Guarantee Co. (1870), 5 Ch. App. 381; Re Medical, Invalid & General Life Assee. Soc., Spencer's Case (1871), 40 L. J. Ch. 455; Re India & London Life Assee. Co. (1872), 27 L. T. 191.

7664. Company unregistered at date of petition—Subsequent registration.]—After the presentation of a petition to wind up an unregistered co., the co. was registered under 1862 Act, with a view to a voluntary winding up. An order having been subsequently made on the petition:—*Held:* notwithstanding the registration, the co. was an unregistered co. within sect. 203 of the above Act, & order made vesting in the official liquidator certain legal estates in securities outstanding in trustees for the co., to be dealt with in the winding up.—*Re HERCULES INSURANCE Co. (1871), L. R. 11 Eq. 321; sub nom. Re HERCULES INSURANCE Co., LTD., Re INTERNATIONAL LIFE ASSURANCE SOCIETY, 40 L. J. Ch. 379.*

7665. Abortive company—Not in fact formed.]—In Apr. 1871, a prospectus was published of a co. to be called the Imperial Anglo-German Bank, the head office to be in Berlin, with a branch in London. The prospectus published the names of the secretary & of twelve directors, five of whom were resident in Berlin & seven, some of whom were Germans, in England. It stated that by the provisions of the German law, under which the

co. was to be incorporated, appcts. for shares could not be made liable before the incorporation of the co., & that their money must therefore be returned in full if the undertaking should not be proceeded with. It further stated that a moiety of the shares had been subscribed for in Germany, & ten per cent. paid thereon, which was required by the German law before the incorporation of a co., & it invited subscriptions for the remaining moiety. On May 20 a large order for advertisements was given at the temporary London office of the inchoate co. to R., as advertising agent, by the secretary in the presence of the principal promoter of the co. The remaining moiety of the shares was allotted in England, & ten per cent. paid thereon. But it having turned out subsequently that the first moiety of the shares had not, in fact, been subscribed for in Germany, nor the requisite percentage paid thereon, the co. was never incorporated.

Upon a petition by R. stating these facts, & praying that the Imperial Anglo-German Bank might be wound up by the ct.:—*Held:* the Imperial Anglo-German Bank, not having been incorporated, never came into existence, & could not be wound up.

Semble: the provisional directors of an inchoate co. do not constitute an assocn. which can be wound up under 1862 Act, s. 199.—*Re IMPERIAL ANGLO-GERMAN BANK (1872), 26 L. T. 229, L. JJ. Annotation:—Refd. Re Matheson (1884), 27 Ch. D. 225.*

7666. Company apparently duly incorporated—Incorporation afterwards found to be defective.]—A co. purporting to be duly incorporated under 1862 Act, was being wound up under the supervision of the ct., when one of the seven persons who subscribed the memorandum of assocn. had his name removed from the register, on the ground of infancy. The chief clerk refusing to proceed with the winding up, on the ground that the co. was not duly incorporated, the ct. ordered the co. to be wound up, as an unregistered co. under 1862 Act, s. 199.—*Re HERTFORDSHIRE BREWERY Co. (1874), 43 L. J. Ch. 358; 22 W. R. 359.*

Annotation:—Distd. Re Nassau Phosphate Co. (1876), 2 Ch. D. 610.

7667. Association of more than seven members.]—In reply to a circular issued by M. & D., setting forth a project for acquiring & remodelling a theatre at the cost of £12,000, with the intention of selling it to a co., to be formed for the purpose, for £40,000, which would enable a return to be made of £300 for every £100 subscribed, several persons, exceeding seven in number, subscribed to the project:—*Held:* the subscribers were partners, & the partnership, as it consisted of more than seven members, could be wound up under 1862 Act, s. 199.—*Re ROYAL VICTORIA PALACE THEATRE SYNDICATE (1874), 30 L. T. 3; 22 W. R. 256, L. JJ.*

7668. — Admitting company's existence & insolvency of company.]—Where, on petition under 1862 Act, s. 199, for the winding up of an alleged unregistered assocn., more than seven persons admit the existence & insolvency of the assocn., the order will go; & the question whether any opposing party is or is not a member of the assocn. will not then be decided, whatever may be the weight of evidence in his favour, but must be determined when the list of contributories is settled.—*Re SOUTH OF FRANCE POTTERY WORKS SYNDICATE (1877), 36 L. T. 651.*

7669. — Who are "members."]—By a special Act of Parliament, passed in 1882, eight persons were incorporated into a co., & were made first directors thereof, "to continue in office until

the first ordinary meeting held after the passing of the Act." The co. was not registered under 1862 Act. No ordinary meeting of the co. was ever held; & in 1887, an action was brought against the co. to recover certain penalties payable under the Act. While the action was pending the eight first directors held meetings at which they allotted to themselves their qualifying shares, paid a call thereon, & applied the money in payment to one of them of preliminary expenses which under the Act were payable by the co., but which he had paid or was liable to pay. Five of them then transferred their shares to another of them in consideration of money paid to the transferee. Judgment was given against the co. in the action, & plffs. presented a petition for the winding up of the co.:—*Held*: the special Act imposed upon the eight persons incorporated thereby the statutory obligation of continuing directors & members of the co. until the first ordinary meeting, & no such meeting having been held, such eight persons still continued members of the co., & consequently the ct. had jurisdiction to make a winding-up order.

The word "members" in 1862 Act, s. 199, does not necessarily mean "shareholders."—*Re SOUTH LONDON FISH MARKET CO.* (1888), 39 Ch. D. 324; 60 L. T. 68; 37 W. R. 3; *sub nom. Re SOUTH LONDON FISH MARKET CO., Ex p. ST. MARY, NEWINGTON, VESTRY*, 4 T. L. R. 764; *sub nom. Re SOUTH LONDON FISH MARKET CO., PLIMSOLL'S CASE*, 1 Meg. 92, C. A.

Annotation:—*Apld. Re Bowling & Welby's Contract*, [1895] 1 Ch. 663.

— But of less than seven at date of petition.]

—*See* No. 7670, *post*; BUILDING SOCIETIES, Vol. VII., p. 507, Nos. 321, 322.

7670. Association of less than seven members—At date of petition.—On a creditor's petition for the winding up of an unregistered loan society, formed under Loan Societies Act, 1840 (c. 110), the members of which formerly exceeded seven in number, but were now only four:—*Held*: having regard to 1862 Act, ss. 199, 200, a winding-up order could not be made when the number of members had at the date of the petition fallen below seven.—*Re BOLTON BENEFIT LOAN SOCIETY, COOP v. BOOTH* (1879), 12 Ch. D. 679; 49 L. J. Ch. 39; 28 W. R. 164.

Annotation:—*Apld. Re Bowling & Welby's Contract*, [1895] 1 Ch. 663.

Winding up of loan societies generally, *see* LOAN SOCIETIES.

See, also, BUILDING SOCIETIES, Vol. VII., p. 507, Nos. 321, 322.

7671. — Foreign company.—Under 1862 Act, the ct. has no jurisdiction to wind up a foreign unregistered co. not consisting of more than seven members.—*NEW YORK & CONTINENTAL LINE* (1909), 54 Sol. Jo. 117.

Winding up of foreign companies generally, *see* Part XII., *post*.

7672. Prescriptive company.—*Re FREE FISHERMEN OF FAVERSHAM (CO. OR FRATERNITY OF)*, No. 7657, *ante*.

7673. Allotment society.—*Re OSMONDTHORPE HALL FREEHOLD GARDEN & BUILDING ALLOTMENT SOCIETY* (1913), 58 Sol. Jo. 13.

Building society.—*See* BUILDING SOCIETIES, Vol. VII., pp. 507, 508, Nos. 320–323.

Club.—*See* CLUBS & OTHER VOLUNTARY ASSOCIATIONS, Vol. VIII., p. 526, Nos. 142–145.

Friendly society.—*See* FRIENDLY SOCIETIES.

Illegal company—Unregistered association of more than twenty members.—*See* Part XIII., *post*.

Industrial society.—*See* INDUSTRIAL, PROVIDENT, & SIMILAR SOCIETIES.

Insurance company.—*See* Part V., Sect. 8, sub-sect. 1, *ante*.

Limited partnership.—*See* PARTNERSHIP.

Loan society.—*See* LOAN SOCIETIES.

Foreign & colonial companies.—*See* Part XII., *post*.

SUB-SECT. 3.—GROUNDS FOR WINDING UP.

7674. Inability to pay debts—Distinction between demands by outside creditors & creditors also being shareholders.—The provision of 1862 Act, s. 199, that an unregistered co. neglecting for the space of three weeks after demand in writing to pay a debt shall be deemed unable to pay its debts, does not apply to the case of a building society where the debt is due to a withdrawing member in respect of a share which he has given notice to withdraw.

In considering that Act, I make a great distinction between what I call an outside creditor, & a creditor who is a shareholder in the co., & I do not think that sect. 199 in that Act, when it gave a power to a creditor to call upon a co. to pay him, or if not to admit that they were insolvent, was intended to apply to any case where one member of the co. called upon the directors to pay him in respect of some rule of the society itself. If this application had been made by an outside creditor of the co.—if the co., for instance, had applied to A. B., a cabinet maker, holding no shares in the co., to make a certain number of tables & chairs for the co., & had refused to pay him, then unquestionably, in my opinion, he might come, under clause 199, & serve the co. with a notice to pay him the amount they owed him, & that if they did not pay it he should present a petition against them. But I do not think that this applies to the case of a person who is a shareholder of the co., & who therefore applies under sect. 13, which only enables those persons to be paid who have applied, & to be paid in rotation (LORD ROMILLY, M.R.).—*Re PLANET BENEFIT BUILDING & INVESTMENT SOCIETY* (1872), L. R. 14 Eq. 441; 41 L. J. Ch. 738; 27 L. T. 638; 20 W. R. 935.

Annotations:—*Consd. Re Horsham Industrial & Provident Soc.* (1894), 70 L. T. 801. *Refd. Walker v. General Mutual Bldg. Soc.* (1887), 36 Ch. D. 777.

See, also, BUILDING SOCIETIES, Vol. VII., pp. 508, 509, Nos. 326–331.

SUB-SECT. 4.—PETITION.

7675. Who may petition—Debenture-holder—Remedy provided by special Act.—An unregistered co. incorporated by Act of Parliament will not be ordered to be wound up on the petition of unpaid debenture-holders when the special Act gives the debenture-holders a remedy by the appointment of a receiver.—*Re HERNE BAY WATERWORKS CO.* (1878), 10 Ch. D. 42; 48 L. J. Ch. 69; 39 L. T. 324; 27 W. R. 36.

Annotation:—*N.F. Re Borough of Portsmouth (Kingston, Fratton & Southsea) Tram. Co.*, [1892] 2 Ch. 362.

7676. — — — — ——An unregistered tramway co. had, under the special Act by which it was incorporated, power to borrow money on debentures. The co. issued debentures in the form prescribed by 1845 Act, schedule C., which was incorporated in the co.'s special Act.

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time fixed for the repayment of the principal sums owing upon the debentures having expired & no payment having been made by the co., a debenture-holder brought an action on behalf of himself & all other debenture-holders, & recovered judgment & obtained the appointment of a receiver. His debt remaining still unpaid, he presented a petition to wind up the co.:—*Held*: (1) the remedies given to a debenture-holder in respect of his security on the undertaking of a co. as a going concern did not deprive him of his ordinary remedy as a creditor of the co.; (2) there being no other means whereby petitioner could obtain payment of his debt, except by a winding-up order, the order must be made.—*Re PORTSMOUTH BOROUGH (KINGSTON, FRATTON & SOUTHSEA) TRAMWAYS CO.*, [1892] 2 Ch. 362; 61 L. J. Ch. 462; 66 L. T. 671; 40 W. R. 553; 8 T. L. R. 516; 36 Sol. Jo. 462.

Annotations:—*As to* (2) *Folld. Re St. Neots Water Co.* (1906), 22 T. L. R. 478. *Reid. Marshall v. South Staffordshire Tram. Co.*, [1895] 2 Ch. 36. *Generally, Mentd. Bartlett v. West Metropolitan Tram. Co.* (1894), 63 L. J. Ch. 519.

7677. — Contributory.—A contributory no less than a creditor is entitled to petition under 1862 Act, s. 199, for the winding up of an unregistered co.—*e.g.* a tramway constituted by special Act of Parliament.—*Re SOUTH STAFFORDSHIRE TRAMWAYS CO.* (1894), 1 Mans. 292; 8 R. 288.

7678. Service of petition—Whether on company or individual shareholders.—A co. not registered under 1862 Act can, under the provisions of sect. 199 of that Act, & the third General Ord. of Nov. 1862, be served with a winding-up petition, & a winding-up order may then be made without the necessity of serving the individual shareholders of the co.—*Re CITY OF LONDON & COLONIAL FINANCIAL ASSOCN., LTD.* (1867), 36 L. J. Ch. 832; 15 W. R. 1095, L. J. J.

SUB-SECT. 5.—CONTRIBUTORIES.

7679. Who are—Effect of 1862 Act, s. 200.—Sect. 38 of the above Act is confined to cos. registered under that Act; & sect. 200 of the same Act creates no new liability.—*Re SHEFFIELD & SOUTH YORKSHIRE PERMANENT BUILDING SOCIETY* (1889), 22 Q. B. D. 470; 58 L. J. Q. B. 265; 60 L. T. 186; 53 J. P. 375; 5 T. L. R. 192, D. C.

Annotation:—*Expld. Sibun v. Pearce* (1890), 44 Ch. D. 354.

See, now, 1908 Act, s. 269.

7680. — Executor.—*CLARKE'S EXECUTOR'S CASE* (1872), Reilly, 223.

Annotation:—*Reid. Re European Assoc. Soc., Ramsay's Case* (1876), 35 L. T. 654.

7681. — Promoters.—An undertaking having been set on foot for the purchase & alteration of a theatre, a partnership consisting of more than seven members was formed for the purpose. Two of the promoters, being members, issued a circular in which was contained the following statement: "The entire remodelling, redecorating, & furnishing will cost £12,000, & of this sum £5,000 only remains for subscription." The partnership having been ordered to be wound up, as an unregistered co., under 1862 Act, s. 200:—*Held*: the two promoters must be settled on the list of contributories for all the balance of the unsubscribed-for capital, up to £12,000.—*Re ROYAL VICTORIA PALACE THEATRE SYNDICATE, MOORE & DE LA*

TORRE'S CASE (1874), L. R. 18 Eq. 661; 43 L. J. Ch. 751; 31 L. T. 83; 22 W. R. 873.

Annotation:—*Reid. Re Moore*, [1899] 1 Ch. 627.

—.]—*See, also*, Part V., Sect. 8, sub-sect. 3, *ante*; *BANKERS & BANKING*, Vol. III., p. 136, Nos. 103, 104; *BUILDING SOCIETIES*, Vol. VII., pp. 510–513.

7682. Liability of—Promoters—Misrepresentation as to capital subscribed.—*Re ROYAL VICTORIA PALACE THEATRE SYNDICATE, MOORE & DE LA TORRE'S CASE*, No. 7681, *ante*.

— **After bankruptcy.**—*See BANKRUPTCY & INSOLVENCY*, Vol. IV., pp. 302, 304, 469, Nos. 2832, 2845–2847, 4230.

7683. — Shareholders before registration of company under repealed statute—Debts incurred before registration.—The official liquidator of a previously existing co., registered under 1856 Act, & winding up under 1862 Act, may be directed to make a list of the persons who were shareholders before registration, for the purpose of contribution to liabilities incurred previously to the registration.—*Re EXHALL MINING CO., LTD., BLECKLY'S CASE* (1867), 16 L. T. 784; 15 W. R. 1104.

7684. — Nature of liability—Whether specialty debt.—The liability of a shareholder of a co. not registered under 1862 Act, but wound up under it, to contribute to the assets of the co., is in the nature of a specialty debt. The liquidator of such a co. is entitled to prove against the estate of a deceased contributory for the estimated value of such liability, although no call has actually been made in the winding up, & to have a proportionate share of the fund set apart to meet it.—*Re MUGGERIDGE, MUGGERIDGE v. SHARP, Ex p. BANK OF LONDON & NATIONAL PROVINCIAL INSURANCE ASSOCN.* (1870), L. R. 10 Eq. 443; 39 L. J. Ch. 620; 23 L. T. 296; 18 W. R. 963.

— — —.]—*See, also*, Nos. 6233–6235, *ante*.

SUB-SECT. 6.—STAY OF PROCEEDINGS.

7685. Against contributory—Action begun without leave of court—1862 Act, s. 202.—(1) Defts., who were members of an unregistered society enrolled & certified under the Industrial & Provident Societies Act, 1851 (c. 31), gave a promissory note in the following form for a debt of the society:—"Twelve months after date, we, the undersigned, being members of the executive committee, on behalf of the L. & S. W. Railway Co-operative Society, do jointly promise to pay," etc.:—*Held*: they were personally liable.

(2) After the making of this note the society was registered under the Industrial & Provident Societies Act, 1862 (c. 87), & after action brought, an order was obtained for winding it up under the 1862 Act, & proceedings under that order were taken in the county ct. Sect. 202 of 1862 Act enacts that where an order has been made, winding up an unregistered co., no suit or other legal proceeding shall be commenced or proceeded with against any contributory to the co., in respect of any debt of the co., except with the leave of the ct. Pltf. had not obtained leave to proceed:—*Held*: the omission to obtain such leave could not be taken advantage of by plea to the further maintenance of the action, but only, if at all, by application to the ct. in which the proceedings under the winding-up order were being pursued.—*GRAY v. RAPER* (1866), L. R. 1 C. P. 694; Har. & Ruth. 794; 14 W. R. 780.

Annotations:—*As to* (1) *Reid. Courtauld v. Saunders* (1867), 16 L. T. 562. *As to* (2) *Reid. Re International Patent*

Pulp & Paper Co. (1876), 24 W. R. 535. *Generally, Mentd.* R. v. London, Lord Mayor, *Ex p.* Boaler, [1893] 2 Q. B. 146.

7686. —.]—An order was made to wind up an unregistered assocn. Subsequently on an *ex p.* application by the liquidator, the judge made an order that an action brought by A. in the C. P. Div. against two contributories of the co. upon some promissory notes should not be proceeded with without leave of the ct. The liquidator alleged that the money secured by the notes had really been advanced to the co.

On June 28, the judge, on the application of A., discharged the order, on the ground that the debt was that of the contributories, & that the liquidator had no interest in the matter:—*Held*: by Jud. Act, s. 24, sub-s. 5, the judge had no jurisdiction to restrain the proceedings in an action in another division of the High Ct.

Sect. 202 of 1862 Act only applies to actions brought against contributories of a co. as such, to enforce a debt of the ct.—*Re SOUTH OF FRANCE POTTERY WORKS SYNDICATE* (1877), 37 L. T. 260; 25 W. R. 870, C. A.

7687. Against company—Under 1862 Act, s. 85.]—Above sect. empowers the ct., at any time after presentation of a petition to wind up a co., upon application of the co., to restrain further proceedings in an action or other proceeding against the co., & is by sect. 199 imported into the portion of the Act, applying to unregistered cos.

Sect. 204, which provides that “an unregistered company shall not, except in the event of its being wound up, be deemed to be a co. under the Act,” does not prevent such application of sect. 85 to unregistered cos., although no order to wind up has been made, if a petition to wind up is pending. In such a case the ct. has a discretion whether it will stay execution, & if, after presentation of the petition, the co. has allowed judgment to be signed without taking the objection that a winding-up petition is pending, the ct. will not interfere to prevent the creditor from issuing execution.—*RUDOW v. GREAT BRITAIN MUTUAL LIFE ASSURANCE SOCIETY* (1881), 17 Ch. D. 600; 50 L. J. Ch. 504; 44 L. T. 688; 29 W. R. 585, C. A.

Annotation:—*Mentd.* Sanderson v. Blyth Theatre Co., [1903] 2 K. B. 533.

7688. Against liquidator—In personal capacity—General jurisdiction of court.]—The appointment of an official liquidator does not vest in him personally the property of an unregistered co. under 1862 Act, s. 203, but only vests it in him in his official capacity for the purpose of assisting the ct. to wind up the co.; & an action to recover arrears of rent-charge commenced against the liquidators of such a co. in their personal capacity ought to be stayed, not because the leave of the ct. had not first been obtained under sect. 87, but under the general jurisdiction of the ct. to stay actions which are clearly not maintainable.—*GRAHAM v. EDGE* (1888), 20 Q. B. D. 683; 57 L. J. Q. B. 406; 58 L. T. 913; 4 T. L. R. 442, C. A.

Annotation:—*Apprvd.* *Re Ebsworth & Tidy's Contract* (1889), 42 Ch. D. 23.

obtained on an *ex p.* motion.—*Re ALBERT LIFE ASSURANCE CO.* (1869), 18 W. R. 91.

Annotation:—*Consd.* *Re Albion Mutual Permanent Bldg. Soc.* (1887), 57 L. J. Ch. 248.

7690. —.]—A vesting order under 1862 Act, s. 293, cannot, except under special circumstances, be obtained *ex p.*—*Re ALBION MUTUAL PERMANENT BUILDING SOCIETY* (1888), 57 L. J. Ch. 248.

7691. Form of—Whether court will grant unrestricted powers.]—A motion was made in the name of the official liquidator of an unincorporated building society, which was in course of being wound up compulsorily under 1862 Act as an unregistered co., for an order, pursuant to sect. 203 of that Act, vesting in the liquidator certain property then vested in the sole surviving trustee of the society; & that the liquidator might be at liberty to exercise any of the powers conferred on him by sect. 95 of the same Act without the sanction or intervention of the ct.:—*Held*: (1) subject to the notice of motion being amended by making it in the name of the society instead of in that of the official liquidator, the usual vesting order should be granted; (2) the right to exercise the powers conferred by 1862 Act, s. 95, without the sanction or intervention of the ct. could not be allowed, it being improper to make the order in such general terms, notwithstanding the order made in *Re Ebsworth & Tidy's Contract*, No. 7693, *post.*—*Re BRITANNIA PERMANENT BENEFIT BUILDING SOCIETY* (1890), 63 L. T. 304.

7692. Effect of—On liability of liquidator.]—*GRAHAM v. EDGE*, No. 7688, *ante.*

7693. — On power of liquidators—To sell—Whether all must join in conveyance of legal estate.]—Part of certain property had been mortgaged to the trustees of a benefit building society, by the mtgc. it was provided that in case of default by the mtgor. the trustees for the time being were to hold the property in trust, if & when required by the directors, to sell the property. The receipts of the trustees were to be good discharges for the purchase-money. The society, which was an unregistered co., was ordered to be wound up, & an order was made appointing six of the directors of the society official liquidators, & declaring that all the acts required or authorised by 1862 Act to be done by the official liquidators might be done by any two of them. By a subsequent order all the real & personal property, including all interest, claims, & rights into & out of the same, was vested in the official liquidators. The order followed in terms of 1862 Act, s. 203. Two of the liquidators then sold & purported to convey the property comprised in the mtgc.:—*Held*: the two official liquidators had no power to convey the legal estate which was vested in the six.—*Re EBSWORTH & TIDY'S CONTRACT* (1889), 42 Ch. D. 23; 58 L. J. Ch. 665; 60 L. T. 841; 54 J. P. 199; 37 W. R. 657, C. A.

Annotations:—*Mentd.* *Re Bryant & Cullingford to Barningham* (1889), 62 L. T. 53; *Re Stamford, Spalding & Boston Banking Co. & Knight's Contract*, [1900] 1 Ch. 287.

See, also, BUILDING SOCIETIES, Vol. VII., p. 510, Nos. 338, 340.

SUB-SECT. 7.—VESTING ORDER.

7689. How obtained—Whether ex parte.]—A vesting order under 1862 Act, s. 203, can be

SUB-SECT. 8.—DISTRIBUTION OF ASSETS.

7694. Surplus assets.]—*CHAPMAN v. HAYWARD* (1886), 2 T. L. R. 758.

Part VIII. Cost-Book Companies and Mining Companies in the Stannaries.

SECT. 1.—COST-BOOK COMPANIES.

SUB-SECT. 1.—IN GENERAL.

7695. Nature of cost-book company—Whether partnership.]—Defts. & others met for the purpose of forming a co. for working a mine on the cost-book principle, the concern to consist of 60,000 shares, of which 15,000 were to be appropriated to the owner of the mine, 33,750 to A., B., & C., & the remainder allotted to other parties in proportion to certain capital subscribed by them, 1,125 being allotted to deft., for which he paid £100 : & it was at that meeting resolved, amongst other things, that the requisite capital to work the mine for the first six months should be found by A., B., & C. The same resolution also stated that the mine had been purchased of the owner for the sum of £1,000 in cash, & £15,000 to be paid in cash or shares at the end of six months, should it be deemed desirable by the adventurers to continue operations, such payment of £15,000, or surrender of the mine to the owner, being optional by the adventurers :—*Held* : by this arrangement, each adventurer became a partner in the concern from the commencement, & liable as such for goods supplied for the working of the mine.—*PEEL v. THOMAS* (1855) 15 C. B. 714 ; 3 C. L. R. 397 ; 24 L. J. C. P. 86 ; 24 L. T. O. S. 259 ; 139 E. R. 606.

7696. ———.]—A shareholder in a cost-book mining co. filed his bill against the managing committee & against a creditor of the co., to restrain an action at law brought against him by the creditor at the instigation of the managing committee. The bill also asked for an account as to the amount of pltf.'s liability to the co. The ct. granted an injunction to restrain the action by the creditor, but dismissed the bill as against the managing committee, on the ground that as the co. was a simple partnership, formed under no Act of Parliament, it was necessary, in order to have an account, that all the members should be made parties to the bill.—*SIRLEY v. MINTON* (1857), 27 L. J. Ch. 53 ; 5 W. R. 575.

Annotation :—*Refd.* *Escott v. Gray* (1878), 47 L. J. Q. B. 606.

7697. ——— Resembles joint-stock company—Effect of entry of new partner.]—In an action against an individual shareholder for coals sold & delivered to a cost-book mining co. there was general evidence that coals had been delivered :—*Held* : the monthly cost sheets sent in by pltf. to the purser of the mine, & by him laid before the managing committee & passed by them, were evidence, as against deft., of the quality & value of the coals so delivered.

The last new shareholder joined the co. in 1865, & in 1866 the purser made payments to pltf. for coals :—*Held* : pltf. had a right to appro-

priate these payments to the items in his account anterior to 1866.

A partnership to carry on a mine on the cost-book principle is in the nature of a joint-stock co. ; it has been recognised to be such by various decisions & Acts of Parliament & it is not a new partnership on the entry of a new member who merely comes in the place of an old one & puts his money into the common fund to be employed in the ordinary course of business. . . . The intent of those who enter such an assocn. is that the money should go into the common fund to be applied in the ordinary course & that old debts should be paid (*MONTAGUE SMITH, J.*).—*GEAKE v. JACKSON* (1867), 36 L. J. C. P. 108 ; 15 L. T. 509 ; 15 W. R. 338.

7698. ——— Whether “public company” — Within Judgments Act, 1838 (c. 110).]—*Qu.* : whether a mining co. on the cost-book principle is a “public company” within the meaning of above Act, so as to make shares therein liable to be charged with a judgment debt.—*NICHOLLS v. ROSEWARNE* (1859), 6 C. B. N. S. 480 ; 28 L. J. C. P. 273 ; 5 Jur. N. S. 1266 ; 7 W. R. 612 ; 141 E. R. 544.

Annotations :—*Mentd.* *Baker v. Tynte* (1860), 6 Jur. N. S. 1192 ; *Fluester v. McClelland* (1860), 8 C. B. N. S. 357 ; *Ex p. Holden* (1863), 13 C. B. N. S. 641.

7699. ——— Whether having capital similar to other companies.]—*Commrs. of Inland Revenue* having decided that in the case of cost-book mines, & under the Stannaries Acts, there was no such thing as capital, & that there could be no profit in working such a mine until every expenditure had been met, & that therefore the cost of sinking a new shaft was not capital expenditure, but working expenditure, & could be deducted in assessing the annual profits for income tax purposes :—*Held* : the *Commrs.* were wrong in their finding that in such mines there could be no capital ; in this respect there was no difference between a cost-book mine & any other mine, & the question whether the cost of sinking the shaft was capital expenditure or working expenditure, or partly the one & partly the other, was a question of fact to be decided on the circumstances of the case.—*MORANT v. WHEAL GRENVILLE MINING Co.* (1894), 71 L. T. 758 ; 11 T. L. R. 67 ; 39 Sol. Jo. 82 ; 3 Tax. Cas. 298, D. C.

Annotation :—*Refd.* *Bonner v. Basset Mines* (1912), 108 L. T. 764.

7700. Cost-book principle—Proof of—Whether court will take judicial notice of principle.]—*Re PENNANT & CRAIGWEN CONSOLIDATED LEAD MINING Co., FENN'S CASE*, No. 7755, *post*.

7701. ———.]—*Re BODMIN UNITED MINES Co.*, No. 7756, *post*.

7702. ———.]—A mining co. by its prospectus & certificates professed to be a co. in

PART VIII. SECT. 1, SUB-SECT. 1.

n. Directors' fees.]—A Mining Co., conducted upon the cost-book principle, the cost-book rules contained no proviso entitling the directors to fees or payments ; but they from time to time retained sums as remuneration for their personal services. At a

general meeting of the co., accounts were submitted & passed. These accounts, under the head of “Cost & merchants' bills,” included the amounts so retained by the directors. They were specifically entered in the cost-book of the co., & could have been discovered by any shareholder on reference to such book :—*Held* : the

directors had no right to retain such sums in the absence of a special rule entitling them to remuneration ; & that they were bound to repay same on the application of the official manager.—*Re KNOCKATRILLANE COPPER MINING Co., Ex p. KINSALE (LORD)* (1857), 10 Ir. Jur. 216.—*IR.*

30,000 shares of £1 each, to be conducted upon the cost-book principle. The directors passed rules, by one of which the co. was to be considered as constituted, & the directors to be at liberty to commence business so soon as one-third of the shares should have been subscribed; & by another, that no person should be recognised as an adventurer in or entitled to any benefit from the co. until he should have signed the rules, & be duly registered in the cost-book as an adventurer. H. having seen the prospectus, but not the rules, applied verbally & paid for & received certificates of shares in the co. The certificates stated that the shares were to be held subject to the rules of the co. The co. failed. H., a year after he received the certificates, brought an action to recover his money, & the action was compromised:—*Held*: (1) the certificates were notice of the rules; & although H., assuming him not to have had previous notice, would have been allowed, perhaps, a reasonable *locus poenitentiae* to return the certificates, still, having retained them, & not having brought his action for a year, he must be taken to have acquiesced in & be bound by the rules; (2) although H. had not signed the rules, still, having applied & paid for & accepted the certificates of shares, he had authorised the co. to register his name in the cost-book without his signing the rules; the contract was complete, & he was a “contributory”; (3) rules peculiar to the cost-book system must be proved.—*Re GREAT CAMBRIAN MINING & QUARRYING CO., HAWKINS’ CASE* (1856), 2 K. & J. 253; 25 L. J. Ch. 221; 27 L. T. O. S. 14; 2 Jur. N. S. 85; 4 W. R. 224; 69 E. R. 774.

Annotations:—As to (2) *Reid. Johnson v. Goslett* (1856), 18 C. B. 728. As to (3) *Folld. Re Great Cambrian Mining & Quarrying Co., Richardson’s Case* (1856), 4 W. R. 670. Generally, *Reid. Re Great Cambrian Mining & Quarrying Co., Ex p. Bowen* (1856), 27 L. T. O. S. 297.

7703. —.]—A company was projected in 1853. R. then applied for shares in it, which he received & paid for. The scrip certificates of allotment were then sent to him, “to be held subject to the rules of the co.” The rules & regulations of the co. were not entered up in their books till after R. received the scrip certificates. From his receipt of the certificates, until May, 1855, when an order was made for winding up the co., R. neither signed any books, rules or regulations, nor received any notice of the proceedings of the co.:—*Held*: (1) R. was a contributory; (2) where a party agreed to take shares in a proposed co., & accepted & paid for them & then received the scrip certificates of allotment, he did, in fact, authorise the co. to sign their books on his behalf; (3) where a party has applied for shares in a co. on the faith of a particular prospectus, & there was afterwards any substantial variation in or departure from that original prospectus or scheme of the co., the party so applying for shares was discharged from any further liability in respect of his application; (4) the ct. could not take judicial notice of the cost-book principle.—*Re GREAT CAMBRIAN MINING & QUARRYING CO., RICHARDSON’S CASE* (1856), 27 L. T. O. S. 197; 4 W. R. 670.

7704. — *Applicable to unregistered colliery companies.*—Colliery cos. in any county of England may lawfully be carried on, without registration, on the cost-book principle.—*R. v. FRANKLAND* (1863), Le. & Ca. 276; 1 New Rep. 375; 32 L. J. M. C. 69; 7 L. T. 799; 27 J. P. 260; 9 Jur. N. S. 388; 11 W. R. 346; 9 Cox, C. C. 273, C. C. R.

Annotations:—*Mentd. R. v. Webb* (1893), 9 T. L. R. 199; *Jeffrey v. Bamford*, [1921] 2 K. B. 351.

Joint-stock mining cos., see Part III., ante.

SUB-SECT. 2.—MEMBERS.

A. Liability inter se.

7705. Salary due to purser—& money incurred in working mine.—*WEEKES v. SNELL* (1854), 23 L. T. O. S. 224, N. P.

7706. Calls in arrears—Right of shareholders to empower purser to sue for.—Shareholders in a cost-book mining co. cannot, by agreement amongst themselves “that calls in arrear shall be considered to be debts due from defaulting shareholders to the purser,” empower him to recover such calls from such shareholders in an action at law.—*HYBART v. PARKER* (1858), 4 C. B. N. S. 209; 140 E. R. 1063; *sub nom. HYBART v. PARKER, HYBART v. EVENS*, 27 L. J. C. P. 120; 30 L. T. O. S. 320; 4 Jur. N. S. 265; 6 W. R. 364.

Annotation:—*Reid. Gray v. Pearson* (1870), L. R. 5 C. P. 568.

7707. — Action by creditor—Collusive action by company to enforce call.—A creditor of a cost-book mining co. will not be allowed to bring an action against a shareholder of the co. for the purpose of enforcing a call, & therefore if the action be not really an action by the creditor, but a collusive action by the co., it will be stayed.—*ESCOTT v. GRAY* (1878), 47 L. J. Q. B. 606; 39 L. T. 121, D. C.

7708. — Judgment against shareholder—Right of purser to present bankruptcy petition.—By Stannaries Act, 1869 (c. 19), s. 2, the term purser means the purser for the time being of a co., & if there is no purser then the secretary for the time being.

The secretary of a cost-book mining co., having recovered a judgment against a shareholder for unpaid calls under sect. 13 of above Act, presented a petition in bkpey. in his own name against the judgment debtor, stating that he petitioned “as secretary for & on behalf of all the shareholders” in the co.:—*Held*: he was not entitled to petition, but the co. must be the petitioning creditors.—*Re NANCE, Ex p. ASHMEAD*, [1893] 1 Q. B. 590; 62 L. J. Q. B. 500; 68 L. T. 733; 41 W. R. 370; 9 T. L. R. 307; 37 Sol. Jo. 306; 4 R. 311, C. A.

7709. Money lent to company for carrying on mine—Money paid to threatening creditors of company.—The manager & principal director of a mining co., under the authority of a minute at a general meeting, provided the money for carrying on a mine of the co., & other purposes of the co., until these sums reached nearly £5,000, when he stopped, & presented this petition. He had procured the money for the above purpose on his own acceptance, some of which he had also given to creditors of the co., who had threatened to sue the co., & were now threatening him upon his separate acceptance:—*Held*: that such acceptance being *bonâ fide* given, & the proceeds applied for the purposes of the co., entitled petitioner to sue for contribution. Although the petitioner might have had the same remedy by bill, the ct. would, in the exercise of its discretion, make an order on petition under the Winding-up Acts, although presented by only a single shareholder. The costs of the winding-up order, although such order be made accordingly to the prayer of the petition, may ultimately be thrown on petitioner.—*Re COURT GRANGE SILVER-LEAD MINING CO., Ex p. SEDGWICK* (1856), 2 Jur. N. S. 949.

B. Liability to Third Parties.

7710. General rule.—(1) Where a mining co. was formed, the capital to be £30,000 in 3,000 shares of £10 each; & 2,000 shares only were

actually subscribed for, of which deft. took 100 :—*Held* : letters subsequently written by deft. to the directors, requiring them to call a meeting for the purpose of changing a director, were evidence to go to the jury to show that he authorised the directors to proceed in the management of the concern with the smaller amount of capital, so as to render him liable for the price of articles supplied for the use of the mines, on the order of the directors.

(2) The members of a mining co. have authority by law, in the absence of any proof of more limited authority, to bind each other on dealings of credit, for the purpose of working the mines, if that appear to be necessary or usual in the management of mines.—*TREDWEN v. BOURNE* (1840), 6 M. & W. 461; 9 L. J. Ex. 290; 4 Jur. 747; 151 E. R. 493.

Annotations :—*As to* (1) *Consd.* *Ricketts v. Bennett* (1847), 4 C. B. 686. *As to* (2) *Refd.* *Barnett v. Lambert* (1846), 15 M. & W. 489; *Peel v. Thomas* (1855), 24 L. J. C. P. 86. *Generally, Refd.* *Re German Mining Co.* (1854), 2 Eq. Rep. 983. *Mentd.* *Re Bradbury, Ex p. Emery* (1854), 4 De G. M. & G. 901.

7711. Effect of statement in prospectus—That company should not deal on credit.—Necessary goods were furnished, according to the usual course in such concerns, to the order of an agent of directors, appointed to carry on a scrip mine, in Cornwall, for the benefit of shareholders :—*Held* : a shareholder who had paid sums of money towards & interfered in working the mine, was a complete partner with the directors, & liable for the goods supplied, & an agreement made by him with the directors, that they should not deal on credit, of which the party who supplied the goods knew nothing, did not exempt him from such liability.—*HAWKEN v. BOURNE* (1841), 8 M. & W. 703; 151 E. R. 1223; *sub nom.* *OATEY v. BOURNE*, *HAWKEN v. BOURNE*, 10 L. J. Ex. 361.

Annotations :—*Consd.* *Ricketts v. Bennett* (1847), 4 C. B. 686; *Hallett v. Dowdall* (1852), 18 Q. B. 2. *Apld.* *Re German Mining Co., Ex p. Chippendale* (1854), 4 De G. M. & G. 19. *Refd.* *Smith v. Archibald* (1849), 14 L. T. O. S. 174; *Forbes v. Marshall* (1855), 3 W. R. 480; *Peel v. Thomas* (1855), 15 C. B. 714; *Hambro v. Hull & London Fire Insee.* (1858), 3 H. & N. 789; *Yorkshire Ry. Wagon Co. v. Maclure* (1881), 19 Ch. D. 478. *Mentd.* *Smith v. M'Guire* (1858), 3 H. & N. 554.

7712. What members are liable—Member to whom no conveyance made of interest in mine—Acknowledgment that party shareholder.—A. pays money for shares in a mine to B., describing himself as treasurer of the mine, & receives from persons calling themselves directors, a memorandum purporting that A. is a proprietor of shares, & that his name is entered in the cost book. A. in writing, & in conversation, acknowledges himself to be a shareholder & receives money from B. as treasurer, on account of supposed profits, but no deed is executed, nor is there an assignment of any interest in the mine from the lessee thereof :—*Held* : A. is not liable for supplies furnished the mine, unless furnished on his credit.—*VICE v. ANSON (LADY)* (1827), 7 B. & C. 409; 3 C. & P. 19; 1 Man. & Ry. K. B. 113; *Mood. & M.* 96; 6 L. J. O. S. K. B. 24; 108 E. R. 776.

Annotations :—*Distd.* *Ellis v. Schmœck* (1829), 3 Moo. & P. 220. *Expld.* *Steigenberger v. Carr* (1841), 3 Man. & G. 191. *Distd.* *Vivian v. Mowatt* (1847), 8 L. T. O. S. 480; *Owen v. Van Uster* (1850), 10 C. B. 318. *Refd.* *Dickinson v. Valpy* (1829), 5 Man. & Ry. K. B. 126; *Pitchford v. Davis* (1839), 5 M. & W. 2. *Mentd.* *Braithwaite v. Skoffeld* (1829), 9 B. & C. 401; *Re Megevand, Ex p. Delhasse* (1878), 47 L. J. Bcy. 65.

Compare No. 7717, *post*.

7713. ———.]—*Semle* : *Vice v. Anson*, No. 7712, *ante*, is not law, & an adventurer in a

mining concern is liable for goods supplied as to any other trading concern, on proof of his being a shareholder, & the payment of the calls, without any conveyance of the real estate. Where the original formation of the adventure is shown, & deft. appears to be an original adventurer, such evidence is sufficient; (2) a cost book used in such mining concerns does not require an agreement stamp.—*VIVIAN v. MOWATT* (1847), 8 L. T. O. S. 480.

7714. ——— Member attending meetings.]—In an action of *assumpsit*, for goods furnished to a mining co. it appeared that defts. had paid their deposits on the shares & obtained scrip receipts, which they transferred previously to the commencement of the action, & they attended two meetings of the co., but did not sign the partnership deed. The jury found that the co. originated in fraud, but that neither pltf. nor defts. were cognisant of it :—*Held* : defts. were liable, by having attended the meetings of the co.—*ELLIS v. SCHMœCK* (1829), 5 Bing. 521; 3 Moo. & P. 220; 7 L. J. O. S. C. P. 231; 130 E. R. 1163.

Annotation :—*Mentd.* *Henderson v. Royal British Bank, Wilson v. Same* (1857), 3 Jur. N. S. 111.

7715. ———.]—A certain number of persons formed themselves into a co. or assocn., to raise a fund for working mines in America, & £6,000 was subscribed in shares of £100 each. The deed by which the co. was formed, was dated Nov. 1, 1833, & it provided, that the directors should have the power of creating & issuing new shares from time to time, & that the shares should be assignable. Bills of exchange having been drawn on the co. by their agent in America, which they required funds to meet, an agreement, dated Dec. 24, 1835, was entered into by three of the directors with pltf. for borrowing the sum of £5,800 from them, which sum was accordingly advanced by pltf. In an action by them against certain of the shareholders, of whom A. was one, to recover the sum so advanced :—*Held* : the fact of A. having, on Dec. 17, 1835, attended a special general meeting of the co., at which resolutions were passed relating to the sale of certain of the co.'s mines, in order to provide for the payment of the bills, was sufficient evidence to go to the jury, to fix him with liability as a shareholder, though A. did not sign the deed, nor was he proved to be the proprietor of any shares, or to have attended any other meeting, or to have done any other act in connexion with the co.—*HARRISON v. HEATHORN* (1843), 6 Man. & G. 81; 6 Scott, N. R. 735; 12 L. J. C. P. 282; 1 L. T. O. S. 230; 134 E. R. 817.

Annotations :—*Mentd.* *Re Mexican & South American Co., Ex p. Grisewood & Smith, Re Same Co., Ex p. De Pass* (1859), 28 L. J. Ch. 769; *Re Mexican & South American Co., Re Aston* (1859), 27 Beav. 474.

7716. ——— Member by whom requisition signed—To call meeting for removal of director.]—*TREDWEN v. BOURNE*, No. 7710, *ante*.

7717. ——— Member by whom deed not executed—Admissions by or after debt incurred.]—Where a deft. is charged with a debt as partner in a mining co., but is not shown to have either contracted such debt personally or represented himself to pltf. as a partner, the fact of his having been partner may nevertheless be shown by evidence short of strict proof that he had executed a deed of co-partnership, or was legally interested in the mine. Admissions made by him, before or after the debt was incurred, may be evidence for this purpose.—*RALPH v. HARVEY, RICHARDS v. HARVEY* (1841), 1 Q. B. 845; 10 L. J. Q. B. 337; 113 E. R. 1355.

Compare No. 7712, *ante*.

7718. ——— Member retiring before registration

of company—Debts incurred before registration.]—**LANYON v. SMITH**, No. 7651, *ante*.

7719. ———.]—**HARVEY v. CLOUGH**, No. 7652, *ante*.

7720. ——— **Party holding himself out as member.**—Deft. advanced money to one G., who was engaged in getting up a co. to work a mine in Cornwall, receiving as security a deposit of 250 shares in the mine, with an option to take the shares in satisfaction *pro tanto*, such option to be declared within fourteen days. Deft. never did in terms declare his option to accept the shares; but he went down the mine, made inquiries, & obtained reports as to the condition & prospects of the mine, & as to the cost of an engine to be used there, & on one occasion assisted in paying the miners' wages; he also permitted the captain of the mine, without contradiction, to represent him as a capitalist from London who had a large interest in the mine, & intended to work it vigorously.

In an action by a person who had supplied goods to the mine upon the faith of representation by the captain that the mine was being worked by a person of substance whose name he was not authorised to give:—*Held*: the above was evidence from which the jury were warranted in inferring that deft. was a partner, although his name was never mentioned, personal identification being sufficient.—**MARTYN v. GRAY** (1863), 14 C. B. N. S. 824; 143 E. R. 667.

7721. Commencement & termination of liability—**Effect of resolution that specified members to find capital to carry on mine for stated period.**—**PEEL v. THOMAS**, No. 7695, *ante*.

7722. ——— **Effect of sale or transfer of shares & notice thereof to creditor.**—Where deft., a part owner of a mine, told pltf., who had supplied the mine on the credit of the firm, that he, deft., had sold his share of the mine to A. & B. who for the future would be his paymasters, & that he, deft., would be no longer responsible:—*Held*: the operation of the notice was a question for the jury.—**VICE v. FLEMING** (1827), 1 Y. & J. 227; 148 E. R. 655.

7723. ——— **Verbal transfer—Notice of transfer given to other shareholders.**—In an action by a creditor for goods supplied to a mine, conducted upon the cost-book principle against deft. as a shareholder, it appeared that the goods had been ordered by the superintendent after deft. had verbally agreed to transfer his shares to another partner, & had withdrawn from the partnership, into which he had originally entered by verbal agreement only. The judge told the jury, that if before the goods were ordered deft. had agreed by word of mouth to transfer his shares to another shareholder, who had agreed to take them, or if he had given notice to the rest of the shareholders that he relinquished his shares to them, they had no longer any authority to pledge his credit:—*Held*: no misdirection.—**NORTHEY v. JOHNSON** (1852), 19 L. T. O. S. 104.

Annotation:—*Refd.* **Watson v. Spratley** (1854), 10 Exch. 222.

7724. In respect of what debts—Bill of exchange—Accepted by directors.—Directors of a mining assocn. cannot bind the members by accepting a bill of exchange, unless authorised so to do by the deed of instrument of copartnership, by the necessity of such a power to the carrying on of the business, by the usage of similar establishments, or by express assent of the party sought to be charged. Still less can the directors bind the members by a bill drawn upon the directors by their own servant, such a bill being in effect a promissory note.—**DICKINSON v. VALPY** (1829), 10

B. & C. 128; L. & Welsb. 6; 5 Man. & Ry. K. B. 126; 8 L. J. O. S. K. B. 51; 109 E. R. 399.

Annotations:—*Consd.* **Ricketts v. Bennett** (1847), 4 C. B. 686. *Refd.* **Thickness v. Bromilow** (1832), 2 Cr. & J. 425; **Bramah v. Roberts** (1837), 3 Bing. N. C. 963; **Pitchford v. Davis** (1839), 5 M. & W. 2; **Tredwen v. Bourne** (1840), 6 M. & W. 461; **Steigenberger v. Carr** (1841), 10 L. J. C. P. 253; **Martyn v. Gray** (1863), 14 C. B. N. S. 824; **Garland v. Jacomb** (1873), L. R. 8 Exch. 216; **Farquharson v. King**, [1902] A. C. 325. *Mentd.* **Dickenson v. Teague** (1834), 4 Tyr. 450; **Ford v. Whitmarsh** (1840), H. & W. 53; **Reynell v. Lewis**, **Wyld v. Hopkins** (1846), 10 Jur. 1097; **Galvanized Iron Co. v. Westoby** (1852), 8 Exch. 17; **London & Continental Assoc. Soc. v. Redgrave** (1858), 4 C. B. N. S. 524; **Edmonds v. Bushell & Jones** (1866), 12 Jur. N. S. 332.

7725. ——— **Accepted by purser or manager.**—By the deed of assocn. of a mining co., it was provided, that the affairs of the co. should be managed by a committee of seven shareholders called managing directors; & they were empowered, at their meetings, to vote by proxy; & B. was appointed the resident director or manager, to superintend the mine & local concerns thereof, hire workmen, provide machinery, etc., but subject to the instructions he might from time to time receive from the managing directors, to whom he was to transmit monthly accounts of the ore raised, wages paid, etc., & a full statement of all debts & liabilities due from the co.; with a proviso that he should not expend or engage the credit of the co. for any sum exceeding £50 in any one month, without the express authority in writing of three of the managing directors:—*Held*: this deed did not authorise B. to draw or accept bills of exchange in the name of the co., even for the necessary purposes of the mine, without the express authority of the managing directors.—**BROWN v. BYERS** (1847), 16 M. & W. 252; 16 L. J. Ex. 112; 153 E. R. 1182.

See, also, Sub-sect. 4, *post*.

7726. ——— **Money borrowed for purpose of mine—By manager—Payment of arrears of wages.**—The resident agent, appointed by the directors of a mining co. to manage the mine, has not an implied authority from the shareholders of the co. to borrow money upon their credit, in order to pay the arrears of wages due to the labourers in the mine, who have obtained warrants of distress upon the materials belonging to the mine, for the satisfaction of such arrears, nor in any other case of necessity however pressing.—**HAWTAYNE v. BOURNE** (1841), 7 M. & W. 595; 10 L. J. Ex. 224; 5 Jur. 118; 151 E. R. 905.

Annotations:—*Consd.* **Ricketts v. Bennett** (1847), 4 C. B. 686. *Distd.* *Re German Mining Co., Ex p. Chippendale* (1854), 4 De G. M. & G. 19. *Refd.* **Cox v. Midland Counties Ry.** (1849), 3 Exch. 268; **Yorkshire Ry. Wagon Co. v. Maclure** (1881), 19 Ch. D. 478; *Re Cunningham, Simpson's Claim* (1887), 36 Ch. D. 532; **Gwilliam v. Twist**, [1895] 2 Q. B. 84. *Mentd.* **Pott v. Bevan** (1844), 1 Car. & Kir. 335; **Pott v. Eylon** (1846), 3 C. B. 32; **Brettel v. Williams** (1849), 4 Exch. 623; **Jacobs v. Morris**, [1902] 1 Ch. 816.

7727. ———.]—A., one of many co-adventurers in a mine, assumed the entire management of it, & without the direction of his co-adventurers, opened an account with a banker in the name of the adventurers, & overdrew that account to a considerable amount. In *assumpsit* by the bankers against B. & F., two of A.'s co-adventurers in the mine for the balance of their account:—*Held*: there was no implied authority to one adventurer from his co-adventurers in a mine to pledge their credit for money borrowed by him for the purposes of the mine.—**RICKETTS v. BENNETT** (1847), 4 C. B. 686; 17 L. J. C. P. 17; 9 L. T. O. S. 267; 11 Jur. 1062; 136 E. R. 678.

Annotations:—*Distd.* *Re German Mining Co., Ex p. Chippendale* (1854), 4 De G. M. & G. 19. *Refd.* **Yorkshire Ry. Wagon Co. v. Maclure** (1881), 19 Ch. D. 478.

7728. ——— **By directors.**—By the deed of

Sect. 1.—Cost-book companies: Sub-sect. 2, B.; sub-sect. 3, A., B., C. & D.]

settlement of an unincorporated mining co., the capital of the co. was to be £50,000, & it was provided that the affairs & business of the co. should be under the sole & entire control of the directors. The deed empowered the directors, if they thought it desirable, to create new shares by vote at a special general meeting. The capital having been expended:—*Held*: the directors had no power, under the terms of this deed, to borrow money, on the credit of the co., for the necessary purpose of working the mines.—*BURMESTER v. NORRIS* (1851), 6 Exch. 796; 21 L. J. Ex. 43; 17 L. T. O. S. 232; 155 E. R. 767.

Annotations:—*Distd.* *Re German Mining Co., Ex p. Chippendale* (1854), 4 De G. M. & G. 19. *Refd.* *MacLae v. Sutherland* (1854), 3 E. & B. 1; *Hambro v. Hull & London Fire Insce.* (1858), 3 H. & N. 789; *Yorkshire Ry. Wagon Co. v. Maclure* (1881), 19 Ch. D. 478. *Mentd.* *Bryson v. Warwick & Birmingham Canal Co.* (1853), 1 W. R. 462; *Ffooks v. South Western Ry.* (1853), 1 Sm. & G. 142; *R. v. Reed* (1880), 5 Q. B. D. 483.

7729. — Necessary goods bought on credit.]—In an action against a shareholder, also the secretary of a mine conducted on the cost-book principle, under which the mine agents made monthly or quarterly estimates of the money required to carry on the business, & raised the amount by calls on the shareholders, it being also the practice, when sufficient funds were not forthcoming, to obtain goods on credit; & debt. having, as secretary, entered the order for goods. The question was left to the jury whether the captain had authority to pledge the credit of the shareholders for goods which were necessary.—*NEWTON v. DALY* (1858), 1 F. & F. 26, N. P.

7730. — Appropriation of payments—By creditor.]—*GEAKE v. JACKSON*, No. 7697, *ante*.

7731. — Proof of amount supplied.]—*GEAKE v. JACKSON*, No. 7697, *ante*.

SUB-SECT. 3.—SHARES.

A. In General.

7732. Not within Mortmain Acts.]—Mines being vested in trustees for the purposes of the undertaking generally, & not in trust for individual shareholders, & the interest of these latter being limited to the profits derived from working these mines:—*Held*: the shares in a co. for working such mines conducted on the cost-book principle were not within Statute of Mortmain, 1736 (c. 36).—*HAYTER v. TUCKER* (1858), 4 K. & J. 243; 32 L. T. O. S. 121; 23 J. P. 19; 4 Jur. N. S. 257; 6 W. R. 243; 70 E. R. 101.

Annotations:—*Distd.* *Morris v. Glynn* (1860), 2 L. T. 73. *Refd.* *Re Hollon, Forbes v. Hardcastle* (1893), 68 L. T. 160.

B. Allotment.

7733. Right of allottee to recover price—All shares not subscribed for.]—There is nothing in the cost-book principle which deprives allottees of shares in a mining co. formed under the cost-book system of their right, as in other cos., to recover back the money paid for shares in cases, where the whole of the shares have not been subscribed for.

Defts., being directors of a mining co. conducted on the cost-book principle, issued a prospectus stating the capital as £12,000, divided into 12,000 shares. Pltf. applied for shares, had fifty allotted to him, & paid £50 upon them to L. & Co., the bankers of the co. Only 1,435 shares were subscribed for, & the mine & effects thereat were shortly afterwards sold, & the concern abandoned. The banking account with L. & Co. was kept in

the names of five of defts. The prospectus described L. & Co. as the bankers of the co., as also did the cost-book rules, by which all payments were directed to be made to them. Pltf. having brought his action to recover back the money he had so paid for shares as for money had & received to his use:—*Held*: he was entitled to recover, & the prospectus & cost-book rules & regulations were evidence against defts. that “money for shares might be properly paid to the bankers named in the prospectus & in the rules & regulations as the agents of the directors.”—*JOHNSON v. GOSLETT* (1857), 3 C. B. N. S. 569; 27 L. J. C. P. 122; 31 L. T. O. S. 35; 4 Jur. N. S. 50; 6 W. R. 127; 140 E. R. 863, Ex. Ch.; *affg.* (1856), 18 C. B. 728.

Annotations:—*Distd.* *Clarke v. Dickson* (1858), 27 L. J. Q. B. 223. *Refd.* *Barston v. Reynolds* (1857), 29 L. T. O. S. 166. *Mentd.* *Wickens v. Steel* (1857), 2 C. B. N. S. 488.

7734. Right of allottee to recover deposit—Misrepresentation in prospectus—That lease of mine obtained.]—It is no defence to a bill seeking the return of a deposit on mining shares, accepted on the faith of a lease mentioned in the prospectus, but which proved never to have been obtained, to say that such cos. in Cornwall are understood to be on the cost-book system & that according to that system a share means only a share in such interest as the promoter may acquire.—*CHESTER v. SPARGO* (1868), 18 L. T. 314; 16 W. R. 576.

Annotation:—*Mentd.* *Re Union Hill Silver Co.* (1870), 22 L. T. 400.

7735. Right of member to recover purchase-price—Misrepresentation.]—The prospectus of a cost-book co. stated that if adequate capital was not subscribed, all moneys received for shares would be returned. Adequate capital was not in fact subscribed. Pltf. lent £500 upon the security of shares, & bought others, & on the face of all the certificates it was stated that the deposit was paid. Bill to recover back the moneys so lent & paid by pltf. dismissed.—*ROBSON v. DEVON (EARL)* (1857), 30 L. T. O. S. 225; 4 Jur. N. S. 245; 6 W. R. 203, L. C. & L. JJ.

Annotation:—*Mentd.* *Towle v. National Guardian Insce. Soc.* (1861), 7 Jur. N. S. 618.

C. Contract for Sale of Shares.

7736. Whether sale of interest in land—Within Statute of Frauds, s. 4.]—A contract to sell shares in a mining co. conducted on the cost-book principle, such shares being “shares of & in the engines, tools, etc., together with all dividends & advantages to be derived therefrom,” is not a contract or sale of any interest in land within the above sect., & therefore requires no memorandum in writing to bind the party.—*WATSON v. SPRATLEY* (1854), 10 Exch. 222; 2 C. L. R. 1434; 24 L. J. Ex. 53; 24 L. T. O. S. 79; 2 W. R. 627; 156 E. R. 424.

Annotations:—*Folld.* *Powell v. Jessop* (1856), 18 C. B. 336. *Appl.* *Hayter v. Tucker* (1858), 4 K. & J. 243. *Consd.* *Bulmer v. Norris* (1860), 9 C. B. N. S. 19; *Bennett v. Blain* (1863), 15 C. B. N. S. 518. *Distd.* *Webber v. Leo* (1882), 9 Q. B. D. 315. *Refd.* *Toppin v. Lomas* (1855), 16 C. B. 145; *Walker v. Bartlett* (1856), 18 C. B. 845; *Morris v. Glynn* (1859), 27 Beav. 218; *Entwistle v. Davis* (1867), L. R. 4 Eq. 272; *Watson v. Black* (1885), 16 Q. B. D. 270; *Re Hollon, Forbes v. Hardcastle* (1893), 68 L. T. 160.

7737. — —.]—Pltf., the owner of 500 shares in a cost-book mine, according to the rules of which the person registered as owner in the cost-book was subject to the payment of calls in respect of the shares so long as he continued registered as the owner, sold his shares to debt., & delivered to him a document addressed to the secretary of the mine, by which pltf. requested the secretary to enter a transfer of the shares

from his name to that of the transferee, subject to the rules, but leaving a blank for the name of the transferee, to be filled up by the holder of the document, which also contained at the foot an agreement on the part of the transferee to accept the shares subject to the rules, with a blank also left for the name of the party so agreeing. Deft. did not cause the shares to be registered in his name; & pltf. in consequence of his name being continued in the cost-book as the owner, was compelled to pay some subsequent calls:—*Held*: (1) there was no legal obligation on deft. to cause the shares to be registered in his name as the owner; (2) there was an implied obligation on him to indemnify pltf. against calls made during the time when he was virtually & potentially the owner of the shares; (3) a transfer of shares in a cost-book mine need not be stamped; (4) a contract for the sale of shares in a cost-book mine is not necessarily a contract for an interest in land, within the above sect.—*WALKER v. BARTLETT* (1856), 18 C. B. 845; 25 L. J. C. P. 263; 27 L. T. O. S. 299; 2 Jur. N. S. 643; 4 W. R. 681; 139 E. R. 1604, Ex. Ch.

Annotations:—*As to* (1) *Consd.* *Maxted v. Paine* (1871), L. R. 6 Exch. 132. *Refd.* *Allen v. Graves* (1870), L. R. 5 Q. B. 478. *As to* (2) *Apld.* *Evans v. Wood* (1867), L. R. 5 Eq. 11, n.; *Grissell v. Bristowe* (1868), L. R. 3 C. P. 112; *Kellock v. Enthoven* (1874), L. R. 9 Q. B. 241. *Refd.* *Cheale v. Kenward* (1858), 3 De G. & J. 27; *Coles v. Bristowe* (1868), L. R. 6 Eq. 149; *Maxted v. Paine* (1871), L. R. 6 Exch. 132. *As to* (4) *Consd.* *Hayter v. Tucker* (1858), 4 K. & J. 243. *Generally, Mentd.* *Prickett v. Badger* (1856), 1 C. B. N. S. 296; *Mathew v. Blackmore* (1857), 1 H. & N. 762.

7738. ———.]—Shares in a mine worked on the cost-book principle do not constitute an "interest in land," within the above sect., in the absence of evidence that the shareholders take a direct interest in the freehold.—*POWELL v. JESSOPP* (1856), 18 C. B. 336; 25 L. J. C. P. 199; 4 W. R. 465; 139 E. R. 1400.

Annotations:—*Consd.* *Hayter v. Tucker* (1858), 4 K. & J. 243. *Distd.* *Webber v. Lee* (1881), 51 L. J. Q. B. 174.

7739. What evidence of title purchaser entitled to.]—The purchaser of shares in a cost-book mining co. is not entitled to a regular abstract of title to the mines themselves as if he were purchasing a share in the land in which they are worked; but he is entitled to such evidence of the constitution of the co. & of the nature of the title under which the mines are worked, as will show that the subject-matter of the purchase is what it professes to be, & that the proposed form of transfer to him will give him a valid title to the shares.—*CURLING v. FLIGHT* (1848), 2 Ph. 613; 17 L. J. Ch. 359; 12 L. T. O. S. 61; 12 Jur. 423; 41 E. R. 1080, L. C.

Annotation:—*Mentd.* *Dawes v. Belts* (1848), 12 Jur. 709.

7740. Misrepresentation—Remedy against vendor.]—If any member of the public had bought shares on the faith of that representation [a representation concurred in by all shareholders in a cost-book mine that the mine was worth more than its true value on its transfer to a limited co.], he would have a good right of action against his transferor.—*Re AMBROSE LAKE TIN & COPPER MINING CO., Ex p. TAYLOR, Ex p. MOSS* (1880), 14 Ch. D. 390; 49 L. J. Ch. 457; 42 L. T. 604; 28 W. R. 783, C. A.

Annotations:—*Refd.* *Re British Seamless Paper Box Co.* (1881), 17 Ch. D. 467. *Mentd.* *Re Cape Breton Co.* (1885), 29 Ch. D. 795; *Lee v. Neuchatel Asphalte Co.* (1889), 41 Ch. D. 1; *London Trust Co. v. Mackenzie* (1893), 68 L. T. 380; *Lagunas Nitrate Co. v. Lagunas*, [1899] 2 Ch. 392; *Omnium Electric Palaces v. Baines*, [1914] 1 Ch. 332; *Re Jubilee Cotton Mills*, [1922] 1 Ch. 100.

7741. ——— Sale of several kinds of mining shares in one transaction.]—(1) The sale, in one transaction, of several kinds of mining shares,

will not be set aside for misrepresentation if the person seeking relief is unable to restore all the shares he has taken. *Secus*: when the sale is of shares of one kind only. *Semble*: (2) a pltf. seeking to set aside a sale of shares is not bound to pay calls on them to prevent forfeiture after filing his bill.

The inability of a pltf. to restore certain shares which have been forfeited for non-payment of calls since his bill was filed, does not deprive him of his right to have the sale of such shares & others to himself set aside.

Deft., by means of misrepresentation, sold to pltf. twenty shares in N., a mining co., twenty in B., twenty in C., twenty in S. B., & twenty in B. B., all in one transaction, & in a subsequent transaction 100 other shares in N. Before filing his bill pltf. sold twenty of the N. shares, & suffered the remaining hundred of the N. shares to become forfeited, in form, though not in substance, for non-payment of calls. These hundred became forfeited in substance after the filing of the bill, with the full knowledge of deft. Of the shares in B., C., S. B., & B. B., some became forfeited after the filing of the bill, & others were never forfeited:—*Held*: (3) pltf. was entitled to have the sale set aside.—*MATURIN v. TREDINNICK* (1864), 4 New Rep. 15; 10 L. T. 331; 28 J. P. 744; 12 W. R. 740.

Annotation:—*As to* (3) *Folld.* *Re Mount Morgan, West Gold Mine, Ltd., Ex p. West* (1887), 56 L. T. 622.

D. Transfer.

7742. Whether writing necessary.]—*NORTHEY v. JOHNSON*, No. 7723, *ante*.

——.]—*See, also*, Sub-sect. 3, C., *ante*.

7743. Whether stamp required.]—*WALKER v. BARTLETT*, No. 7737, *ante*.

7744. ——— Certificate by transferor of transfer of shares.]—To a certificate that A. had transferred to deft. certain shares in a mine, was added a statement signed by deft., that he agreed to accept & take the same:—*Held*: the certificate was evidence against deft. as an admission by him that he was a shareholder in the mine, & it did not require a transfer stamp.—*TOLL v. LEE* (1849), 4 Exch. 230; 18 L. J. Ex. 364; 13 L. T. O. S. 325; 13 Jur. 614; 154 E. R. 1195.

Annotation:—*Refd.* *Watson v. Spratley* (1854), 10 Exch. 222.

7745. Duty of purser.]—*TIPPET v. JOHNS & TRELEAVEN* (PRIOR TO 1850), *Tapping's Essay on the Cost-Book*, 2nd ed., p. 187.

7746. Validity of transfer—Non-compliance with rules.]—The rules of a mining co. carried on upon the cost-book principle, provided that no shareholder should dispose of his shares without giving notice in writing to the purser of the intended transfer, & that every transfer should be according to a particular form provided for that purpose. The form was printed & contained a notice that no transfer was valid or complete unless entered in the cost-book & acknowledged by the purser. A shareholder agreed to transfer his shares, & the proposed transferee stipulated that the transferor should pay the calls then due. They went together to the office of the co., & deposited with the purser a transfer of the shares executed by them both & in the required form, & the transferor paid the calls, but no notice in writing was given of the transfer, nor was there any formal acknowledgment on the part of the purser:—*Held*: (1) the transferee was properly placed upon the list of contributories; (2) he was liable to the debts of the co. incurred before the transfer.—*Re PENNANT & CRAIGWEN CONSOLIDATED LEAD*

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MINING CO., MAYHEW'S CASE (1854), 5 De G. M. & G. 837; 24 L. J. Ch. 353; 24 L. T. O. S. 150; 1 Jur. N. S. 566; 3 W. R. 95; 43 E. R. 1095, L. C. & L. JJ.

Annotations:—As to (1) Consd. Re Royal British Bank, Ex p. Walton, Ex p. Hue (1857), 26 L. J. Ch. 545. *As to (2) Consd. Taylor v. Ifill* (1863), 8 L. T. 148. *Refd. Re Welsh Potosi Lead & Copper Mining Co., Ex p. Official Liquidator* (1857), 29 L. T. O. S. 400. *Generally, Mentd. Re Great Cambrian Mining & Quarrying Co., Ex p. Hawkins* (1856), 2 Jur. N. S. 85.

7747. — — — — —.]—This was an action by a shipping agent against a shareholder of a co. carried on on the cost-book system, for the expense of shipping certain goods for the co. It appeared that debt.'s name was not on the book, & there was no approval of the transfer of shares to him by the directors pursuant to the rule, & consequently he was not a shareholder:—*Held*: *pltf.* was non-suited.—**EVANS v. DE CASTRO** (1855), 25 L. T. O. S. 203; *subsequent proceedings, sub nom. Re COURT GRANGE SILVER MINING CO., Ex p. DE CASTRO* (1856), 28 L. T. O. S. 141.

7748. Evidence of—Entry of transferee's name in cost-book.]—REYNOLD'S EXECUTOR v. BASSETT'S EXECUTOR (PRIOR TO 1854), Wordsworth's Joint-Stock Companies, 10th ed., p. 375.

Annotation:—Refd. Watson v. Spratley (1854), 24 L. J. Ex. 53.

7749. Transferor—Right to indemnity—Failure of transferee to register transfer.]—WALKER v. BARTLETT, No. 7737, *ante*.

7750. — — — — — **Transfer to party incompetent to accept transfer.]—WATSON v. MILLER**, [1876] W. N. 18.

7751. — — — — — **Transfer of shares after judgment in action for nuisance caused by working mine—Whether injunction granted against transferor.]—MATTHEWS v. KING** (1865), 3 H. & C. 910; 13 L. T. 120; 159 E. R. 793; *sub nom. MATHEWS v. KING*, 29 J. P. 632.

— — — — — **Whether contributory.]—See Sub-sect. 6, C., post.**

7752. Transferee—Liability for debts of company—Incurred before transfer.]—Re PENNANT & CRAIGWEN CONSOLIDATED LEAD MINING CO., MAYHEW'S CASE, No. 7746, *ante*.

7753. — — — — —.]—A transferee of shares in a co. conducted on the cost-book principle, takes his shares with their past as well as future liabilities; the deed of settlement of the co., containing a provision for the transfer of shares. Such liability is independent of any special contract between the transferor & transferee.

The rule is not affected by the circumstance that the transferor is one of the creditors of the co.; & the shares in the hands of the transferee, & the transferee personally, become liable, on a deficiency of the assets of the co., to contribute towards the payment of the debt of the transferor.—**TAYLOR v. IFILL** (1863), 1 New Rep. 566; 8 L. T. 148.

7754. — — — — — **Incurred before registration of transfer—Unauthorised registration.]—A transferee of shares in a cost-book mine, the rules of which require transfers to be registered, in order to convey an interest in the mine, is not liable for debts of the concern contracted before his transfer is registered. A. agreed to accept a transfer of shares in trust from B., with an understanding that the transfer was to take effect only in the event of B. going abroad. B. never went abroad, but without, as the jury found, A.'s authority registered the transfer:—*Held*: this unauthorised registration did not render A. liable as a partner**

for debts of the co.—**THOMAS v. CLARK** (1856), 18 C. B. 662; 25 L. J. C. P. 309; 139 E. R. 1530.

— — — — — **Whether contributory.]—See Sub-sect. 6, C., post.**

E. Relinquishment.

7755. Power of member to relinquish.]—(1) A shareholder in a mine conducted on the cost-book principle, who complies with the regulations of the cost-book, providing that notice should be given by him of his intention to retire, is discharged from all further responsibilities & liabilities with respect to the affairs of the mine.

(2) What the cost-book principle is cannot be judicially taken notice of by the ct. What that principle is must be proved in the cause, as any other custom.—**Re PENNANT & CRAIGWEN CONSOLIDATED LEAD MINING CO., FENN'S CASE** (1854), 4 De G. M. & G. 285; 2 Eq. Rep. 944; 22 L. T. O. S. 311; 2 W. R. 282; 43 E. R. 517, L. C. & L. JJ.

Annotations:—As to (1) Refd. Re Pennant & Craigwen Consolidated Lead Mining Co., Mayhew's Case (1854), 5 De G. M. & G. 837. *As to (2) Refd. Re Great Cambrian Mining & Quarrying Co., Hawkin's Case* (1856), 2 K. & J. 253.

7756. Without discharging arrears.]

(1) The ct. does not, without evidence, take judicial cognisance of the meaning of the term "cost-book principle."

(2) In a co. conducted on the "cost-book principle," shareholders in arrear were, by a general meeting, allowed to surrender their shares without discharging such arrears:—*Held*: the shares having been legally surrendered, the surrenderors were not contributories.—**Re BODMIN UNITED MINES CO.** (1857), 23 Beav. 370; 26 L. J. Ch. 570; 29 L. T. O. S. 20; 3 Jur. N. S. 350; 5 W. R. 300; 53 E. R. 145.

7757. — After call made—But before payment of call.]—(1) By a rule of a joint-stock co., carried on on the cost-book principle, it was provided, that a shareholder might relinquish his shares, provided he should have paid his proportion of the costs & liabilities then incurred by the co., & thereupon such shareholder should cease to be affected by any liability, & become entitled to his share of the then assets of the co.

On Jan. 2 a call was made on the shareholders, payable on Jan. 28. E. on Jan. 27 gave notice of relinquishment of his shares without paying the call:—*Held*: he was at liberty to do so.

(2) If the calls were not paid within twenty-eight days after notice, the shares were to be forfeited. E. not having paid the call on the shares relinquished, & the forfeiture having been subsequently confirmed by the co.:—*Held*: he ought not to be put upon the list of contributories in respect of those relinquished shares.—**Re MIXON COPPER MINING CO., EDWARDS' CASE** (1860), 1 L. T. 399.

7758. Right of relinquishing member—To share of assets.]—A shareholder in a Cornish mine worked on the cost-book system, relinquished his shares in July, 1868, & paid his share of the expenses up to his retirement. In Aug. 1869, an order for winding up the co. was made, & the retired shareholder claimed to prove as a creditor for the value of his share of the stock & plant. The assets were insufficient to pay the creditors of the mine. It having been found by a jury that, according to the custom of Cornwall, an adventurer in a cost-book mine, upon relinquishing his shares & discharging his proportion of the liabilities of the co. at that date, is entitled to be paid his share of the then value

of the stock & plant, & that such share is due to him immediately, & payable within two years, the proof was admitted.—*Re PROSPER UNITED MINING CO., Ex p. PALMER* (1872), 7 Ch. App. 286; 26 L. T. 374; 20 W. R. 323, L. J.J.

Annotation:—Refd. Re Frank Mills Mining Co. (1883), 23 Ch. D. 52.

7759. ——— **Mode of valuation.]**—In a co. formed on the cost-book system the practice had been for a shareholder to be at liberty to retire on the terms that if the co. was solvent he received from the co. a sum of money equal to his ratable proportion of the excess of the assets above the liabilities, but if the co. was insolvent he paid to the co. his ratable proportion of the excess of the liabilities above the assets. In every case in which a shareholder had retired when the liabilities were in excess of the assets the purser in calculating the value of the assets had entered all the arrears of calls as good debts, & the shareholder retired on paying only his proportionate part of the excess of the liabilities over the assets according to the number of shares, without regard to the solvency or insolvency of the other shareholders. C. gave notice to retire in Nov. 1879, but no account was made out showing what he was to pay. In Mar. 1880, an order was made to wind up the co. The liquidator, in 1882, made out an account showing what C. was to pay, & in estimating the assets omitted all arrears of calls owing by insolvent shareholders, & then calculated C.'s contribution by dividing the excess of liabilities over assets ratably among C. & the other solvent shareholders:—*Held*: (1) the fact that on all previous occasions the assets had been reckoned without any allowance for the insolvency of persons owing arrears of calls, & the contribution of the retiring shareholder ascertained without reference to the insolvency of any of the continuing shareholders, was not sufficient evidence of an agreement among the shareholders that the contribution of a retiring shareholder should be calculated on that footing; (2) The course of practice followed by an officer of a co. was not so strong evidence of an agreement sanctioning that practice as a course of practice in an ordinary partnership of few members; (3) C. was entitled to have the assets of the co. valued on the footing of its being a going concern, which it was when he gave notice of retirement, & the solvency of the persons who owed calls, & of the continuing shareholders, must be taken as matters stood at the date of the notice of retirement, & not at the time when the account was made out.—*Re FRANK MILLS MINING CO.* (1883), 23 Ch. D. 52; 52 L. J. Ch. 457; 49 L. T. 193; 31 W. R. 440, C. A.

Annotation:—Generally, Mentd. Gleaner Co. v. Assmt. Com., [1922] 2 A. C. 169.

Liability of relinquishing member—As contributory.]—*See Sub-sect. 6, C., post.*

—— **To third parties.]**—*See Nos. 7651, 7652, ante.*

F. Forfeiture.

7760. For non-payment of calls—Validity.]—In mines worked on the cost-book system there is no custom to forfeit shares for non-payment of calls, without special stipulation.

A., B. & C. joined in a mining adventure on the cost-book principle, as recognised in Devonshire & Cornwall. A. fell into arrear with his calls. Notice was given him of a meeting to declare his shares forfeited. The meeting was held, but instead of his shares being declared forfeited, a resolution was passed granting him an extension of time, "such extended time to cease on," etc.

No payment was made & no further notice was given; but a fortnight after the extended time had expired the shares were declared forfeited:—*Held*: such declaration of forfeiture was invalid.—*CLARKE & CHAPMAN v. HART* (1858), 6 H. L. Cas. 633; 27 L. J. Ch. 615; 32 L. T. O. S. 380; 5 Jur. N. S. 447; 10 E. R. 1443, H. L.; *affg. S. C. sub nom. HART v. CLARKE* (1854), 6 De G. M. & G. 232, L. J.J.

Annotations:—Distd. Rule v. Jewell (1881), 18 Ch. D. 660. *Refd. Drysdale v. Piggott* (1856), 8 De G. M. & G. 546; *Re Agriculturist Cattle Insee., Spackman's Case* (1864), 12 W. R. 1133; *Garden Gully United Quartz Mining Co. v. M'Lister* (1875), 1 App. Cas. 39; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; *Palmer v. Moore*, [1900] A. C. 293; *Hopkinson v. Mortimer, Harley*, [1917] 1 Ch. 646.

7761. ——— **—.]**—*SIMMONS, ETC. (SHAREHOLDERS IN WEST DEVON GREAT CONSOLS MINES) v. PHILLIPS* (1886), 2 T. L. R. 455, C. A.

7762. ——— **Action to set aside forfeiture—Laches.]**—At a meeting of the partners in a cost-book mine held in 1874, it was stated that the mine was £2,003 in debt, & a call of £25 was made upon each of the six shares in the mine. Two of the partners did not pay this call, & were in arrear for other calls. At subsequent meetings in June, 1874, the shares of these partners were declared to be forfeited. These two partners took no steps as to the mine until July, 1879, when they made a claim, & in Sept. 1880, they brought an action, alleging that the shares had not been regularly forfeited, & claiming to be still partners. It appeared that the mine was in debt in 1878:—*Held*: even assuming the shares not to have been regularly forfeited, plffs., under the circumstances, could not, after lying-by for more than six years, successfully assert their claim to be partners.—*RULE v. JEWELL* (1881), 18 Ch. D. 660; 29 W. R. 755.

Annotation:—Mentd. Lambert v. Addison (1882), 46 L. T. 20.

SECT-SECT. 4.—REGULATION AND MANAGEMENT.

7763. Purser—Duties of.]—*TIPPET v. JOHNS & TRELEAVEN* (Prior to 1850), Tapping's Essay on the Cost-Book, 2nd ed. p. 187.

7764. ——— **Rights of—Recovery of money lent for purpose of mine—Release.]**—Pltf. A., the purser of a mine, in order to carry it on, raised money by the deposit of a promissory note, made in his favour by seven of the shareholders, & which two other shareholders had refused to sign, & applied the money so raised in paying the workmen. At a subsequent meeting of the shareholders & creditors, an assignment of the mine, in order to sell it, & pay the debts, was resolved upon, & A. then claimed to be admitted as a creditor for money which he had raised on a note of hand to pay the workmen. A deed of assignment was accordingly executed, to which all the adventurers were parties of the first part, & the several persons whose names were thereunto subscribed, as creditors of the adventurers, for supplies to & debts incurred by them in respect of the same mine, to the amounts set opposite their respective names, of the second part. The deed, after reciting that the shareholders had in the prosecution of the mine incurred debts thereon with the persons parties thereto of the second part, contained a conveyance in trust for those creditors, & a provision that no action should be brought by any of the persons parties thereto of the second part, against any of the persons parties thereto of the first part, for the recovery of any debts due or owing upon the mine, or in anywise relative thereto; & that if

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any such action was brought, the deed might be pleaded as a release. A. executed the deed, the amount of the note & interest thereon being placed against his name. To an action brought by A. upon the note against the seven persons who signed it, they pleaded the deed as a release, averring that A. signed it as a creditor of the parties thereto of the first part, in respect of the causes of action in the declaration mentioned, which allegation was traversed by the replication:—*Held*: A. must be held to have signed the deed in respect of his claim for the advance of the money raised upon the note, & applied for the use of the mine, & not in respect of his claim upon the note itself, which therefore was not released, & consequently the plea was not proved.—*LANYON v. DAVEY* (1843), 11 M. & W. 218; 12 L. J. Ex. 200; 152 E. R. 782.

7765. ——— Recovery of company's documents from third party—Whether entitled to sue in own name.]—Detinue for documents of pltf. Plea, that they were delivered to deft. by persons jointly interested in them with the pltf.; that the said persons never demanded them back; & that deft. held with their consent. The evidence was, that pltf. was a shareholder & purser in the B. Mining Co., & that he had delivered the documents to deft., an accountant, in pursuance of a resolution of the shareholders, in order that deft. might report on the state of the co.'s affairs, & that pltf. in his own name, & not on behalf of the other shareholders, had demanded them back:—*Held*: the plea raised a good defence, & was proved.—*ATWOOD v. ERNEST* (1853), 13 C. B. 881; 22 L. J. C. P. 225; 21 L. T. O. S. 185; 1 W. R. 436; 138 E. R. 1449; *sub nom.* *ATTWOOD v. ERNEST*, 1 C. L. R. 738; 17 Jur. 603.

——— **Liability of—On bill of exchange.]—**See *AGENCY*, Vol. I., p. 644, Nos. 2648, 2649.

Manager—Liability of—On bill of exchange.]—See *AGENCY*, Vol. I., p. 644, No. 2647.

7766. Directors—Powers of—To borrow money.]—*BURMESTER v. NORRIS*, No. 7728, *ante*.
See, also, Sub-sect. 2, B., *ante*.

7767. Cost-book—Whether stamp necessary.]—*VIVIAN v. MOWATT*, No. 7713, *ante*.

7768. Rules—Effect of—As evidence—That money duly paid to company's bankers.]—*JOHNSON v. GOSLETT*, No. 7733, *ante*.

7769. ——— On contracts made before company formed.]—A co. constituted upon the cost-book system is bound only by the rules & regulations entered in the cost-book, & is not bound by a preliminary contract made before the formation of the co.—*THOMAS v. HOBLER* (1861), 4 De G. F. & J. 199; 5 L. T. 564; 8 Jur. N. S. 125; 45 E. R. 1160, L. C.

SUB-SECT. 5.—LEGAL PROCEEDINGS BY AND AGAINST COST-BOOK COMPANIES.

7770. Action against co-partners—Parties.]—The bill alleged, that M. being entitled to a mining lease, divided it into a hundred shares, of which pltf. became entitled to two, & other parties to nineteen shares; that M., with the concurrence of the other parties, to whom he had accounted, but unknown to pltf., sold & conveyed the mining lease to A., B., & C., for forming a new co., & in trust for new shareholders, & that he received the consideration paid by A., B., & C., one half in money, & the other half in shares in the new

adventure, & which shares were transferable by the delivery of the certificates. The bill stated, that M. still possessed shares & certificates, & insisted that pltf. had a right either to adopt or reject the contract with A., B., & C., & either to receive his share of the consideration paid, or to have his original two-hundredths made good, out of the interest then possessed by M. in the new adventure. On demurrer:—*Held*: A., B., & C., & the other shareholders, were not necessary parties; but the bill might be sustained against M. alone.—*MARE v. MALACHY* (1836), 1 My. & Cr. 559; 5 L. J. Ch. 345; 40 E. R. 490, L. C.

Annotations:—*Refd.* *Turner v. Borlase* (1840), 11 Sim. 17; *Walworth v. Holt* (1841), 5 Jur. 237.

7771. ———.]—The owner of nearly one half the shares in a valuable mine in Cornwall, which was divided into 1,624 shares, having become bkpt., his assignee & the other shareholders agreed, without the consent of the creditors, to dispose of his shares amongst themselves & their friends; & in order to effect that object, they arranged that the mine should be sold, in an amicable suit to be instituted by a creditor of the mine against the then shareholders; that the mine should be re-purchased by the assignee at a certain sum, & that a new co. should be formed, consisting of the old & new shareholders. The bkpt.'s shares were disposed of accordingly, the assignee & the old shareholders having agreed to take some of them; H. & T. to take another jointly; & certain other persons, the remainder. Afterwards it was agreed that the shares in the mine should be altered to 54th shares. The decree was then obtained, & the mine sold & re-purchased as had been arranged. H. & T. then agreed to sever their share. The creditors having discovered the circumstances under which the bkpt.'s shares had been disposed of, the assignee was removed, & pltf. appointed in his place. Pltf. filed a bill against H. alone, alleging that H. & all the other shareholders had notice of the circumstances before mentioned, & praying that H. might transfer her share to him, & account for & pay to him the profits thereof, & that a receiver might be appointed of the profits of the mine:—*Held*: "the profits of the mine" must be taken to mean the profits of the share sought to be recovered; & none of the other shareholders were necessary parties to the bill.—*TURNER v. HILL* (1840), 11 Sim. 1; 59 E. R. 773.

7772. ———.]—*SIBLEY v. MINTON*, No. 7696, *ante*.

7773. ——— Inspection of books & papers.]—An order was made on deft. against one of the committee of management of a mining co., worked on the cost-book principle, for inspection of books & papers in the custody of the secretary.—*CHAFFERS v. WOOLMER* (1857), 30 L. T. O. S. 126.

7774. Bankruptcy proceedings—Power of purser to institute.]—*Re NANCE, Ex p. ASHMEAD*, No. 7708, *ante*

SUB-SECT. 6.—WINDING UP.

A. In General.

7775. Jurisdiction of Court of Chancery to wind up—Company working mine in Germany.]—*Re DUISBERG IRON WORKS Co.* (1850), 14 L. T. O. S. 526.

7776. ——— Company working mine in Ireland.]—*Re KILBRICKEN SILVER LEAD MINING Co.* (1849), 14 L. T. O. S. 127.

7777. ——— Company working mine in Devon.]—

ARUNDELL v. ATWELL (1853), Tapping's Essay on the Cost-Book, 2nd ed., p. 7.

7778. ———.]—The Ct. of Ch. has jurisdiction to wind up the affairs of a mine on the cost-book principle, situated within the jurisdiction of the Devon Ct. of Stannaries, although the shareholders presenting the petition for the winding-up order do not represent one-tenth in value of the shares of the co.—*Re SOUTH LADY BERTHA MINING Co.* (1862), 2 John. & H. 376; 32 L. J. Ch. 92; 7 L. T. 20; 9 Jur. N. S. 170; 10 W. R. 687; 70 E. R. 1103.

7779. ——— **Company registered as limited company—As regards transactions before winding up.**]—A co. was formed in 1853, & carried on upon the cost-book principle until 1857, when it was registered as a limited co., under 1856 Act, & an order was subsequently obtained for winding up the affairs in bkpcy. An order was now made upon petition that the co. should be wound up in Chancery, under Joint-Stock Cos. Acts, 1848 (c. 45), & 1849, c. 108, in respect of such transactions as occurred prior to the date of registration as a "limited co."—*Re WELSH POTOSI MINING Co.* (1858), 27 L. J. Ch. 311; 31 L. T. O. S. 129; 4 Jur. N. S. 577.

Annotation:—Refd. Re Plumstead, Woolwich & Charlton Consumers Pure Water Co., & Plumstead, Woolwich & Charlton Consumers' Pure Water Co. Same Co. v. Davis, Ellis v. Same Co. (1860), 29 L. J. Ch. 741.

—— **Mining company in Stannaries.**]—See Sect. 2, sub-sect. 4, A., *post*.

7780. **Who may petition—Director—For money lent for carrying on mine & payment of creditors—Costs.**]—*Re COURT GRANGE SILVER-LEAD MINING Co., Ex p. SEDGWICK*, No. 7709, *ante*.

B. Grounds for Winding up.

7781. **Affairs of company embarrassed.**]—*Re KILBRICKEN SILVER LEAD MINING Co.* (1849), 14 L. T. O. S. 127.

7782. **Inability to pay debts.**]—Two mining cos. agreed to amalgamate upon certain terms, one of which was, that one co. should pay to the other £1,600, & should also provide working materials of the value of £1,600 for the mines of the other. This agreement was afterwards modified by a new agreement, which provided for the security by promissory notes of the debts due from one co. to the other. These promissory notes were not given, & there was a conflict of evidence as to whether the debt from one co. to the other was ever in fact paid; but the amalgamated co. carried on business & made calls, which were partly paid. No profits were obtained from the mines, & at a meeting in Sept. it was proposed that the co. should be wound up. This was approved by the majority of shareholders present, but negatived on the votes being taken, because one of the dissentients voted in respect of about 17,000 shares. The co. then ceased to carry on business, & actions were brought against some of the directors in respect of the co.'s debts. Of these actions due notice was given to the co., but they did not provide for them in any way. The landlord of one of the mines had also proceeded to recover the rent. On a petition for a winding-up order being presented:—*Held*: these circumstances brought the case within the winding up Acts; & the order was made accordingly.—*Re PENNANT & CRAIGWEN CONSOLIDATED LEAD MINING Co.* (1851), 18 L. T. O. S. 152; 15 Jur. 1192.

7783. ———.]—Where a co. had instigated one of its creditors to recover from a defaulting shareholder a debt for which the co. was liable:—*Held*: the shareholder could not proceed to obtain a

conditional order for dissolution under Joint-Stock Companies Act, 1848 (c. 45), s. 12, & the circumstances of the case in question, though falling within the scope of sect. 5, afforded no test of insolvency.—*Re WHEAL LOVELL MINING Co., Ex p. WYLD* (1849), 1 Mac. & G. 1; 1 H. & Tw. 125; 18 L. J. Ch. 139; 13 L. T. O. S. 181; 13 Jur. 133; 41 E. R. 1163, L. C.

Annotations:—Refd. Re Monmouthshire & Glamorganshire Banking Co. (1851), 15 Beav. 74; *Re British Alkali Co., Ex p. Guest* (1852), 5 De G. & Sm. 458. *Mentd. Lanyon v. Smith* (1863), 3 B. & S. 938.

C. Contributories.

7784. **Who are—Allottee not having signed rules—Statement on certificate that shares held subject to rules.**]—*Re GREAT CAMBRIAN MINING & QUARRYING Co., RICHARDSON'S CASE*, No. 7703, *ante*.

7785. ———.]—*Re GREAT CAMBRIAN MINING & QUARRYING Co., HAWKINS' CASE*, No. 7702, *ante*.

7786. ——— **Holder of scrip certificates—Whether contract with company established.**]—Where a shareholder of a cost-book has *bond fide* signed the books of the co., has then handed his scrip certificates to a total stranger to the co., & that stranger holds the certificates, there is no contract between the co. & such stranger, so as to fix him with liability as a contributory to the co. on its being wound up.

The secretary of a co. signed the books for some shares, & admitted the receipt or control of scrip certificates for others on account of a third party. The secretary alleged that he had not signed the books in respect of the certificates: & that, although the other party had signed the books of the co. for his shares, he had never received any of them:—*Held*: there was a contract between the secretary & the co., & under the circumstances of the case, the secretary was liable as a contributory in respect of some of the shares for which he had signed the books, & for the amount of shares represented by the scrip certificates so received by him.—*Re GREAT CAMBRIAN MINING & QUARRYING Co., Ex p. BOWEN* (1856), 27 L. T. O. S. 297; 4 W. R. 800.

Annotation:—Mentd. Re Cornwall (1856), 28 L. T. O. S. 221.

7787. **Transferee—Under void transfer.**]—In 1851, the co. had called up & expended all the capital contemplated by the deed, viz. £10 per share. The co. had been established in 1849, professedly on the cost-book principle, with monthly meetings, three directors, one to retire annually, & no new member to be admitted until approved by a board of directors. After 1851 no new directors were appointed. In Mar. 1852, the co. being indebted to S., one of the shareholders, in about £1,000, a meeting was called & held some time in spring or summer of that year, at which all the adventurers attended. It was then resolved that the whole authority of the board of directors should be handed over to the secretary, to be exercised under the supervision of S. alone, who was to furnish all moneys necessary to work the mine, to try & redeem what had been already lost. Previously to this meeting, viz. in 1851, P. one of the shareholders, being indebted to De C. placed in deposit with him ten shares as a security. After the meeting, P., without informing De C. of the change of circumstances in the co., offered to relinquish the ten shares to De C. in part payment. In Dec. 1852, De C. having put inquiries to the secretary, which were satisfactorily answered, agreed in writing to take these shares

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on the same terms as P. held them. In Apr. 1853, De C. endeavoured to sell the shares in question to other parties, & with that view applied to be admitted on the register as a transferee. This was at first refused, but ultimately assented to, but no such registration ever took place. The next meeting of the co. did not take place till 1854, when it appeared that the loss for which the co. was liable to S. amounted by this time to nearly £5,000. In 1856 S. alone presented his petition to have the co. wound up, on which an order was made accordingly:—*Held*: De C. was not liable to be placed on the list of contributories.—*Re COURT GRANGE SILVER MINING CO., Ex p. DE CASTRO* (1856), 28 L. T. O. S. 141; 2 Jur. N. S. 1203.

7788. — Member relinquishing shares—Before company registered under Companies Acts.]—A shareholder in a mining co. on the cost-book principle gave notice, according to the rules of the co., of his ceasing to be a member of it. Afterwards the co. was registered under the 1856 Act, as a limited co., & was subsequently wound up:—*Held*: the shareholder was not liable to be placed on the list of contributories of the co. ordered to be wound up.—*Re WELSH POTOSI LEAD & COPPER MINING CO., LTD., LOFTHOUSE'S CASE* (1857), 2 De G. & J. 69; 27 L. J. Bcy. 1; 31 L. T. O. S. 19; 6 W. R. 140; 44 E. R. 914, L. C. & L. JJ.

Annotation:—Expld. & Apld. Lanyon v. Smith (1863), 3 B. & S. 938.

7789. — — — — —.]—B. a shareholder in a mining co. on the cost-book principle, retired from it under a provision in the cost-book enabling a shareholder to surrender his shares. A few weeks afterwards the co. was registered under 1856 Act, & B.'s name was entered in the register & returned in the list of shareholders. An order having been subsequently made for winding up the commr. placed B.'s name on the list of contributories:—*Held*: B.'s name ought never to have been on the register of shareholders, & ought to be removed from it under the power given by 1866 Act, s. 25, of amending the register, & it ought also to be removed from the list of contributories.

Qu.: whether the name of a registered shareholder can be removed from the list of contributories without an amendment of the register.—*Re WELSH POTOSI MINING CO., LTD., BIRCH'S CASE* (1857), 2 De G. & J. 10; 27 L. J. Bcy. 4; 31 L. T. O. S. 19; 6 W. R. 141; 44 E. R. 891, L. C. & L. JJ.

Annotations:—Expld. & Apld. Lanyon v. Smith (1863), 3 B. & S. 938. *Refd. Re Moseley Green Coal & Coke Co., Ex p. Fox* (1863), 8 L. T. 223; *Re Southampton, etc. Boat Co., Bird's Case* (1864), 4 De G. J. & Sm. 200.

Compare No. 7651, ante.

7790. — — — — — All formalities complied with—
Purser exceeding authority in dealing with member.—A shareholder in a co., carried on upon the cost-book principle, relinquished his shares upon paying his *pro rata* portion of the liabilities of the co. All the formalities required for the relinquishment of such shares were regularly complied with & entered in the books of the co., & the correspondence was conducted with the purser, who fixed the amount to be paid by the shareholder without the sanction of the managing committee:—*Held*: (1) the purser being the authorised officer of the co. to conduct such transaction, the shareholder was exempted from liability in respect of any excess of power on the part of the purser; (2) upon the winding up of the co. it was ordered

that such shareholder should not be placed on the list of contributories.—*Re WRYSGAN SLATE QUARRYING CO., Ex p. BIRCH* (1859), 28 L. J. Ch. 894; 7 W. R. 335.

7791. — — — — — More than two years before winding-up order made—Within two years of mine stopping.]—(1) The holder of shares in a cost-book mining co. transferred all his shares to a transferee for a nominal consideration. The co. registered the transfer & made calls on the transferee, & then discovered that the transferee was a poor man & could not pay anything. They brought an action & recovered judgment against him, & afterwards forfeited his shares for non-payment of calls. More than two years after the transfer an order was made for winding up the co.:—*Held*: assuming that the transfer was fraudulent under Stannaries Act, 1869 (c. 19), s. 30 the transfer having been acted on & the shares forfeited by the co., with knowledge of the insolvency of the transferee, it could not be set aside in the winding up, & the name of the transferor could not be put on the list of contributories.

(2) A shareholder in a cost-book mine who has ceased to be a shareholder more than two years before the order for winding up, cannot be put on the list of contributories as a past member, although he had not so ceased for two years before the mine ceased to be worked.—*Re WHEAL UNITY WOOD MINING CO., CHYNOWETH'S CASE* (1880), 15 Ch. D. 13; 42 L. T. 636; 28 W. R. 897, C. A.

7792. — — — — — Transferor—Transferee not registered.]—Upon the winding up of a co. carried on upon the cost-book principle, it appeared, by their deed, that shares in the co. would pass by the delivery of the certificates; but no shareholder was entitled to a dividend unless his name was entered in the share register-book. A shareholder, who had transferred his shares, but whose transferee had not been registered:—*Held*: to be liable as a contributory of the co.—*Re WRYSGAN SLATE QUARRYING CO., Ex p. HUMBY* (1859), 28 L. J. Ch. 875; 33 L. T. O. S. 7; 5 Jur. N. S. 215; 7 W. R. 335.

7793. — — — — — Transfer to nominee—Transaction not bona fide.]—C. took 300 shares in an unregistered cost-book mining co., but in order to raise the value of the shares by increasing the apparent number of the shareholders, caused 100 of the shares to be transferred into the name of G. & 100 into the name of P.; G. & P. signed the transfers, & allowed their names to be placed on the register of shareholders, but C. paid the calls & was the real owner of the shares.

The company being wound up under 1862 Act:—*Held*: C. was rightly placed on the list of contributories in respect of the whole 300 shares.—*Re WHEAL EMILY MINING CO., COX'S CASE* (1863), 4 De G. J. & Sm. 53; 3 New Rep. 97; 33 L. J. Ch. 145; 9 L. T. 493; 9 Jur. N. S. 1184; 12 W. R. 92; 46 E. R. 834, L. JJ.

Annotations:—Distd. Re Great Wheal Busy Mining Co., King's Case (1871), 6 Ch. App. 196. *Refd. Re Britannia Fire Assn., Coventry's Case*, [1891] 1 Ch. 202.

7794. — — — — — Transaction bona fide.]—K., the secretary of an unregistered co. carried on upon the cost-book system, purchased shares in the co., & had them transferred to a nominee, who was a man of small means, his object being to prevent its being generally known that he was trafficking in shares in the co. The transfer was registered, & about three years afterwards the co. was wound up by an order of the Ct. of Stannaries:—*Held*: the transaction was a *bona fide* purchase of shares in the name of a trustee, & K. could not be put on the list of contributories in respect of

them. *Semble*: even if K. had purchased the shares in the name of a nominee for the purpose of escaping liability, yet as K. was never under any obligation to the co. in respect of those shares, he could not be made a contributory.—*Re GREAT WHEAL BUSY MINING CO., KING'S CASE* (1871), 6 Ch. App. 196; 40 L. J. Ch. 361; 24 L. T. 599; 19 W. R. 549, L. JJ.

Annotations:—*Appld. Re National Bank of Wales, Massey & Giffin's Case*, [1907] 1 Ch. 582. *Refd. Re London, Bombay & Mediterranean Bank* (1881), 18 Ch. D. 581; *It. v. Lambourn Valley Ry.* (1888), 22 Q. B. D. 453.

7795. ——— **Transaction acquiesced in by company.**—*Re WHEAL UNITY WOOD MINING CO., CHYNOWETH'S CASE*, No. 7791, *ante*.

D. Proof.

7796. For what amount.—A mining co. was formed upon the cost-book principle. In Dec. 1865, calls were made on the shareholders, which H. & J., two of the shareholders, failed to pay. In Feb. 1866, G. who was a creditor of the co. for a considerable sum, at the instigation of the co. commenced an action against H. for the debt due by the co. The co. were desirous by means of this action to compel H. to pay his calls. When the action came on for trial, & a jury had been sworn, it was arranged that a verdict should be found against H. for the amount of calls due from him & costs, & this having been done, judgment was entered up against H. for the amount of the verdict. In May, 1866, G., at the instigation of the co., brought a similar action against J. The sum claimed in this action included a part of the debt claimed in the action against H. as well as a debt subsequently incurred by the co. At the trial of this second action the jury found a verdict for pltf. for a sum which was afterwards raised by the ct. to £787. Before judgment could be entered up J. petitioned to wind up the co., & a winding-up order was made, & also an order to stay proceedings in the action by G. against J. After the action against J. various sums were paid by the co. to G. These sums exceeded the £787, but the evidence showed that the intention of the co. in paying them was to apply them in discharge of the debt due to G. before the action against H. On the footing of such an appropriation a balance remained due from the co. to G., & he carried in a claim in the winding up for that balance:—*Held*: the claim was properly admitted, the co. having a right to attribute the payments made by them to H. to the earlier debt.—*Re WHEAL LUDCOTT & WREY CONSOLS MINES CO., Ex p. JACKSON* (1869), 21 L. T. 67; 17 W. R. 745, L. JJ.

SECT. 2.—MINING COMPANIES IN THE STANNARIES.

SUB-SECT. 1.—JURISDICTION OF STANNARIES COURT.

In general.—*See* COURTS, Vol. XVI., p. 203.

7797. To rectify register.—The jurisdiction conferred by 1862 Act, s. 35, to rectify the register of companies within the district of the Stannaries, does not exclude the jurisdiction of the Superior Cts. of common law & equity for the same purpose.—*Re PENHALE & LOMAX CONSOLIDATED SILVER LEAD MINING CO.* (1867), 2 Ch. App. 398; *sub nom. Re PENHALE & LOMAX CONSOLIDATED SILVER LEAD MINING CO., LTD., Ex p. ATTER*, 36 L. J. Ch. 515; 16 L. T. 336; 15 W. R. 664, L. JJ.

Annotations:—*Consd. Dunbar v. Harvey*, [1913] 2 Ch. 530. *Refd. Re Radium Ore Mines* (1913), 110 L. T. 57.

7798. To order inspection of company's books & documents—Winding-up petition pending—Nature of shareholder's right of inspection.—The practice of the Stannaries Ct. is the same as that of the High Ct. of Justice, that the mere fact of a winding-up petition is not enough to justify an order for inspection of books. But if grounds are shown, the petition may properly be ordered to stand over to allow the petitioner to enforce his right as a shareholder to inspection. The right of inspection under the Stannaries Act, 1855 (c. 32), s. 22, is personal to the shareholder & does not extend to his solrs. or agents.—*Re WEST DEVON GREAT CONSOLS MINE* (1884), 27 Ch. D. 106; 51 L. T. 841; 32 W. R. 890, C. A.

Annotation:—*Consd. Bevan v. Webb*, [1901] 2 Ch. 59.

SUB-SECT. 2.—SHARES.

7799. Unpaid calls—Judgment obtained against shareholder—Petition in bankruptcy—By whom presented.—*Re NANCE, Ex p. ASHMEAD*, No. 7708, *ante*.

7800. Transfer—Transferee only nominee—Validity—Acquiescence by company.—*Re WHEAL UNITY WOOD MINING CO., CHYNOWETH'S CASE*, No. 7791, *ante*.

—*See, further*, Sect. 1, sub-sect. 3, D., *ante*.

Shares in cost-book companies generally, *see* Sect. 1, sub-sect. 3, *ante*.

SUB-SECT. 3.—REGULATION AND MANAGEMENT.

7801. Meeting—Whether single shareholder can constitute.—A single shareholder cannot constitute a meeting of a co. under the Stannaries Act, 1869 (c. 19), s. 4.—*SHARP v. DAWES* (1876), 2 Q. B. D. 26; 46 L. J. Q. B. 104; 36 L. T. 188; 25 W. R. 66, C. A.

Annotations:—*Fold. Re Sanitary Carbon Co.*, [1877] W. N. 223. *Distd. East v. Bennett*, [1911] 1 Ch. 163. *Refd. Re Fireproof Doors, Umney v. The Co.*, [1916] 2 Ch. 140.

Compare Nos. 3780, 3782, *ante*.

SUB-SECT. 4.—WINDING UP.

A. Courts exercising Jurisdiction.

See, now, 1908 Act, s. 131 (4).

7802. "Company"—Partnership of two persons.—A partnership of two persons formed to work metalliferous mines in Cornwall is a "co." within the meaning of that term in the Stannaries Act, 1887 (c. 43), ss. 2, 28, & is by Partnership Act, 1890 (c. 39), s. 1 (2), excluded from the provisions of that Act; & by Stannaries Ct. (Abolition) Act, 1896 (c. 45), s. 1, & 1908 Act, s. 131 (4), the county cts. of Cornwall now have exclusive jurisdiction to wind up such a co.—*DUNBAR v. HARVEY*, [1913] 2 Ch. 530; 83 L. J. Ch. 18; 109 L. T. 285; 57 Sol. Jo. 686; 20 Mans. 388, C. A.

Annotation:—*Refd. Re Radium Ore Mines* (1913), 110 L. T. 57.

7803. "Engaged in working" mine—Company formed for purpose of working—But no work ever begun.—A co. was formed for the purpose of purchasing & working a mine in Cornwall, & was registered under 1862 Act, in the Registry Office of the Stannaries Ct., but its registered office was in London & it never commenced business:—*Held*: it was a co. "engaged in working" a mine within 1862 Act, s. 81, & the jurisdiction to wind

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it up was in the Stannaries Ct., & not in the Ct. of Ch.

The test of the Stannary jurisdiction under that clause is not "actual working," but the object for which the co. is framed.—*Re EAST BOTAILLACK CONSOLIDATED MINING CO., LTD.* (1864), 34 Beav. 82; 5 New Rep. 158; 34 L. J. Ch. 81; 11 L. T. 408; 10 Jur. N. S. 1193; 13 W. R. 197; 55 E. R. 564.

Annotations:—N.F. *Re Silver Valley Mines* (1881), 18 Ch. D. 472. **Fold.** *Re New Terras Tin Mining Co.*, [1894] 2 Ch. 344. ROMILLY, M.R., held that a co. was within 1862 Act, s. 81, if it was formed to work a mine in Cornwall though it never possessed or worked a mine there. That decision was disapproved of in *Re Silver Valley Mines*, No. 7804, *post*, but now sect. 81 has been repealed & the new enactment (1890 (Winding up) Act, s. 1 (4)) substitutes for "engaged in working mines" the words "formed for working mines" & thus makes the decisions of ROMILLY, M.R., law (VAUGHAN WILLIAMS, J.). **Reid.** *Dunbar v. Harvey*, [1913] 2 Ch. 530.

7804. — — — — —.]—The words "engaged in working" mines in 1862 Act, s. 81, mean "is or has been engaged in working," or "now or formerly engaged in working" mines in Cornwall, & do not apply to a case where the co., although they have purchased a mine in Cornwall, have not begun to work it.

Where, therefore, & co. was formed to purchase mines in "Cornwall or elsewhere in England," & contracted to purchase a right to have a lease of a mine in Cornwall, but never acquired the lease or began to work the mine:—**Held:** the High Ct. of Ch. had jurisdiction to make a winding-up order.—*Re SILVER VALLEY MINES* (1881), 18 Ch. D. 472; 45 L. T. 104; 30 W. R. 36, C. A.

Annotations:—Consd. *Re New Terras Tin Mining Co.*, [1894] 2 Ch. 344. The point in *Re Silver Valley Mines* was as to the meaning of "engaged in working mines" as used in 1862 Act, s. 81, but now s. 81 has been repealed & the new enactment (1890 (Winding up) Act, s. 1 (4)) substitutes for "engaged in working mines" the words "formed for working mines" (VAUGHAN WILLIAMS, J.). **Reid.** *Dunbar v. Harvey*, [1913] 2 Ch. 530.

7805. **Company in voluntary liquidation—Removal of lunatic liquidator.]—***Re NORTH MOLTON MINING CO., LTD.*, No. 6886, *ante*.

7806. "Formed for working mines within Stannaries."—*Re BULLER & BASSET TIN & COPPER CO., LTD.* (1891), 35 Sol. Jo. 260.

7807. — — — **Company formed to work mines within Stannaries "or elsewhere in England."]**—Where a co. is formed for working mines within the Stannaries "or elsewhere in England," but is not shown to be actually working mines beyond the limits of the Stannaries, the ct. having jurisdiction to wind it up, or to entertain an application in its voluntary winding up, is the Stannaries Ct.; & where an application in the voluntary winding up has been made to that ct., the High Ct. will

not exercise its power to retain subsequent applications before itself, but will transfer them to the Stannaries Ct.—*Re NEW TERRAS TIN MINING CO.*, [1894] 2 Ch. 344; 63 L. J. Ch. 397; 70 L. T. 625; 42 W. R. 504; 38 Sol. Jo. 308; 1 Mans. 149; 8 R. 233.

Annotation:—Reid. *Dunbar v. Harvey*, [1913] 2 Ch. 530.

7808. **Company empowered to work in any part of world—Only mines in Cornwall worked.]**—Although the memorandum of a co. may empower it to work in any part of the world, if, as a fact, the intention of the founders was to work a particular mine in Cornwall, & it has never been engaged in any mine beyond that county, a petition to wind up the co. will be transferred to the ct. exercising jurisdiction in the Stannaries.—*Re RADIUM ORE MINES, LTD.* (1913), 110 L. T. 57; 30 T. L. R. 66, C. A.

7809. **More advantageous that company should be wound up in Court of Chancery—Stannaries Court unable to stay actions pending against contributories.]**—Where a shareholder in a mining co. on the cost-book system in the Stannaries was being sued in London, & the Vice-Warden had no power to stay the action:—**Held:** the co. having ceased to carry on business, this was a proper case for a winding-up order in this & not in the Stannaries Ct.—*Re WHEAL ANNE MINING CO.* (1862), 30 Beav. 601; 6 L. T. 38; 10 W. R. 330; 54 E. R. 1023.

7810. **Petition by shareholders—Representing less than one-tenth in value of shares.]—***Re SOUTH LADY BERTHA MINING CO.*, No. 7778, *ante*.

B. Practice and Procedure.

7811. **Who may appear & oppose petition—Creditor.]**—On a petition to wind up a co. within the Stannaries a creditor is not entitled to appear & oppose.—*Re TRETOIL & MESSER MINING CO.* (1862), 2 John. & H. 421; 6 L. T. 154; 70 E. R. 1123.

Annotation:—Reid. *Re South Bertha Copper Mining Co* (1862), 6 L. T. 241.

7812. **Transfer of petition—From High Court to Stannaries Court.]—***Re BULLER & BASSET TIN & COPPER CO., LTD.* (1891), 35 Sol. Jo. 260.

7813. — — — — —.]—*Re NEW TERRAS TIN MINING CO.*, No. 7807, *ante*.

7814. — — — — —.]—*Re RADIUM ORE MINES, LTD.*, No. 7808, *ante*.

7815. **Adjournment of hearing of petition—To allow petitioner to inspect company's documents—Who may inspect.]—***Re WEST DEVON GREAT CONSOLS MINE*, No. 7798, *ante*.

7816. **Costs—Of opposing creditor—Withdrawal of petition in High Court.]—***Re WALKHAM UNITED MINES*, [1882] W. N. 134.

Part IX.—Statutory Companies for Public Purposes.

NOTE.—The general Act applicable in England is *Companies Clauses Consolidation Act, 1845* (c. 16), referred to as *1845 Act*. Cases decided under earlier Acts containing similar provisions have been included in this Part, & in considering the cases in this Part regard should be had to the Act under which they were decided.

SECT. 1.—IN GENERAL.

Company as "Person."—See CORPORATIONS, Vol. XIII., pp. 351–353.

7817. What is company formed for public purposes.—The Crystal Palace Co., originally incorporated by a deed of settlement in 1852, was to acquire the Great Exhibition building in Hyde Park, & remove & erect the same on land purchased for the purpose at Sydenham. The objects & business of the co. were, *inter alia*, the advancement of the arts & sciences, & the cultivation of a refined taste among all classes of the community. Subsequently the co. was registered under Cos. Acts & issued debentures:—*Held*: the co. was not a co. formed for public purposes.—SAUNDERS v. BEVAN (1912), 107 L. T. 70; 28 T. L. R. 518; 56 Sol. Jo. 666, H. L.; *affg.* S. C. *sub nom.* *Re Crystal Palace Co., Fox v. The Co.* (1911), 104 L. T. 898, C. A.

7818. Whether within Public Authorities Protection Act, 1893 (c. 61)—Commercial company performing duties of public utility.—(1) A co. incorporated by Act of Parliament, not only for the performance of duties of public utility, but also for the purpose of earning profits, is not entitled to the benefit of the above Act.

(2) The dividend being limited by Act of Parliament to 10 per cent *per annum*:—*Held*: the income tax must be treated as an additional dividend, & the co. could pay dividends free of income tax, so long as the dividend plus the income tax, did not exceed 10 per cent.—A.-G. v. MARGATE PIER & HARBOUR (COMPANY OF PROPRIETORS), [1900] 1 Ch. 749; 69 L. J. Ch. 331; 82 L. T. 448; 64 J. P. 405; 48 W. R. 518; 44 Sol. Jo. 393.

Annotations:—As to (1) *Consd. The Johannesburg*, [1907] P. 65. *Refd. Ambler v. Bradford Corpn.*, [1902] 2 Ch. 585; *Parker v. L. C. C.*, [1904] 2 K. B. 501; *Sharpington v. Fulham Grdns.* (1904), 52 W. R. 617; *Bradford Corpn. v. Myers*, [1916] 1 A. C. 242.

—.]—*Sec. further, PUBLIC AUTHORITIES & PUBLIC OFFICERS.*

7819. Presumption of compliance with requirements of incorporating statute.—Where a public co. has been incorporated by virtue of a statute which prescribed certain rules for the constitution

of such cos., & for regulating their proceedings, it will be assumed, in judging of the transactions between the co. & other parties, that the requirements of the statute have been complied with.—COLONIAL BANK OF AUSTRALASIA v. WILLAN (1874), L. R. 5 P. C. 417; 43 L. J. P. C. 39; 30 L. T. 237; 22 W. R. 516, P. C.

Annotations:—*Mentd.* *R. v. Woodhouse*, [1906] 2 K. B. 501; *R. v. Bloomsbury Income Tax Comrs.*, [1915] 3 K. B. 768; *R. v. Nat Bell Liquors*, [1922] 2 A. C. 128.

SECT. 2.—PROMOTION.

Application to obtain Act—Deposit of money by promoters.—See PARLIAMENT.

Agreement relating to Bill—Withdrawal of opposition—Legality.—See CONTRACT, Vol. XII., pp. 251, 252, Nos. 2057–2064.

7820. Promotion expenses—Liability of company to pay—No contract under seal.—A private Act, incorporating a gaslight co., enacted that the costs of obtaining the Act should be paid out of the money subscribed, in preference to all other payments. The attorney who obtained the Act sued the co. in debt, upon the Act, for his costs:—*Held*: the action was maintainable without setting out any deed.—TILSON v. WARWICK GAS LIGHT CO. (1825), 4 B. & C. 962; 7 Dow. & Ry. K. B. 376; 4 L. J. O. S. K. B. 53; 107 E. R. 1317.

Annotations:—*Folld.* *Carden v. General Cemetery Co.* (1839), 5 Bing. N. C. 253; *Hitchins v. Kilkenny Ry.* (1850), 9 C. B. 536. *Appld. Re Kensington Station Act* (1875), L. R. 20 Eq. 197. *Distd. Re Skegness & St. Leonard's Tram. Co., Ex p. Hanly* (1888), 41 Ch. D. 215. *Mentd.* *Campion v. King* (1842), 6 Jur. 35; *Edwards v. Bates* (1844), 2 Dow. & L. 299; *Pardoe v. Price* (1847), 16 M. & W. 451; *Addison v. Preston Corpn.* (1852), 16 Jur. 643; *Wyatt v. Metropolitan Board of Works* (1862), 11 C. B. N. S. 744; *Bush v. Martin* (1863), 2 H. & C. 311; *Sansom v. St. Leonard, Shoreditch* (1869), L. R. 4 C. P. 654; *Baker v. Hulme Cultram U. C.* (1915), 85 L. J. K. B. 799.

When contracts by corporations required to be sealed, see CORPORATIONS, Vol. XIII., pp. 380 *et seq.*

7821. — — —.]—By 1845 Act, s. 65, it is provided that all the money raised by the co., whether by subscriptions of the shareholders, or by loan, or otherwise, shall be applied, firstly, in

PART IX. SECT. 1.

o. Power of shareholder to question terms of Act.—A co. brought debt to compel a subscriber to pay an instalment of his subscribed stock called in by the directors. Deft. excepted to the declaration as being bad on various grounds, & called in question, if not the existence of the co., at least the existence of any subscription list & the authority of the co. to take the steps taken by them to carry into effect the objects of their charter:—*Held*: in such a case when the legislature passes an Act to control & regulate such a co. it is generally beyond the province of the cts. to deny to the statutory provisions their plain effect merely on the ground that these do not seem reconcilable with either public or private claims, & it was impossible to hold the present corpn. at

an end for non-user & they were entitled to an extended time to finish the construction of their roads & the stock subscribed therefore was not extinguished for non-user.—CITY OF TORONTO & LAKE HURON RY. CO. v. CROOKSHANK (1847), 4 U. C. R. 309.—CAN.

p. — — —.]—To an action for calls, alleged to be due by deft. to a co., deft. pleaded, on equitable grounds, that he subscribed for the shares & became a shareholder in a co., called the C. Car Co., incorporated by letters patent for certain specified purposes & not otherwise; that afterwards, & without the assent & against the will of deft., that co. applied to the Dominion legislature & obtained an Act constituting the shareholders therein a body corporate, under the name of the C. Car & Manufacturing

Co., the now plffs.; that by the Act greater powers were conferred upon plffs. than were possessed by the C. Car Co., & the nature of the business was varied & extended, & the undertaking rendered more hazardous than was contemplated by the C. Car Co., or the deft. when he became a shareholder thereof; & that deft. never agreed to become a shareholder or invest his money in a co. possessing the powers of plffs.; whereby deft. is relieved from liability:—*Held*: the plea was clearly bad: for the Act was binding on all the shareholders, whether assenting or not to the application for it, & the ct. had no jurisdiction to relieve deft. from a liability which the statute expressly declared that he should continue to be subject to.—CANADA CAR & MANUFACTURING CO. v. HARRIS (1874), 24 C. P. 380.—CAN.

Sect. 2.—Promotion.]

paying the costs & expenses incurred in obtaining the special Act, & all expenses incident thereto, & secondly, in carrying the purposes of the Act into execution:—*Held*: the expenses of obtaining the special Act were recoverable against the co. in an action of debt.—*HITCHINS v. KILKENNY RY. Co.* (1850), 9 C. B. 536; 14 L. T. O. S. 467; 137 E. R. 1001.

Annotation:—*Distd. Re Skegness & St. Leonard's Tram. Co., Ex p. Hanly* (1888), 41 Ch. D. 215.

7822. Personal undertaking by directors.]—Four of the directors of a railway co. applied for an order for the taxation of the parliamentary agents' bill of costs, submitting in the usual way to pay what should be found due to them. The order was accordingly made, & the bills were taxed; but before the taxing master had issued his certificate of taxation a petition was presented, & an order was made for the winding up of the co., & thereupon the directors moved for an injunction to restrain the parliamentary agents from taking any proceedings against them:—*Held*: the submission to pay was a personal undertaking, & the injunction was refused without costs, as they might get reimbursed by applying under the order for winding up for payment of the sum so paid as a debt paid for the co.—*Re SUDLOW & KINGDOM* (1850), 12 Beav. 527; 16 L. T. O. S. 406; 14 Jur. 1126; 50 E. R. 1162; *sub nom. Re SUDLOW & KINGDON, Ex p. DOVER & DEAL RY. Co.*, 19 L. J. Ch. 524.

7823. No money raised by company—1845 Act, s. 65.]—In an action for work bestowed & money spent in obtaining a railway Act, in which it was provided that the expenses incident to the passing of the Act should be paid by the co., the co. pleaded that they had not raised or received, nor had been able to raise or receive, any money which they might apply to the payment of such expenses:—*Held*: by the above sect., this plea was no answer to the action.—*MANNING v. LONDON, WORCESTER & SOUTH WALES RY. Co.* (1867), 17 L. T. 68.

7824. Agreement by company to pay on capital being raised—Issue of part only of authorised capital.]—A co. was being promoted for the building of a railway, & for the purchase, in connection therewith, of a certain canal. The promoters & a firm of solrs. came to an agreement, afterwards adopted by the co., by which the solrs. consented to give their services *gratis* in the event of the application to Parliament failing, or the capital not being raised, but in the event of these two conditions being fulfilled, they were to be paid the customary professional charges for work done. An Act of Parliament was obtained incorporating the co., & providing for the transfer to it of the canal, & authorising the construction of the railway. The capital was not to exceed £8,000,000, & the co. was authorised to resolve that the canal undertaking & capital necessary for it should be a separate undertaking with a separate capital. This course was adopted by the co., & the canal capital fixed at £1,250,000. This amount was raised, but the rest of the capital of the co. was not raised. In an action by the solrs. to recover the customary professional charges, for work done by them:—*Held*: the raising of the canal capital was not a raising of "the capital," & the conditions of the contract made between the promoters & the solrs. not having been fulfilled, the solrs. were not entitled to succeed in the action.—*NICHOLS v. NORTH METROPOLITAN RAILWAY & CANAL Co.* (1894), 71

L. T. 836, C. A.; *affd.* (1896), 74 L. T. 744, H. L.

7825. ——— How enforced—Remedy given by special Act.]—The special Act of a railway co. gave a right to sue the co. for the costs of obtaining the Act, & it incorporated 1845 Act. By 1845 Act, s. 65, the money raised by the co. was to be applied first in payment of such costs:—*Held*: (1) Stat. Limitations did not run against creditors in respect of such costs until the co. had assets to meet the claims; (2) the remedy given by the special Act was in addition to, & not in substitution for the right given by 1845 Act to payment out of the assets of the co.—*Re KENSINGTON STATION ACT* (1875), L. R. 20 Eq. 197; *sub nom. Re KENSINGTON STATION & NORTH & SOUTH JUNCTION RAILWAY ACT, 1859, REED'S CLAIM, ANTON'S CLAIM*, 32 L. T. 183; *sub nom. Re KENSINGTON STATION & NORTH & SOUTH LONDON JUNCTION RAILWAY ACT*, 23 W. R. 463.

Annotations:—*As to* (2) *Refd. Re Skegness & St. Leonard's Tram. Co., Ex p. Hanly* (1888), 41 Ch. D. 215. *Generally, Mentd. Re Hereford & South Wales Waggon & Engineering Co., Head & Walter's Claims* (1876), 45 L. J. Ch. 461; *Re Birmingham & Lichfield Junction Ry.* (1885), 28 Ch. D. 652.

7826. ——— Solicitor's lien.]—The lien of a solr. is confined to what is due to the solr. in that character, & does not extend to general debts. Accordingly the lien of the solr. of a railway co. for his costs does not include costs incurred in relation to the promotion of the co. before incorporation, such costs by the usual clause in the Act having been made a statutory debt to be paid by the co.—*Re GALLAND* (1885), 31 Ch. D. 296; 55 L. J. Ch. 478; 53 L. T. 921; 34 W. R. 158, C. A.

Annotations:—*Refd. Re Taylor, Stileman & Underwood*, [1891] 1 Ch. 590. *Mentd. Boden v. Hensby* (1891), 61 L. J. Ch. 174; *Re Hanbury, Whitting & Nicholson* (1896), 75 L. T. 449.

7827. ——— Time for enforcing.]—*Re KENSINGTON STATION ACT*, No. 7825, *ante*.

7828. ——— Who entitled to recover.]—By an Act of Parliament constituting a joint-stock co., the co. were to apply the first moneys received under the Act in discharge of the expenses incurred in obtaining the Act:—*Held*: pltf., though a member of the co., might sue them for his time & trouble, & money expended in obtaining the Act. *CARDEN v. GENERAL CEMETERY Co.* (1839), 5 Bing. N. C. 253; 7 Dowl. 275; 1 Arn. 503; 7 Scott, 97; 8 L. J. C. P. 163; 3 Jur. 24; 132 E. R. 1102.

Annotations:—*Folld. Hitchins v. Kilkenny Ry.* (1850), 9 C. B. 536. *Consd. Re Kensington Station Act* (1875), L. R. 20 Eq. 197. *Distd. Re Skegness & St. Leonard's Tram. Co., Ex p. Hanly* (1888), 41 Ch. D. 215. *Refd. Scott v. Ebury* (1867), L. R. 2 C. P. 255; *Lee v. Bude & Torrington Ry.* (1871), L. R. 6 C. P. 576. *Mentd. Campion v. King* (1842), 6 Jur. 35; *Pardoe v. Price* (1847), 16 M. & W. 451; *Addison v. Preston Corpn.* (1852), 16 Jur. 643; *Brown v. London Corpn.* (1861), 7 Jur. N. S. 729; *Wyatt v. Metropolitan Board of Works* (1862), 11 C. B. N. S. 744; *Baker v. Hulme Cultram U. C.* (1915), 85 L. J. K. B. 799.

7829. ——— Persons employed by promoter—Promoter's clerk.]—The special Act of a tramway co. provided that the costs of & incident to the preparing for, obtaining, & passing of the Act should be paid by the co.:—*Held*: a person who had, as clerk to a promoter of the co., performed work in relation to the obtaining of the Act, but who had looked only to the promoters for his remuneration, could not prove in the winding up of the co. in respect of the work so performed by him.—*Re KENT TRAMWAYS Co.* (1879), 12 Ch. D. 312; *sub nom. Re KENT TRAMWAYS Co., PIKE'S CLAIM*, 28 W. R. 158, C. A.

Annotation:—*Consd. Re Skegness & St. Leonard's Tram. Co., Ex p. Hanly* (1888), 41 Ch. D. 215.

7830. **Not acting directly for company.]**—The special Act incorporating a tramway co. provided that the costs, charges, & expenses of & incident to the preparing, applying for, obtaining & passing of the Act should be paid by the co. The Act was obtained by a parliamentary agent, who was employed by S., a person who had taken an active part in the promotion of the co., but who was not mentioned in the Bill or in the Act, & who never became a member of the co. After the co. was incorporated the parliamentary agent, either of his own accord or upon instructions from S., procured for the tramway co. another Act, which contained a similar provision as to the payment of the costs, charges & expenses of obtaining it. The seal of the co. was affixed to the petition for this second Act, but without authority. The co. never had any board of directors or body of shareholders capable of entering into a binding contract or of exercising any of the statutory powers, & it was ordered to be wound up shortly after the passing of the second Act:—*Held*: the parliamentary agent was not entitled to prove against the co. in the winding up in respect of the costs, charges, & expenses of either of the Acts.

Those persons only who do work directly for a co. in process of formation, without being employed by any one else for hire or reward, are entitled to look to the co. when formed, for payment of the costs & expenses of the work of which the co. had got the benefit, & those persons who are employed by any one else to do the work for hire or reward must look to the person who employed them.—*Re SKEGNESS & ST. LEONARD'S TRAMWAYS CO., Ex p. HANLY* (1888), 41 Ch. D. 215; 58 L. J. Ch. 737; 60 L. T. 406; 37 W. R. 225; 5 T. L. R. 166; 1 Meg. 127, C. A.

Annotations:—*Reid*. *Cutbill v. Shropshire Ry.* (1891), 7 T. L. R. 381; *Re Manchester, Middleton & District Tram. Co., [1893]* 2 Ch. 638; *Nichols v. Regent's Canal Co.* (1894), 63 L. J. Q. B. 641.

7831. ——— **Party agreeing with promoters to pay all costs of obtaining Act.]**—A clause in a private Act of Parliament, in terms imposing a duty not relating to the public interest, does not invalidate a previous agreement not to exact its performance, made in view of the passing of the Act by the person to whom the duty would otherwise, by the terms of the Act, be due, with the persons subjected to it, or with other persons on their behalf.

Pltf. had agreed with the promoters of a railway Bill, to bear the costs of obtaining & passing it. The Bill was passed, & contained the usual clause, directing payment by the co. of the costs of obtaining & passing it. To an action for his costs, the co. pleaded, equitably, the previous agreement:—*Held*: a good plea.—*SAVIN v. HOYLAKE RY. CO.* (1865), L. R. 1 Exch. 9; 4 H. & C. 67; 35 L. J. Ex. 52; 13 L. T. 374; 11 Jur. N. S. 934; 14 W. R. 109.

Annotations:—*Distd.* *Re Brampton & Longtown Ry., Shaw's Claim* (1875), 10 Ch. App. 177. *Mentd.* *Corbett v. S. E. & C. Ry. Co.'s Managing Committee*, [1905] 2 Ch. 280.

7832. ——— **Promoter promising subscribers that no liability should be incurred.]**—A solr. who was promoting a railway co. induced various persons to sign the subscription contract, by an assurance that they should incur no liability if the line was not made. Some of these persons were provisional directors. The Act was obtained, & contained the usual clause that the preliminary expenses should be paid by the co. The line was not made. The undertaking was abandoned, & the co. ordered to be wound up. The solr. carried

in a claim as creditor for professional services in obtaining the passing of the Act. This claim was opposed by some of the contributories, on the ground of the above assurances:—*Held*: the solr. was entitled to prove, for that the assurances made by him could only operate as a contract to indemnify the individuals to whom they were made, & did not exonerate the co. in its corporate capacity.—*Re BRAMPTON & LONGTOWN RY. CO., SHAW'S CLAIM* (1875), 10 Ch. App. 177; 44 L. J. Ch. 670; 33 L. T. 5; 23 W. R. 813, L. C. & L. J.

Annotation:—*Consd.* *Re Skegness & St. Leonard's Tram. Co., Ex p. Hanly* (1888), 41 Ch. D. 215.

7833. ——— **What are—Costs of preparing abandoned parts of scheme.]**—Six railways, forming parts of a general system, were projected by the same persons. An Act of Parliament was obtained authorising the construction of two only, the other four being abandoned, & the special Act provided that the expenses, costs & charges of obtaining & passing the Act, & incidental & preparatory thereto, should be paid by the co.:—*Held*: the costs incurred in relation to the abandoned railways were to be regarded as costs incidental & preparatory to the obtaining of the Act, & were properly payable by the incorporated co.—*Re TILLEARD* (1863), 3 De G. J. & Sm. 519; 32 L. J. Ch. 765; 8 L. T. 587; 27 J. P. 436; 11 W. R. 764; 46 E. R. 736, L. J.

Annotations:—*Consd.* *Re Skegness & St. Leonard's Tram. Co., Ex p. Hanly* (1888), 41 Ch. D. 215. *Reid.* *Re Hereford & South Wales Waggon & Engineering Co., Head & Walter's Claims* (1876), 45 L. J. Ch. 461; *Re Rotherham Alum & Chemical Co.* (1883), 53 L. J. Ch. 290. *Mentd.* *Re Russell, Son & Scott* (1886), 55 L. T. 71; *Parker v. Blenkhorn, Newbould & Bailward* (1888), 59 L. T. 906; *Re Hellard & Bewes*, [1896] 2 Ch. 229.

7834. ——— **Promise to pay money—On withdrawal of landowner's opposition.]**—Pltf., whose land was affected by a Bill in Parliament for a railway & canal undertaking promoted by deft. co. in 1883, agreed to withdraw his opposition on an undertaking being signed by their solrs. that his costs should be paid out of the first capital raised by the co. & that a protecting clause in his favour should be inserted in the Bill. By the Act obtained by them in 1882, defts. were authorised to raise the capital for the railway & canal undertaking, & were further empowered to take steps for making the canal undertaking a separate undertaking with separate capital. In 1883 they obtained an Act authorising them to raise separate capital for the canal co., in which the protecting clause to pltf. was inserted. Out of the whole amount of the capital raised for the canal undertaking only one-fifth had been obtained before the passing of the Act of 1883:—*Held*: as there had been a surplus capital which, when raised, had not been appropriated to the canal co., the directors, after paying the expenses properly applicable to canal purposes, could use such surplus in any other way not contrary to the Act, including the payment of pltf.'s costs, & though the undertaking given by the solrs. would not have bound them, whether there had or had not been any money which could have been applied to the payment of such costs, it was under the circumstances, binding on them, but the action could not be maintained against the co. as the undertaking had not been a contract by them.—*ALLAN v. REGENTS CANAL CITY & DOCKS RY. CO. & HIGGINSON & VIGERS* (1885), 2 T. L. R. 84, C. A.

Annotation:—*Reid.* *Nichols v. North Metropolitan Ry. & Canal Co.* (1894), 71 L. T. 836.

7835. ——— **As consideration for landowner's support.]**—The promoters of a railway

Sect. 2.—Promotion. Sects. 3, 4 & 5 : Sub-sect. 1.] co. contracted with a landowner, being a peer of Parliament, to pay him £20,000 personally, for his countenance & support in obtaining their Act, such sum to be independent of the ordinary payment for land, severance, & other usual compensation. After the passing of the Act the directors of the co., when formed, ratified the contract, but having doubts whether, under the Lands Clauses Act, 1845 (c. 18), the landowner was entitled to the money personally, they covenanted by deed to pay interest upon the amount, which was to be retained by the co. or paid into ct. A separate agreement stipulated for the quantity of land to be taken for the railway, & the amount to be paid by the co.:—*Held*: the original contract & the contract by the directors after the formation of the co. to pay a sum of money for countenance & support previously given in procuring the Act, were *ultra vires* of the co., & could not be enforced against the co. as payment of expenses of obtaining the Act, under 1845 Act, s. 65, or otherwise.

The doctrine laid down in *Edwards v. Grand Junction Railway Co.*, No. 8317, *post*, that a co. after formation is bound by the contract of its promoters, disapproved of; & so far as it applies to anything to be done which is *ultra vires* of the co. must be considered as overruled.—*SHREWSBURY (EARL) v. NORTH STAFFORDSHIRE RY. CO.* (1865), L. R. 1 Eq. 593; 35 L. J. Ch. 156; 13 L. T. 648; 30 J. P. 435; 12 Jur. N. S. 63; 14 W. R. 220.

Annotations:—*Reid. Taylor v. Chichester & Midhurst Ry.* (1867), L. R. 2 Exch. 356; *Mann v. Edinburgh Northern Tram. Co.*, [1893] A. C. 69.

SECT. 3.—FORMATION.

7836. Dissolution of limited company—Reincorporation by special Act—Vesting of property of old company “by way of sale”—Finance Act, 1895 (c. 16), s. 12.]—By a special Act of Parliament a limited co. was dissolved & reincorporated with additional powers, the property of the dissolved co. being thereby vested in the new co., & the shareholders being given stock of the new co. in substitution for the stock of the dissolved co. theretofore held by them:—*Held*: the property of the dissolved co. “vested by way of sale” in the new co. within the above sect. notwithstanding that there was no contract of sale between the two cos. by reason of their never having been in existence at the same time.—*A.-G. v. FELIXSTOWE GAS LIGHT CO.*, [1907] 2 K. B. 984; 76 L. J. K. B. 1107; 97 L. T. 340; 14 Mans. 291.

SECT. 4.—PRINCIPAL OFFICE AND NOTICES, ETC.

What is principal office—For purpose of giving courts jurisdiction.]—*See* COUNTY COURTS, Vol. XIII., pp. 459, 460; MAYOR’S COURT, LONDON.

—**For purpose of service of legal process.]**—*See* PRACTICE & PROCEDURE.

7837. Notices—Advertisement of—No evidence that newspaper circulated in district of company’s principal place of business—Validity of meeting of which notice advertised in such newspaper.]—Debt for calls. Plea, that the call was not made by any persons having authority on behalf of the co. to make it. By Swansea Dock Act, 1847 (c. cxxiii.), certain persons were named as directors,

who subsequently resolved that the principal place of business should be Swansea. On Oct. 5, at a meeting of some of the directors held in London, it having been then resolved to call an extraordinary general meeting of the co. to be held in London on Oct. 20, a notice was, on Oct. 5, inserted in the *Sun* newspaper, published & circulated in London on that day, & subsequently published in other newspapers, calling a meeting of the co. in London on Oct. 20. At the meeting held on Oct. 20, the directors appointed in July were discharged, others being appointed. By 1845 Act, ss. 71 & 138, fourteen days’ notice of all public meetings is to be given by advertisement in a paper circulating in the district of the co.’s principal place of business. There was no evidence to show that the *Sun* newspaper of Oct. 5 ever reached Swansea. On Oct. 21, 1847, & Jan. 31, 1848, meetings of shareholders were held at Swansea, when the number of directors was reduced to nine, & on Feb. 10, 1848, three of those directors made the call in question:—*Held*: as it was not proved that the *Sun* newspaper of Oct. 5 reached Swansea, the notice was bad, & the meeting of Oct. 20, which discharged the directors by whom the call was afterwards made, was invalid, & the call was good.—*SWANSEA DOCK CO. v. LEVIEN* (1851), 20 L. J. Ex. 447; 17 L. T. O. S. 256.

7838. Service of legal process—Action by secretary against company—Company having no office.]

—By 1845 Act, s. 135, any writ may be served on a co. by being left at or sent by post to the office of the co., or by being given to the secretary, or, if there is no secretary, to a director. The secretary of a co. sued the co., served the writ on a director, & signed judgment against the co. in default of appearance. The co. had no office:—*Held*: the service was invalid, & the judgment ought to be set aside.—*LAWRENSEN v. DUBLIN METROPOLITAN JUNCTION RY. CO.* (1877), 37 L. T. 32, C. A.

—*See, generally*, PRACTICE & PROCEDURE.

SECT. 5.—CAPITAL.

SUB-SECT. 1.—INCREASE.

7839. What constitutes—Conversion of stock.]—Under a special Act of Parliament, which contained a recital that it was expedient that certain debenture stock of an incorporated co. where the liability was limited by Act of Parliament, should be converted into first preference stock, the said debenture stock was cancelled, & an amount of first preference stock was created:—*Held*: this first preference stock was an increase of the nominal share capital of the co. within Customs & Inland Revenue Act, 1889 (c. 7), s. 17, & the co. were bound to deliver a statement of the same to the Commrs. of Inland Revenue, as provided by that sect.—*A.-G. v. MILFORD DOCKS CO.* (1893), 69 L. T. 453; 57 J. P. 598; 9 T. L. R. 586; 37 Sol. Jo. 652, D. C.

7840. ——— Stock of larger amount—Bearing lower rate of interest.]—By the special Act of a railway co. the existing preference stock of the co. was cancelled & a new preference stock was created, to a larger amount & bearing a smaller dividend, the new stock being allotted so that each holder of the old stock received an amount of the new which gave him an equivalent dividend. The existing ordinary stock was cancelled & a new ordinary stock was created of twice the amount

of the old, one half being preferred ordinary, the other half deferred ordinary stock, each holder of the old stock receiving as much of each kind of the new as he held of the old ordinary stock:—*Held*: in each case the increase so authorised by the Act was “an increase of the amount of the nominal share capital” of the co. within Stamp Act, 1891 (c. 39), s. 113, & the stamp duty imposed by that sect. was payable in respect of it.—*MIDLAND RY. CO. v. A.-G.*, [1902] A. C. 171; 71 L. J. K. B. 315; 86 L. T. 206; 50 W. R. 433; 18 T. L. R. 352, H. L.; *affg. S. C. sub nom. A.-G. v. MIDLAND RY. CO.*, [1901] 1 K. B. 220, C. A.

Annotations:—*Appld. A.-G. v. Gas Light & Coke Co.* (1902), 19 T. L. R. 12. *Consd. A.-G. v. Regent's Canal & Dock Co.*, [1904] 1 K. B. 263. *Refd. A.-G. v. London & India Docks Co.* (1906), 95 L. T. 536; *G. N. Picc. & Brompton Ry. v. A.-G.* (1908), 98 L. T. 731.

7841. — Consolidation of stock—Value increased.—By defts.' private Act certain existing stock yielding rates of interest was consolidated & converted into one stock of an increased nominal value yielding a uniform rate of interest; & by sect. 6 (2) the co. was given power to create stock to the value of £437,500 in lieu of stock to the value of £175,000 which the co. had power to create prior to the passing of the Act, & that sub-sect. contained the following proviso: “Except to the extent of the increase in this sub-sect. provided for, nothing in this Act shall be construed as authorising any increase of nominal share capital of the co.”:—*Held*: notwithstanding the proviso in the sub-sect., there had been an increase in the nominal share capital of the co. within Stamp Act, 1891 (c. 39), s. 113, & stamp duty was payable thereon.—*A.-G. v. GAS LIGHT & COKE CO.* (1902), 19 T. L. R. 12, C. A.

7842. — Amalgamation of capital.—The G. Ry. Co. was incorporated by an Act of Parliament in 1899 with a capital of £2,400,000, & duly paid the duty thereon under the Stamp Act, 1891 (c. 39). The B. Ry. Co. was incorporated by an Act of 1897 with a capital of £600,000, & duly paid the duty thereon under the Act of 1891. By an Act of 1902 all the powers, rights, privileges, liabilities, & immunities of the G. Ry. Co., were transferred to the B. Ry. Co., & the G. Ry. Co. was dissolved:—*Held*: by the transfer there was an increase of the amount of nominal share capital of the B. Co. authorised by the Act of 1902 to the extent of £2,400,000, & the duty thereon must be paid by the B. Ry. Co. under Stamp Act, 1891 (c. 39).—*GREAT NORTHERN, PICCADILLY & BROMPTON RY. CO. v. A.-G.*, [1909] A. C. 1; 78 L. J. K. B. 185; 98 L. T. 731; 24 T. L. R. 506; 52 Sol. Jo. 411, H. L.; *revsg. S. C. sub nom. A.-G. v. GREAT NORTHERN, PICCADILLY & BROMPTON RY. CO.* (1906), 50 Sol. Jo. 669.

— **Creation & issue of new shares—Requisites of offer to & acceptance by existing shareholders.**—*See* Sect. 8, sub-sect. 4, B., *post*.

— **Issue of preference shares—Rights of holders—As regards dividends.**—*See* Sect. 11, sub-sect. 5, B., *post*.

7843. — Mistake in description—Liability of company & officers.—The L. Ry. Co. had power under its Acts to issue £100,000 preference shares & a large amount of ordinary shares. By an Act passed in 1864, it was amalgamated, together with other cos., with the C. Co., at which time it had issued £85,000 preference shares, which were to rank as No. 1 preference stock, & £60,000 ordinary shares, which were to rank as No. 2 preference stock, & power was reserved by the Act to the C. Co. to raise any capital which any of the amalgamated cos. had power to raise before the

amalgamation. The directors under a *bonâ fide* belief that they had power to raise the remaining £15,000 preference shares of the L. Co., & to make them rank with the £85,000 No. 1 preference stock, issued £150,000 preference stock, & described them in the certificates, which were signed by the directors & the secretary, as “No. 1 preference stock,” & some of this stock was purchased by plts. A scheme was filed in Ch. for arranging the affairs of the C. Co., & it was decided by the ct. that the new stock was not No. 1 preference stock, but ranked below both it & No. 2 preference stock. On a bill being filed by plts., alleging that they had been deceived by the form in which the stock had been issued & the certificates made, & praying that the co., the directors, & secretary might be held responsible for the misrepresentation:—*Held*: plts. had not been deceived by any misrepresentation of fact, but there had been a common misconception of law.—*EAGLESFIELD v. LONDONDERRY (MARQUIS)* (1876), 4 Ch. D. 693; 35 L. T. 822; 25 W. R. 190, C. A.; *affd.* (1878), 38 L. T. 303; 26 W. R. 540, H. L.

Annotations:—*Mentd. Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394; *Cargill v. Bower* (1878), 10 Ch. D. 502; *Yorkshire Ry. Waggon Co. v. Maclure & Cornwall Minerals Ry.* (1881), 45 L. T. 747; *Deeley v. Lloyds Bank*, [1912] A. C. 756.

7844. Ascertainment of amount of increase—Whether amount authorised or actual amount raised—Stamp Act, 1891 (c. 39), s. 113.—By the Caledonian Ry. Act, 1890 (c. cxxxv.), a holder of the ordinary stock of that railway could require the co. to convert the whole or any part of such stock into preferred converted ordinary stock & deferred converted ordinary stock, & to issue to him an amount of preferred & deferred converted ordinary stock each equal to the amount of ordinary stock so converted. By the Caledonian Ry. Act, 1898 (c. clxxxviii.), the Act of 1890 was made to apply to all the ordinary stock of the co. issued under any past or future Act of Parliament. By the Caledonian Ry. Act, 1899 (c. ccxv.), the co. was authorised to raise £906,000 additional capital by the issue at their option of new ordinary shares or stock, or new preference shares or stock. The railway co. delivered the statement required by the above sect. as to £906,000, but the Crown claimed that as this could, under the co.'s private Acts, be converted into stock or shares of the nominal value of £1,812,000, the latter was the amount of nominal capital authorised, & that stamp duty was payable on that amount:—*Held*: £1,812,000 was the increased amount of the nominal share capital authorised within the sect., & stamp duty was payable on that basis.—*A.-G. v. CALEDONIAN RY. CO.* (1911), 105 L. T. 184; 27 T. L. R. 559, C. A.

7845. Effect of—Company authorised to raise capital for separate undertaking—Whether new capital part of original capital—& applicable to original purposes of company.—A railway co. having power under separate Acts of Parliament to make & purchase certain branch railways in connection with their main line were for those purposes respectively authorised to raise the requisite capital by the creation of new stock. Having issued script certificates accordingly, but being about to apply the money subscribed in respect thereof to the prosecution of works on their original line, a holder of such script filed his bill on behalf of himself, & all the other proprietors of such script, against the co. & its directors, praying an injunction to restrain the co. & the directors from employing any money

Sect. 5.—Capital: Sub-sects. 1, 2 & 3. Sect. 6: Sub-sect. 1.]

which had been subscribed in respect of the new stock towards the completion of the original line, or otherwise than in the completion of the works for which the money was subscribed:—*Held*: overruling demurrers of the co. & directors for want of equity & want of parties, (1) upon the construction of the Acts of Parliament creating the new stock, the capital raised by the script was not to be considered as identical with or part of the original capital of the co., & the holders of the script had a clear equity to keep the co. in the application of the money raised to those purposes for which it was advanced; (2) *pltf.*, as owner of such script, had a right in that character to file his bill clear of any objection to which such bill might have been open had he merely been a member of the co.; (3) a holder of script by purchase is invested with all the rights of the original subscriber.—*BAGSHAW v. EASTERN UNION RY. Co.* (1850), 2 Mac. & G. 389; 6 Ry. & Can. Cas. 152; 2 H. & Tw. 201; 19 L. J. Ch. 410; 14 L. T. O. S. 541; 14 Jur. 491; 42 E. R. 151, L. C. *Annotations*:—*As to* (1) *Refd.* *East Anglian Rys. v. Eastern Counties Ry.* (1851), 11 C. B. 775; *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331; *Shrewsbury & Birmingham Ry. v. North-Western Ry.*, etc. (1857), 6 H. L. Cas. 113; *Riche v. Ashbury Ry. Carriage Co.* (1874), L. R. 9 Exch. 224. *Generally, Mentd.* *Re Madrid & Valencia Ry.* (1852), 16 Jur. 809; *South Yorkshire Ry. & River Dun Co. v. G. N. Ry.* (1854), 7 Ry. & Can. Cas. 744; *Bostock v. North Staffordshire Ry.* (1855), 4 E. & B. 798; *Taylor v. Chichester & Midhurst Ry.* (1867), L. R. 2 Exch. 356.

SUB-SECT. 2.—APPLICATION.

In payment of promoting expenses.]—See Sect. 2, ante.

7846. In payment of costs of promoting Bill in Parliament—To alter rights of shareholders.]—(1) In a railway co. there were two classes of shareholders. A general meeting authorised the directors to apply to Parliament for an Act, which would very materially alter the existing rights & interests of the two classes *inter se*:—*Held*: such an application was not a breach of trust or duty, & to hold otherwise would be applying too strictly to a railway co. the principles admitted to be applicable to private partnerships, resting on private contracts unconnected with public duties & interests, & capable of dissolution.

(3) Upon the application of a shareholder of one of such two classes, for an injunction to restrain the application to Parliament, & the use of the corporate seal & the application of the corporate funds for that purpose, the *ct.* refused to restrain the application to Parliament, or the use of the corporate seal for that purpose, but restrained the application of the funds & moneys of the co. towards the payment of the costs.—*STEVENS v. SOUTH DEVON RY. Co.* (1851), 13 Beav. 48; 7 Ry. & Can. Cas. 696; 20 L. J. Ch. 491; 17 L. T. O. S. 46; 15 Jur. 235; 51 E. R. 18.

Annotations:—*As to* (2) *Consd.* *Re L. C. & D. Ry. Arrangement Act, Ex p. Hartridge & Allender* (1869), 5 Ch. App. 672, n. *Refd.* *Ffooks v. South Western Ry.* (1853), 1 Sm. & G. 142. *Generally, Mentd.* *A.-G. v. Lambeth Vestry* (1888), 4 T. L. R. 257.

7847. — To vary original object of company.]—(1) Parliament having created a co. the power rests in Parliament to vary its constitution, or to control or to annihilate it; & it is not the function of a *ct.* of equity to decide on the propriety of an application to Parliament to vary the original object contemplated by the Act. Such an application is not illegal if it be pursued by legal means. But it appearing in a suit by certain shareholders

that a co. had resolved to use its funds, & to pledge its credit, & to make contracts, for the purpose of such an application to Parliament:—*Held*: such appropriation of funds & pledges & contracts were illegal; &, at the instance of the shareholders, an injunction was granted restraining the appropriation of funds, the pledging of the co.'s credit, & the entering into contracts in support of such an application to Parliament; the *ct.* declined to restrain the co. from introducing or soliciting such Bill, or using the name & seal of the co. for those purposes.

(2) Certain of the directors of a railway co. acting on the nomination of another railway co. which was interested in certain shares in it, & which nominated those directors by virtue of the Act constituting the co., were excluded, by a resolution of the board of directors, from the meetings of the directors, & the majority delegated all the powers of the board to a managing committee:—*Held*: although in such a body the majority binds the minority, yet it is essential to the validity of their acts that the voice of the minority should have been heard; & such exclusion of directors was restrained.

(3) A railway co. was beneficially entitled to certain shares in another railway co., which, under the authority of the Act constituting the latter co., were vested in trustees for the former. The former co. filed a bill against the directors & certain shareholders of the latter, & against the trustees of their own shares, complaining that certain dispositions of the trust funds & contracts, which were in contemplation, were illegal; & praying for an account & relief against the directors, & an injunction to restrain such disposition of funds & contracts:—*Held*: as the equitable title of *ptfs.* was executed, they, making their trustees *defts.*, could sustain their suit, & were not precluded from suing by 1845 Act, s. 20, which exonerates cos. from seeing to the execution of any trusts affecting shares.—*GREAT WESTERN RY. Co. v. RUSHOUT* (1852), 5 De G. & Sm. 290; 7 Ry. & Can. Cas. 991; 19 L. T. O. S. 281; 16 Jur. 238; 64 E. R. 1121.

Annotations:—*As to* (1) *Refd.* *Green v. Nixon* (1857), 23 Beav. 530. *Generally, Mentd.* *G. W. Ry. v. Oxford, Worcester, & Wolverhampton Ry.* (1853), 3 De G. M. & G. 341.

7848. — To extend powers of company—Application unsuccessful.]—In pursuance of a resolution passed by three-fourths of the shareholders of a railway co., a Bill to confer further powers on the co. was presented to Parliament & thrown out; the directors proposed to pay the expenses of this Bill out of the capital of the co. On motion by another co. holding preference shares of *deft.* co. to continue an *interim* injunction restraining such payment:—*Held*: the capital of the co. could only be applied for the purpose of the undertaking mentioned in the particular Act, & the directors could not indemnify themselves out of the capital of the co. under 1845 Act, s. 100, the costs & expenses incurred in promotion of the Bill.—*CALEDONIAN RY. Co. v. SOLWAY JUNCTION RY. Co.* (1883), 49 L. T. 526; 32 W. R. 164; *subsequent proceedings* (1884), 1 T. L. R. 52.

Ultra vires application of co.'s funds generally, see Sect. 12, sub-sect. 2, A. (a). *post.*

In payment of dividends.]—See Sect. 11, sub-sect. 5, D., post.

SUB-SECT. 3.—STAMP DUTIES.

See Sect. 14, sub-sect. 6, post.

On increase of capital.]—See Sub-sect. 1, ante.

SECT. 6.—MEMBERSHIP.

SUB-SECT. 1.—CAPACITY.

7849. Infant.]—To a declaration in debt for calls, charging debt. as the holder of shares under a railway Act incorporated with 1845 Act, it is no answer to plead that debt., when he became indebted, was an infant; or that debt. is sued as the registered holder of shares, that when he became so registered he was an infant, & that he has not, since he attained his age, been registered anew, or ratified the original registration, or held the shares except as such registered holder as before mentioned; for by the express wording of 1845 Act, an infant is liable for calls; at all events, if he is sued after obtaining his age & still holds the shares, for such holding is a ratification.—**CORK & BANDON RY. CO. v. CAZENOVE** (1847), 10 Q. B. 935; 9 L. T. O. S. 313; 11 Jur. 802; 116 E. R. 355.

Annotations:—**Folld. Leeds & Thirsk Ry. v. Fearnley** (1849), 4 Exch. 26. **Expld. & Distd. Newry & Enniskillen Ry. v. Coombe** (1849), 3 Exch. 565. **Consd. West Cornwall Ry. v. Mowatt** (1850), 15 L. T. O. S. 247; **North Western Ry. v. McMichael, Birkenhead, Lancashire & Cheshire Junction Ry. v. Pilcher** (1851), 5 Exch. 114. **Refd. Mid. G. W. Ry. v. Quin** (1851), 17 L. T. O. S. 248.

7850. —.]—To an action for calls on railway shares, debt. pleaded that at the time of the making of the calls he was an infant; & also, that at the time he became the holder of the shares he was an infant:—**Held**: the pleas were bad, it not appearing that he became a shareholder by contract, & avoided it.—**LEEDS & THIRSK RY. CO. v. FEARNLEY** (1849), 4 Exch. 26; 7 Dow. & L. 68; 5 Ry. & Can. Cas. 644; 18 L. J. Ex. 330; 13 L. T. O. S. 468; 154 E. R. 1110.

Annotation:—**Consd. North Western Ry. v. McMichael, Birkenhead, Lancashire & Cheshire Junction Ry. v. Pilcher** (1850), 5 Exch. 114.

7851. Repudiation of contract—During infancy.]—Debt for calls on railway shares. Plea, that debt. became the holder of the shares by reason of his having contracted & subscribed for them, & not otherwise; & that, at the time of his so contracting & subscribing, & also at the time of making the calls, he was an infant; that, while he was an infant, he repudiated the contract & subscription, & gave notice to pltf. that he held the shares at their disposal:—**Held**: a good *prima facie* bar; & if debt., after he became of age, disaffirmed his repudiation, or if he became liable by enjoyment of the profits, those facts should be replied.

The words “every person who shall have subscribed” [1845 Act, s. 8] mean every person who shall have “contracted to subscribe.” The law is never to be construed so as to affect with liability to a contract persons incapable of contracting; the liability imposed by this statute cannot apply to such of the subscribers as are lunatics, infants, or *femes covertas* (**PARKE, B.**).—**NEWRY & ENNISKILLEN RY. CO. v. COOMBE** (1849), 3 Exch. 565; 5 Ry. & Can. Cas. 633; 18 L. J. Ex. 325; 12 L. T. O. S. 475; 154 E. R. 970.

Annotations:—**Consd. West Cornwall Ry. v. Mowatt** (1850), 19 L. J. Q. B. 478; **Deposit Life Assce. v. Ayscough** (1856), 6 E. & B. 761; **R. (Blackborn) v. Midland Counties & Shannon Junction Ry.** (1863), 9 L. T. 155. **Refd. Leeds & Thirsk Ry. v. Fearnley** (1849), 4 Exch. 26; **Mid. G. W. Ry. v. Quin** (1851), 17 L. T. O. S. 248; **North Western Ry. v. McMichael, Birkenhead, Lancashire & Cheshire Junction Ry. v. Pilcher** (1851), 5 Exch. 114; **Edwards v. Kilkenny & G. S. & W. Ry.** (1863), 14 C. B. N. S. 526.

7852. Within reasonable time after becoming of age.]—A plea of infancy to an action for railway calls should allege that the infant repudiated the contract within a reasonable time

after he became of full age.—**DUBLIN & WICKLOW RY. CO. v. BLACK** (1852), 8 Exch. 181; 7 Ry. & Can. Cas. 434; 22 L. J. Ex. 94; 20 L. T. O. S. 70; 155 E. R. 1310.

Annotation:—**Refd. Carter v. Silber**, No. 2 (1892), 38 Sol. Jo. 362.

7853. —.]—To a declaration for railway calls debt. pleaded, that, at the time when he first became the holder of the shares, & at the time of his making the contracts by force of which the debts, causes of action, & liabilities in the declaration mentioned accrued to pltf. & were incurred by debt., & at the time of his making & entering into the contracts by force of which pltf. claim to be entitled by law to make the call upon debt., as in the declaration alleged, debt. was an infant within the age of 21 years. Replication, that debt., at the time when he first became the holder of the shares, & at the time of his making the contracts in the plea mentioned, was of the full age of 21 years. It appeared at the trial, that debt. was the purchaser of the shares in question whilst he was an infant, & that, after he was of full age, a call was made:—**Held**: the term “contract” meant the contract by which debt. became a shareholder, & not the obligation to pay the calls under 1845 Act, s. 21, & the plea was proved by evidence of his infancy, at the time of the transfer to him of the shares.

Qu.: whether the word “contract,” being so construed, the plea was an answer to the action.—**BIRKENHEAD, LANCASHIRE & CHESHIRE JUNCTION RY. CO. v. PILCHER** (1850), 5 Exch. 24; 6 Ry. & Can. Cas. 564; 19 L. J. Ex. 207; 14 L. T. O. S. 507; 14 Jur. 297; 155 E. R. 11; *subsequent proceedings, sub nom. NORTH WESTERN RY. CO. v. MCMICHAEL, BIRKENHEAD, LANCASHIRE, & CHESHIRE JUNCTION RY. CO. v. PILCHER* (1851), 5 Exch. 114.

Annotations:—**Refd. West Cornwall Ry. v. Mowatt** (1850), 19 L. J. Q. B. 478; **Cork & Bandon Ry. v. Goode** (1853), 1 C. L. R. 345.

7854. —.]—Where nothing but the simple fact of infancy is pleaded to an action for railway calls against a purchaser who has been registered, & thereby become a shareholder in a permanent character, the interest continuing to be vested in the infant, & the subsequent obligation to pay, such a plea is insufficient. Where, to a declaration for railway calls, debt. pleaded, that, at the time when he first became the holder of the shares, & at the time of his making the contracts by force of which the debts, causes of action, & liabilities in the declaration mentioned accrued to pltf. & were incurred by debt., & at the time of his making & entering into the contracts by force of which pltf. claim to be entitled by law to make the call upon debt., as in the declaration alleged, debt. was an infant within the age of 21 years: to which pltf. replied that debt., at the time when he first became the holder of the shares, & at the time of his making the contracts in the plea mentioned, was of the full age of 21 years; upon which issue was joined, & a verdict entered for the debt.:—**Held**: pltf. were entitled to judgment *non obstante veredicto*.—**NORTH WESTERN RY. CO. v. M'MICHAEL, BIRKENHEAD, LANCASHIRE & CHESHIRE JUNCTION RY. CO. v. PILCHER** (1850), 5 Exch. 114, 121; 6 Ry. & Can. Cas. 622; 20 L. J. Ex. 97, 99; 16 L. T. O. S. 440, 15 Jur. 132; 155 E. R. 49, 52.

Annotations:—**Consd. R. (Blackborn) v. Midland Counties & Shannon Junction Ry.** (1863), 9 L. T. 155; **Whittingham v. Murdy** (1889), 60 L. T. 956.

7855. Lunatic.]—**NEWRY & ENNISKILLEN RY. CO. v. COOMBE**, No. 7851, *ante*.

Sect. 6.

. 2.]

SUB-SECT. 2.—WHAT CONSTITUTES.

7856. Subscriber—Not registered as shareholder—Nor receiving share certificate.]—(1) By a railway Act, 6 Will. 4, c. lxxix., s. 129, it is provided that all persons who have subscribed, or who shall hereafter subscribe to the undertaking, shall pay such sums as shall from time to time be called for, & that in case of default it shall be lawful for the co. to sue for & to recover the same. Sect. 130 empowers the directors to make calls from the subscribers to, & proprietors of, the undertaking for the time being, & if any owner or proprietor shall neglect to pay his ratable proportion it shall be lawful for the co. to sue for & recover the same. Sect. 125 provides that the co. shall from time to time enter in a book the names, etc., of the several persons who shall be or become entitled to shares in the undertaking, & shall deliver a certificate thereof to every such proprietor on demand, which shall be evidence of his title to the shares. A deft. had subscribed the parliamentary contract, but was not registered in the book as a proprietor:—*Held*: the words “subscriber” & “proprietor” are synonymous in the Act, & therefore deft. was liable as a subscriber in an action brought against him for calls made on the proprietors of the undertaking.

(2) Sect. 118 of above Act enacts, that the proceedings of the meetings shall be entered in a book, & shall be signed by the chairman of such respective meetings, & shall be allowed to be read in evidence in all cts., etc.:—*Held*: the signature of the minutes of a previous meeting by the chairman at the subsequent one was a sufficient compliance with the Act.—*WEST LONDON RY. CO. v. BERNARD* (1843), 3 Q. B. 873; 3 Ry. & Can. Cas. 649; 1 Dav. & Mer. 397; 13 L. J. Q. B. 68; 2 L. T. O. S. 187; 8 Jur. 144; 114 E. R. 743.

7857. — To new company—Amalgamation not completed.]—A co. for making a railway from D. to M. was incorporated by 8 & 9 Vict. c. cxix., under the name of M. G. W. Ry. Co. of Ireland. Some of its directors provisionally registered another co. for making a railway from M. to G., to be called “The G. & M. J. Ry. Co.” Three months afterwards this name was altered at the registration office to “The M. G. W. Ry. Co. of Ireland (extension from M. to G.).” Most of the directors of the two cos. were the same. L. applied for & received scrip certificates in the extension co., & paid deposits thereon, & received receipts headed with the altered name, & signed the shareholders’ agreement & parliamentary contract. The M. G. W. presented, in its own name & under its corporate seal, a petition to Parliament for an Act to make a railway from M. to G., undertaking, at its own expense, to make the railway. The Act which was passed upon this petition, 9 & 10 Vict. c. ccxxiv, only gave authority to make the railway from M. to A., or but a part of the distance. The directors had power under the Act to raise the necessary sums by contributions among themselves or by the admission of other parties. The additional capital required for the extension was directed to form “part of the general & original capital of the co.”; & the provisions of the recited Act, 8 & 9 Vict. c. cxix, were to extend to & be read with the new Act. The expression “The Co.,” in the new Act, was declared to mean the M. G. W. Co. In Sept. 1846,

at a meeting of the directors of the M. G. W. Co., a resolution was passed stating on what terms the holders of the extension scrip should be entitled to certificates in the joint co., & another resolution approving of & confirming those terms. At that meeting the seal of the M. G. W. Co. was affixed to the shareholders’ book, which, however, did not then contain the names of the shareholders in the extension line. The latter were added in Mar. 1847, when one of them, that of deft., was inserted. Three calls were made; the first was dated previous to the insertion of the extension subscribers in the shareholders’ book, the two others after that insertion. An action was brought for these calls:—*Held*: (1) the Act did not amalgamate the two cos.; & even if the directors possessed a power of amalgamation, the resolution of Sept. 1846, was not an exercise of that power so as to render deft. liable to an action for any one of the calls at the suit of the M. G. W. Co.; (2) the list of registered shareholders, although it might be proved not to have been a faithful register, was *prima facie* evidence that the contributory therein named was a shareholder, which fact, however, might be displaced by other evidence.—*MIDLAND GREAT WESTERN RY. CO. OF IRELAND v. LEECH* (1852), 3 H. L. Cas. 872; 10 E. R. 348; *sub nom.* *MIDLAND GREAT WESTERN RY. CO. OF IRELAND v. LEECH, SAME v. JOHNSON, SAME v. EDMOND*, 20 L. T. O. S. 297, H. L. Annotation:—*Mentd.* *Nixon v. Brownlow* (1857), 2 H. & N. 445.

7858. — Holding & transferring in promoting company.]—Where, in an act of calls, it appeared that deft. had signed the subscribers’ deed of a registered coal mine & co., for 50 shares of a certain amount in a capital, & afterwards signed the parliamentary contract upon an application for an Act empowering the co. to make the railway, the original deed authorising such application, for 50 shares of a different amount in a different amount of capital, & numbered differently on the registry of the railway co., although no separate capital was ever raised or intended to be raised for the railway, the deposits being paid out of the original capital, & no railway co. scrip was issued, & though there was virtually only one direction, with one set of officers, & one office, & one common seal, & deft. had only paid one sum of money, & received scrip for one set of shares, at the time of signing the original deed, & he had sold those shares before the call, describing them by certain numbers, different from those for which he had signed the parliamentary contract:—*Held*: there were, by virtue of the deeds & the Act of Parliament, separate cos., with separate shares & separate liabilities thereon; deft. had only transferred the shares in the registered co., & he was liable to calls on the shares in the parliamentary co.—*LOUGHOR COAL & RY. CO. v. WILLIAMS* (1854), 3 C. L. R. 158; 24 L. T. O. S. 116.

7859. — Not signing parliamentary contract or subscribers’ agreement.]—Deft. by letter requested the provisional committee to allot to him one hundred shares in a proposed railway co. In answer he received the following letter: “Sir, The provisional committee having allotted to you fifty shares of £20 each in this undertaking, I am instructed to request that you will pay a deposit upon them of £1 10s. per share, on or before the 30th inst., to one of the following bankers, etc.

PART IX. SECT. 6, SUB-SECT. 2.
q. Name inserted in Act & list of subscribers without authority.]—A person named in the Act of incorpora-

tion & in the list of subscribers, who never authorised his name to be used, or held any shares in the co., ceases to be a member thereof after the first

meeting to organise the co.—*PORTLAND & LANCASTER STEAM FERRY CO. v. PRATT* (1850), 7 N. B. R. (2 All.) 17.—CAN.

I beg also to inform you that scrip certificates for the above number of shares will be delivered to you in exchange for this letter, & the banker's receipt for the deposit after the execution of the parliamentary contract, & subscribers' agreement which will lie for your signature at this office on & after the 30th inst." A the foot of the letter was the following memorandum: "The shares allotted to you will be considered forfeited, if the deposit be not paid within the period specified above, & the parliamentary contract & subscribers' agreement must be signed on or before Aug. 20, 1845." Deft. paid the deposit, but did not sign the parliamentary contract or subscribers' agreement. The co. was afterwards incorporated, & deft.'s name was placed on the sealed register of shareholders. In an action for calls:—*Held*: deft. was not a shareholder, & the above circumstances were an answer to the *prima facie* case arising from the production of the register containing deft.'s name.—*WATERFORD, WEXFORD, WICKLOW & DUBLIN RY. CO. v. PIDCOCK* (1853), 8 Exch. 279; 7 Ry. & Can. Cas. 437; 22 L. J. Ex. 146; 20 L. T. O. S. 210; 17 Jur. 26; 1 W. R. 153; 155 E. R. 1352.

Annotations:—*Refd.* *New Brunswick & Canada Ry. & Land Co. v. Muggerridge* (1859), 33 L. T. O. S. 317; *Edwards v. Kilkenny & G. S. & W. Ry.* (1863), 14 C. B. N. S. 526; *Burke v. Lechmere* (1871), 19 W. R. 565.

7860. — — —.]—In an action for calls, it being necessary to prove notice to deft. of an alteration in the scheme, evidence that notices were sent by post to all the names & addresses upon the list of allottees, which comprised deft.'s:—*Held*: sufficient *prima facie* proof of the notice; but it appearing that deft. had not executed the deed, he was not liable.—*CARMARTHEN RY. CO. v. WRIGHT* (1858), 1 F. & F. 282, N. P.

7861. — — — Part only of proposed works authorised—Alteration of amount & division of proposed capital.]—The subscribers' agreement of a proposed co. stated that it was formed for making a railway to be called the G. & K. Ry., & to commence at K. & terminate at G., the capital to be one million in shares of £25 each. The deed empowered the directors to abandon the undertaking, or any part thereof & also to make application to Parliament for an Act for any of the purposes aforesaid; also to fix upon, & from time to time to alter or vary the termini, route, course, or line of the railway; & to determine whether & how far, & to what extent the undertaking should be carried into effect & deferred or abandoned; & in case any Act should authorise the construction of a part thereof, to make in any subsequent session application for the construction of the remainder. Deft. executed the deed as a subscriber for 150 shares, & paid the deposit of £1 10s. per share. The directors applied to Parliament & 9 & 10 Vict. c. cclx incorporated the co. by the name of the K. & G. S. & W. Ry. Co., for making a railway from K. to G., the capital of the co. to be £225,000, in 11,250 shares of £20 each. After the Act passed deft. was placed on the register of shareholders as a subscriber for fifty shares of £20 each:—*Held*: (1) deft. was a shareholder in the incorporated co., & liable as such to execution on a judgment recovered by a creditor against the co.; (2) sect. 36 of 1845 Act, which enables execution to issue "against any of the shareholders," if the execution against the property or effects of the co. proves ineffectual, means shareholders at the time of the sheriff's return of *nulla bona*.—*NIXON v. BROWNLOW, NIXON v. GREEN* (1858), 3 H. & N. 686; 27

L. J. Ex. 509; 31 L. T. O. S. 369; 4 Jur. N. S. 878; 6 W. R. 772, Ex. Ch.

Annotation:—*As to* (2) *Refd.* *Ilfracombe Ry. v. Poltimore* (Lord) (1868), 37 L. J. C. P. 86.

7862. No shares allotted—1845 Act, ss. 21 et seq.]—(1) The above sects. do not authorise an action against a "subscriber to the undertaking" for calls.

(2) *Qu.*: whether a party may be a "shareholder," without being on the register.

(3) A count alleged that deft. subscribed a certain sum to the undertaking, & that certain portions thereof were called for, & places & times appointed for the payment thereof, & that deft. had due notice of the premises, & that plffs., the co., did all things necessary to entitle them to have the calls paid, but that deft. made default:—*Held*: the count disclosed no cause of action, inasmuch as it did not show that deft. was a "shareholder" within the above Act.

(4) In an action for calls made by a co. under above Act the form of remedy given by sect. 24 must be followed.—*WOLVERHAMPTON NEW WATERWORKS CO. v. HAWKESFORD* (1859), 6 C. B. N. S. 336; 28 L. J. C. P. 242; 33 L. T. O. S. 366; 5 Jur. N. S. 1104; 7 W. R. 464; 141 E. R. 486; *subsequent proceedings* (1861), 11 C. B. N. S. 456.

Annotations:—*As to* (3) *Consd.* *Portal v. Emmens* (1876), 1 C. P. D. 201. *Refd.* *Re Electric Telegraph Co. of Ireland, Bunn's Case* (1860), 2 De G. F. & J. 275. *As to* (4) *Consd.* *A.-G. v. Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101. *Refd.* *Woolley & Woolley v. Broad* (1892), 66 L. T. 680; *Neville v. London Express Newspaper*, [1919] A. C. 368; *Aramayo Francke Mines v. Public Trustee*, [1922] 2 A. C. 406. *Mentd.* *Vallance v. Falle* (1884), 53 L. J. Q. B. 459; *Stevens v. Chown, Stevens v. Clark*, [1901] 1 Ch. 894; *Devonport Corp'n. v. Tozer*, [1902] 2 Ch. 182. *Generally, Mentd.* *Abergavenny Improvement Comrs. v. Straker* (1889), 42 Ch. D. 83; *Whittaker v. L. C. C.*, [1915] 2 K. B. 676.

7863. — — —.]—*PORTAL v. EMMENS*, No. 7878, *post*.

7864. — Shares allotted—Subscriber's name placed on register.]—(1) A railway Act, after naming certain persons, enacts that they & "all other persons who have already subscribed or shall hereafter subscribe to the undertaking, are by this Act united into a co. for the purpose of making & maintaining a railway." Prior to the passing of the railway Act, defts. & others signed a document, whereby they agreed on the passing of the Act for the construction of the railway to subscribe for the number of shares of £10 each placed opposite their respective names, defts.' number being fifty. The Act passed in 1865; in 1866 an allotment of shares was made to defts., but no notice was given to them; & soon afterwards the proceedings of the co. were suspended. Defts.' names were placed on the register of shareholders, & in Apr. 1868, the register was re-sealed, defts.' names being then on it for fifty specific shares; but no notice of this registration was given to defts. Calls having been soon after made, defts. repudiated all liability as shareholders:—*Held*: under the agreement defts. were "subscribers" to the undertaking within the railway Act, & had been rightly put on the register, & were "shareholders within 1845 Act, s. 8, & liable to pay calls.

(2) There is nothing to make the time within which the register shall be made up an essential condition to the validity of the register (*HANNEN, J.*).—*BURKE v. LECHMERE* (1871), L. R. 6 Q. B. 297; 40 L. J. Q. B. 98; 19 W. R. 565.

Annotation:—*As to* (1) *Refd.* *Portal v. Emmens* (1876), 1 C. P. D. 201.

7865. Shareholder—Reincorporation of company — Not registered as shareholder thereof — Nor

Sect. 8.—Membership: Sub-sects. 2, 3 & 4, A. & B.
(a)

receiving share certificate.]—By an Act passed for the reincorporation of the N. & E. Ry. Co., it was provided that all persons & corporations who, on the day of the passing of the Act, were shareholders in the N. & E. Co. were thereby reincorporated by the name of the N. & A. Co. It was also provided that, to complete the title, every person holding shares in the N. & E. Co. should be deemed to hold a share in the N. & A. Co. to be called a deferred share; & should be entitled to receive within one month after the passing of the Act, on demand, a certificate for such deferred share, upon presenting the proper certificate:—*Held*: a shareholder in the N. & E. Co., who, since the passing of the Act, had not become registered as a shareholder of the N. & A. Co., & who had not obtained a certificate of shares, was not thereby disqualified from maintaining a suit against the directors of the N. & A. Co.—*SPACKMAN v. LATTIMORE* (1860), 3 Giff. 16; 4 L. T. 45; 7 Jur. N. S. 179; 9 W. R. 229; 66 E. R. 304.

7866. — Minimum subscription not paid.]—*EAST GLOUCESTERSHIRE RY. CO. v. BARTHOLOMEW*, No. 7918, *post*.

7867. — —.]—(1) Pltf. applied for shares in a joint-stock co. subject to 1845 Act, which were accordingly allotted to him, & he paid the allotment money, & his name was entered on the register of shareholders. After the allotment, the co. sent him scrip certificates, transferable by delivery, with a statement that the allottee or bearer would be entitled to exchange them for share certificates. Pltf. sold his right to the shares to a purchaser, & delivered him the scrip certificates, but executed no transfer of the shares. The purchaser gave notice to the co. of the sale, & paid some calls on the shares. The co. afterwards made other calls, & demanded payment from pltf., & ultimately brought an action against him for them. Pltf. filed his bill to restrain the action:—*Held*: the shares did not pass by the delivery of the scrip certificates, & pltf. was not discharged from his liability as a shareholder.

(2) By the private Act of a joint-stock co., it was provided that it should not be lawful for the co. to issue any share, nor should any share vest in the person accepting the same until one-fifth of the amount of the share had been paid up:—*Held*: notwithstanding this proviso, a shareholder who had not paid one-fifth of the amount of the shares which had been allotted to him, was liable for payment of calls.—*MC EUEN v. WEST LONDON WHARVES & WAREHOUSES CO.* (1871), 6 Ch. App. 655; 40 L. J. Ch. 471; 25 L. T. 143; 19 W. R. 837, C. A., L. JJ.

Director.]—See Sect. 9, sub-sect. 5, *post*.

7868. Holder of scrip certificates to bearer.]—The prospectus of a railway co., issued after its incorporation, stated the capital as £255,000, in 5,100 provisional scrip certificates to bearer, of £50 each, £1 to be paid on application, & £4 on allotment; & that, “on registration of the scrip, of which due notice will be given, the certificates for £50 will be divided into five shares of £10 each.” On the application of A., scrip certificates were allotted to him, which he shortly afterwards, without taking any steps to convert them into shares, sold in the market. These scrip certificates, together with many others which had been in like manner parted with by their allottees, were repurchased, on behalf of the co., by agents of the directors, & more than two years afterwards were entered upon the register as shares,

each scrip certificate representing five shares, in the names of A. & the other allottees:—*Held*: A. was under no obligation to convert the scrip certificates into shares, & on selling them in the market, as he was entitled to do under the terms of his contract, he was relieved from all liability, & could not be retained on the register as the holder of the shares represented by these scrip certificates.—*EUSTACE v. DUBLIN TRUNK CONNECTING RY. CO.* (1868), L. R. 6 Eq. 182; 37 L. J. Ch. 716; 18 L. T. 679; 16 W. R. 1110.

Annotations:—*Apld. Re Asiatic Banking Corpn., Ex p. Collum* (1869), L. R. 9 Eq. 236. *Apprvd. McIlwraith v. Dublin Trunk Connecting Ry.* (1871), 7 Ch. App. 134.

.]—McILWRAITH v. DUBLIN TRUNK CONNECTING RY. CO., No. 7961, post.

7870. —.]—*MC EUEN v. WEST LONDON WHARVES & WAREHOUSES CO., No. 7867, ante.*

Transferor or transferee—Who liable for calls.]—See Sect. 8, sub-sect. 5, D. (a), *post*.

7871. — Who liable to execution for debts of company.]—*ILFRACOMBE RY. CO. v. POLTIMORE*, No. 7877, *post*.

7872. — Acquisition for purpose hostile to company.]—At a general meeting of the shareholders of a railway co. a resolution was passed deferring the construction of the railway, & for a return of 14s. per share of the paid-up capital to the shareholders, which was afterwards confirmed by resolution passed at subsequent meetings. These resolutions were published in the public papers, & in pursuance of them an instalment of 10s. per share was returned & received by the several shareholders, & the certificates of the shares bore an indorsement to that effect, signed by the co.’s secretary. Subsequent to this return being made, & after the time allowed for the compulsory purchase of land by the co. had expired, W. became the purchaser of five shares from one of the shareholders who had agreed to the above resolutions & had received the instalment of 10s. per share in respect of the said five shares, & a deed of transfer of the same was duly executed. This deed W. delivered with the certificates of the shares to the secretary of the co., & required him to register the same in the manner provided by the 1845 Act, s. 15, which the secretary refused to do:—*Held*: W. was not entitled to a writ of *mandamus* to compel the registering of such transfer deed under the sect.; as one of the public he had no right whatever to the writ, & the circumstances under which he had become a purchaser of the shares showed that he was not proceeding *bonâ fide* for the purpose of enforcing the rights of a shareholder.—*R. v. LIVERPOOL, MANCHESTER & NEWCASTLE-UPON-TYNE RY. CO.* (1852), 21 L. J. Q. B. 284; 19 L. T. O. S. 108; 16 Jur. 949.

Annotation:—*Distd. R. v. Wilts & Berks Canal Navigation* (1874), 29 L. T. 922.

— To found right of action against company.]—See ACTION, Vol. I., p. 76, Nos. 612, 613.

SUB-SECT. 3.—RIGHTS OF MEMBERS.

Directors exceeding powers—When restrained.]—See Sect. 11, sub-sect. 5, D.; Sect. 12, sub-sect. 2, A. (f), *post*.

Right to inspect—Register of members.]—See Sect. 7, sub-sect. 3, *post*.

— Register of mortgages.]—See Sect. 14, sub-sect. 5, *post*.

— Company books & documents generally.]—See Sect. 11, sub-sects. 3, 4, *post*.

SUB-SECT. 4.—LIABILITIES OF MEMBERS.

A. *In General.*

For calls.]—See Sect. 8, sub-sect. 5, D., *post*.

To execution for bills of company.]—See Sub-sect. 4, B., *post*.

7873. For libel—Letter written by one shareholder to another—Concerning conduct of former officer of company.]—A. was engaged to superintend the works of a railway co., & subsequently, at a general meeting of the proprietors, the engagement was not continued, but a former inspector was reinstated. A vacancy subsequently occurred in the situation of engineer to the comrs. for the improvement of the river W., & A. became a candidate. B. wrote to C., introducing D. as a candidate, & C., having written to B., informing him that another person had succeeded in obtaining the appointment, B. wrote an answer to C., reflecting on the conduct of A. whilst in the situation of engineer to the railway co. There was a subsequent election, at which A. was unsuccessful in consequence of this letter having been shown. It appeared that B. & C. were both shareholders in the railway co., & that B. managed C.'s affairs in the railway. B. had not been applied to for his opinion, & the letter, containing the libel, was written after the termination of one election, & before the other was in contemplation:—*Held*: in an action by A. against B. for the libel, the letter was not a privileged communication.—*BROOKS v. BLANSHARD* (1833), 1 Cr. & M. 779; 3 Tyr. 844; 2 L. J. Ex. 275; 149 E. R. 613.

—.]—See, further, LIBEL & SLANDER.

B. *Execution against Members for Debts of Company.*(a) *Who may Issue.*

7874. Secretary of company—For salary—With notice that no provision made for payment of salary.]—Where a railway co. had made no provision in its scheme of arrangement for payment of what was due to the secretary for salary:—*Held*: he was entitled to a writ of *sci. fa.* against the shareholders, though he was aware of the scheme & had not objected to it.—*Re TEIGN VALLEY RY. CO.* (1869), 17 W. R. 817.

(b) *Against Whom Execution may issue.*

7875. Shareholder—To whom company indebted in greater amount.]—It is no answer to a motion for a *sci. fa.* against a shareholder of a joint-stock co. under 1845 Act, s. 36, upon a judgment obtained against the co., that the co. is indebted to the shareholder against whom execution is sought, to a greater amount than that of his unpaid calls, for moneys disbursed by him as a director on behalf of the co.—*WYATT v. DARENTH VALLEY RY. CO.* (1857), 2 C. B. N. S. 110; 29 L. T. O. S. 96; 140 E. R. 353.

At time of return of nulla bona.]—*NIXON v. BROWNLOW, NIXON v. GREEN*, No. 7861, *ante*.

—Right of creditor to inspect register.]—See Sect. 7, sub-sect. 3, *post*.

—.]—Compare No. 2662, *ante*.

PART IX. SECT. 6, SUB-SECT. 4.—A.

r. *For debts of company*—Right of set-off.]—Railway Act declared a shareholder liable to judgment creditors of the co. for an amount equal to the amount unpaid on the stock held by him:—*Held*: a shareholder, in an action against him by a judgment creditor of the co., could not set off in equity a debt due to him by the co. before the

judgment was recovered.—*McBETH v. SMART* (1868), 14 Gr. 298.—CAN.

s. —.]—Pltf. co., as judgment creditor of a tramway co., brought the action against defts., as shareholders therein, to compel them to contribute & pay to pltf. co., out of the amounts respectively unpaid up by them upon their shares in the co., a sum sufficient to satisfy the judgment. The state-

7877. Transferor or transferee—Registration of transfer before return of writ against company—After notice of intention to apply to issue execution against creditor.]—(1) Where an execution has been issued against the property of a co., & some but not sufficient goods substantially to satisfy it can be found, the ct. under 1845 Act, s. 36, has a discretionary power to allow execution against a shareholder without a previous levy on the goods, which are insufficient.

(2) *Qu.*: whether a registration of the transfer of a shareholder's shares, before the return of the writ of execution against the co., but after notice that the execution creditor intends to apply for leave to issue execution against him, exonerates such shareholder.—*ILFRACOMBE RY. CO. v. POLTIMORE* (1868), L. R. 3 C. P. 288; 37 L. J. C. P. 86; 18 L. T. 85; 16 W. R. 460.

7878. Original director—No qualification shares allotted—No register formed.]—Sect. 36 of 1845 Act is governed by sect. 3 of that Act, & consequently a member of a co. may be a "shareholder" within the former sect. although no shares have been allotted to him & no register has been formed.

A special Act formed four promoters into a co., & made them directors till the first ordinary meeting of shareholders, & provided that each director should hold not less than thirty shares. There never was any such meeting, no register of members was ever drawn up, & no shares were ever allotted. The Act embodied an agreement which bound the co. to pay pltf. a certain sum of money:—*Held*: in respect of the co.'s debt to pltf., each promoter was liable under a *sci. fa.* as a shareholder to the extent of thirty shares.

By 1845 Act, ss. 85, 86, no one shall be capable of being a director unless he holds the prescribed number of shares, & if he ceases to hold that number of shares, he ceases to be a director, but these provisions apply only to elected directors & not to directors named in a special Act (*JESSEL, M.R.*).—*PORTAL v. EMMENS* (1876), 1 C. P. D. 664; 46 L. J. Q. B. 179; 35 L. T. 882; 25 W. R. 235, C. A.

Annotations:—*Distd.* *Kipling v. Todd* (1878), 3 C. P. D. 350. *Consd.* *Mammatt v. Brett* (1886), 54 L. T. 165. *Folld.* *Tahourdin v. Weston-super-Mare Grand Pier Co.* (1887), 4 T. L. R. 124. *Refd.* *Re Esparto Trading Co.* (1879), 12 Ch. D. 191; *Colombia Chemical Factory Manure & Phosphate Works, Hewitt's Case, Brett's Case* (1883), 25 Ch. D. 283; *Re South London Fish Market Co.* (1888), 39 Ch. D. 324; *Re Wheal Buller Consols, Ex p. Jobling* (1888), 4 T. L. R. 282.

7879. Resignation from directorship—Share capital wholly issued to other parties.]—Defts. T. & A. were named as directors in the special Act of a railway co. The Act provided that the qualification of directors should be fifty shares of £10 each, & that the directors named in the Act should continue in office till the first ordinary meeting of the co. T. never acted as a director, & another director was appointed in his place. A. acted as director for a time & then resigned, & his place on the board was informally filled up. No shares were allotted to either of the directors, & the whole of the share capital of the co. was placed in other hands. A register of shareholders of the co. was drawn up, in which the names of

ment of defence raised an objection in point of law to the whole claim, that the tramway co. was not within the Act, as not being a "railway" co.:—*Held*: the tramway was a "railway" within the Act, & pltf. succeeded on the point of law.—*EDISON GENERAL ELECTRIC CO. v. EDMONDS* (1896), 4 B. C. R. 354.—CAN.

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defts. did not appear. No ordinary meeting of the co. was held, & the resignations of defts. & the sealing of the register were therefore informal. In an action of *sci. fa.*, brought several years after defts.' resignations of their directorships, by the public officer of another co. which had obtained a judgment against the first-named co.:—*Held*: as no shares had been allotted to defts., & they were not *de facto* directors, & all the share capital of the co. was in other hands, defts. could not be made liable as directors on their share qualifications except by way of estoppel; & no estoppel had been raised.—*KIPLING v. TODD* (1878), 3 C. P. D. 350; *sub nom.* *KIPLING v. TODD, SAME v. ALLAN*, 47 L. J. Q. B. 617; *sub nom.* *KIPLING v. TODD, SAME v. ALLAN*, 39 L. T. 188; 27 W. R. 84, C. A.

Annotations:—*Folld. Mammatt v. Brett* (1886), 54 L. T. 165. *Refd.* *North & South Woolwich Subway Co. v. Pym* (1878), 39 L. T. 346; *Re Florence Land & Public Works Co., Nicol's Case, Tufnell & Ponsonby's Case* (1885), 29 Ch. D. 421.

7880. —.]—A railway co. was incorporated by a special Act of Parliament, passed on Aug. 18, 1882. In sect. 4 of the Act deft. was described as a promoter of the undertaking, & in sect. 30 as one of the first directors of the co., who should continue in office until the first ordinary meeting held after the passing of the Act. Sect. 28 required that the qualification of a director should be the possession in his own right of not less than one hundred shares in the co. Deft. attended one board meeting, & on Dec. 23, 1882, sent in his resignation as director to the board, which was accepted by them in the following week. Deft. took no other part in the affairs of the co. Deft. never had any shares allotted to him, nor was any register of shares kept. No shares were ever taken up by the public, & the object of the co. failing, an abandonment Act was obtained & passed in Aug. 1885. The claim of pltf. was for services rendered by him as a surveyor & engineer in relation to & before the formation of the co. Pltf. brought his action against the co., obtained judgment by default, & issued a writ of *fi. fa.* against the co. The sheriff's return to the writ was *nulla bona*. Pltf. then applied to the High Ct. for leave to issue execution against deft. personally under 1845 Act, s. 36:—*Held*: as the resignation by deft. was *bonâ fide*, it was a surrender of his inchoate right to take shares, & operated to divest him of any liability attaching to the holding of shares; & leave to issue execution against him must be refused.—*MAMMATT v. BRETT* (1886), 54 L. T. 165.

Liability of directors in respect of qualification shares generally.—*See Sect. 9, sub-sect. 5, post.*

(c) Grounds for Granting or Refusing.

7881. General rule—Discretion of court.—A *sci. fa.* may issue at the suit of a judgment creditor of a co., subject to 1845 Act, s. 36, against a shareholder. *Qu.* whether that is the sole remedy. When it is proved to the satisfaction of the ct., upon the motion for such *sci. fa.*, that an execution has been issued against the co., & that it has been unproductive, the issuing of the *sci. fa.* is still a matter of discretion with the ct.

Where a co. was established for making a railway in Ireland, although no proceedings had been taken to procure satisfaction in Ireland, & the affidavits did not expressly negative the existence of property there, the ct. granted a rule for a *sci. fa.*

against a director who had stated at a meeting of the co. in London, that in consequence of the shareholders not paying the calls, the directors had no funds to meet the claims against them, one of the claims being the judgment obtained by pltf.—*DEVEREUX v. KILKENNY & GREAT SOUTHERN & WESTERN RY. CO., Re EMERY* (1850), 5 Exch. 834; 1 L. M. & P. 788; 20 L. J. Ex. 37; 16 L. T. O. S. 216; 14 Jur. 1028; 155 E. R. 365.

Annotations:—*Refd. Kilkenny & G. S. & W. Ry. v. Fellden* (1851), 6 Exch. 81; *Addison v. Tate* (1855), 11 Exch. 250; *Burke v. Dublin Trunk Connecting Ry., Miller's Case, Kernaghan v. Dublin Trunk Connecting Ry., James's Case, Marley's Case* (1867), L. R. 3 Q. B. 47.

7882. —.]—On an application by a judgment creditor of a co. for a *sci. fa.* against a shareholder, under 1845 Act, s. 36, the ct. has a discretion as to allowing the writ to issue.—*SHRIMPTON v. SIDMOUTH RY. CO.* (1867), L. R. 3 C. P. 80; 17 L. T. 647.

Annotation:—*Consd. Lee v. Budo & Torrington Junction Ry.* (1871), L. R. 6 C. P. 576.

7883. —.]—The discretion of the ct. in granting or refusing a *sci. fa.* against a shareholder under 1845 Act, s. 36, is to be a judicial discretion exercised according to the known rules of law. A vague suggestion of fraud, or that Parliament was imposed upon by false recitals in the special Act, will not, where a fair *prima facie* case is made out by pltf., induce the ct. to withhold the writ; but the party will be left to plead to the *sci. fa.* any defence, legal or equitable, which he may have.—*LEE v. BUDE & TORRINGTON JUNCTION RY. CO.* (1871), L. R. 6 C. P. 576; 19 W. R. 954; *sub nom.* *LEE v. BUDE & TORRINGTON JUNCTION RY. CO., Re STEVENS & FISHER*, 40 L. J. C. P. 285; 24 L. T. 827.

Annotation:—*Mentd. R. v. Yates* (1883), 48 J. P. 102.

7884. Failure of execution against company.—*DEVEREUX v. KILKENNY & GREAT SOUTHERN & WESTERN RY. CO., Re EMERY*, No. 7881, *ante*.

7885. —.]—**Value of land extended inadequate.**—*R. v. DERBYSHIRE, ETC. RY. CO.*, No. 7945, *post*.

7886. —.]—Under 1845 Act, s. 36, a party who has recovered judgment against a co. is not precluded from issuing execution against the shareholders who have not paid up the full amount of their shares though lands of the co. have been extended under an *elegit* if the proceeds of the lands be insufficient to satisfy the debt.—*ADDISON v. TATE* (1855), 11 Exch. 250; 3 C. L. R. 1075; 24 L. J. Ex. 249; 25 L. T. O. S. 182; 3 W. R. 487; 156 E. R. 823.

7887. —.]—*ILFRACOMBE RY. CO. v. POLTI-MORE*, No. 7877, *ante*.

7888. —.]—Execution was issued against a director of a co. personally in default of satisfaction of judgment obtained against the co. itself.—*TAHOUDIN v. WESTON-SUPER-MARE GRAND PIER CO.* (1887), 4 T. L. R. 124, D. C.

7889. Company about to be or being wound up.—An execution against a co. having proved ineffectual, the ct. allowed the creditor to issue execution against some of its members to the extent of their shares not paid up, notwithstanding the co. was about to be wound up.—*Re PHILLIPS, Ex p. WARKWORTH DOCK CO.* (1854), 18 Beav. 629; 52 E. R. 247.

7890. —.]—A creditor of a joint-stock co., having obtained judgment against the co., & issued execution against its property without being able to obtain satisfaction, obtained a rule *nisi* for a *sci. fa.* for execution under 1845 Act, s. 36, against a shareholder, to the extent of his shares

not paid up. It appeared that the co. was in process of being wound up; & that, though it had no property against which execution could issue, a considerable sum stood to the credit of the official manager:—*Held*: the existence of funds which might ultimately, under the Winding up Acts, be made available for the payment of the debt was not a bar to the proceeding under the sect., & the ct. would not, in the exercise of its discretion, refuse to interfere.—*MACKENZIE v. SLIGO RY. Co.* (1854), 4 E. & B. 119; 3 C. L. R. 1; 24 L. J. Q. B. 17; 24 L. T. O. S. 60; 1 Jur. N. S. 304; 3 W. R. 10; 119 E. R. 46; *subsequent proceedings* (1855), 24 L. T. O. S. 209.

7891. Collusion between creditor & company—To harass shareholders' proceedings against company.]—Pending a suit by shareholders of a co., on behalf of themselves & all other shareholders except defts., against the co. & its directors, seeking to be relieved from calls as improperly made, & after an *interim* injunction restraining further proceedings for such calls upon payment of their amount into ct., the solrs. of the co. & of the directors in the suit who were cognisant of the transactions of which the bill complained commenced an action against the co., & allowed them to submit to judgment by default for the balance of their bill of costs, & upon a return of *nulla bonâ* proceeded by *sci. fa.* against plffs.:—*Held*: the solrs. were properly made defts. by amendment; & the ct., inferring from the evidence that it was an object of the action to prevent the prosecution of the suit, restrained them, until the hearing of the cause, from proceeding on the *sci. fa.* against plffs., or any other person on whose behalf the bill was filed; & refused to put plffs. upon terms of giving judgment to the extent of their debt.—*HORN v. KILKENNY & GREAT SOUTHERN & WESTERN RY. Co.* (1855), 1 K. & J. 399; 3 Eq. Rep. 812; 24 L. J. Ch. 241; 24 L. T. O. S. 292; 3 W. R. 226; 69 E. R. 514.

Annotations:—*Refd.* *Green v. Nixon* (1857), 23 Beav. 530; *Lee v. Bude & Torrington Junction Ry.* (1871), L. R. 6 C. P. 576. *Mentd.* *Beck v. Dean* (1856), 3 Jur. N. S. 14; *Escott v. Gray* (1878), 47 L. J. C. P. 606.

7892. Company indebted to shareholder to greater amount.]—*WYATT v. DARENTH VALLEY RY. Co.*, No. 7875, *ante*.

7893. Execution against other shareholders—Duty of creditor to give credit for amount received.]—Where a creditor obtained a judgment against a co., & then proceeded to enforce it against several shareholders, the ct. considered that he was bound to give credit, to one shareholder whom he sued, for moneys previously received from the others, but the ct. would not disturb the appropriation of part of the moneys the creditor had received, in payment of his costs of his ineffectual proceedings against other shareholders.—*GREEN v. NIXON* (1857), 23 Beav. 530; 27 L. J. Ch. 819; 29 L. T. O. S. 207; 3 Jur. N. S. 993; 5 W. R. 433; 53 E. R. 208.

Annotation:—*Mentd.* *Lee v. Bude & Torrington Junction Ry.* (1871), L. R. 6 C. P. 576.

7894. Tender under protest refused by creditor.]—An offer to pay, under protest, the sum obtained is a good tender. A creditor, having obtained a judgment against a railway co., gave notice to a shareholder that he was about to apply for leave to issue a *sci. fa.* against him, & the shareholder thereupon tendered, under protest, the whole sum claimed, which included £150 for costs incurred since the judgment; the creditor refused it, & obtained a rule *nisi* for a *sci. fa.*:—*Held*: the tender was good, & ought to have been accepted by the creditor; & the ct. discharged the rule with costs, without prejudice to another applica-

tion, if the sum claimed, minus the £150, were not paid.—*SCOTT v. UXBRIDGE & RICKMANSWORTH RY. Co.* (1866), L. R. 1 C. P. 596; Har. & Ruth. 620; 35 L. J. C. P. 293; 14 L. T. 596; 12 Jur. N. S. 602; 14 W. R. 893.

Annotations:—*Refd.* *Lee v. Bude & Torrington Junction Ry.* (1871), L. R. 6 C. P. 576. *Mentd.* *Greenwood v. Sutcliffe*, [1892] 1 Ch. 1.

Tender generally, see CONTRACT, Vol. XII., pp. 319 *et seq.*

7895. Execution by another creditor—& payment thereunder.]—A rule *nisi* having been obtained by a judgment creditor of a co. against a shareholder for a *sci. fa.* under 1845 Act, s. 36, on the application of the shareholder the ct. made the rule absolute for execution without a *sci. fa.* It is sufficient answer to such rule that since the rule was obtained the shareholder has *bonâ fide* paid the full amount due on his shares to another creditor of the co. who had obtained a *sci. fa.* against him & it is not necessary that execution should have issued, & the ct. discharged the rule.—*BURKE v. DUBLIN TRUNK CONNECTING RY. Co.*, *MILLER'S CASE*, *KERNAGHAN v. DUBLIN TRUNK CONNECTING RY. Co.*, *JAMES'S CASE*, *MARLEY'S CASE* (1867), L. R. 3 Q. B. 47; 8 B. & S. 773; 37 L. J. Q. B. 50; 16 W. R. 107.

7896. — But no payment thereunder.]—It is no answer to an application, under 1845 Act, for a *sci. fa.* against a shareholder, that the Ct. of Q. B. has ordered execution to issue without a *sci. fa.* against the same shareholder at the suit of another judgment creditor of the co., if no payment has been made or tendered under such order.—*RIGBY v. DUBLIN TRUNK RY. Co.* (1867), L. R. 2 C. P. 586; *sub nom.* *RIGBY v. DUBLIN TRUNK CONNECTING RY. Co.*, *Re BUTLER*, 36 L. J. C. P. 282; 17 L. T. 101; 15 W. R. 1063.

Annotation:—*Mentd.* *Burke v. Dublin Trunk Connecting Ry.*, *Miller's Case*, *Kernaghan v. Dublin Trunk Connecting Ry.*, *James's Case*, *Marley's Case* (1867), L. R. 3 Q. B. 47.

7897. Judgment erroneous ex facie.]—Error on the face of the record is no ground for the ct. refusing to issue a writ of *sci. fa.* against a shareholder for obtaining execution & judgment recovered against the co.—*WILLIAMS v. SIDMOUTH RAILWAY & HARBOUR Co.* (1867), L. R. 2 Exch. 284; 36 L. J. Ex. 184; 16 L. T. 425; 15 W. R. 995.

7898. Notice of filing scheme of arrangement—Under Railway Companies Act, 1867 (c. 127), s. 9.]—After publication in the Gazette of notice of the filing of a scheme of arrangement by a railway co. under the above Act, creditors of the co. will not be allowed, without first obtaining leave of the ct., to issue execution upon a writ of *sci. fa.* obtained pursuant to 1845 Act, s. 36, against shareholders of the co.; the amount of capital remaining to be paid, in respect of which the *sci. fa.* has been obtained, being property of the co. within sect. 9 of the Act of 1867.—*Re DEVON & SOMERSET RY. Co.* (1) (1868), L. R. 6 Eq. 610; 37 L. J. Ch. 914; 18 L. T. 631; 17 W. R. 133.

Annotation:—*Refd.* *Devas v. East & West India Dock Co.* (1889), 58 L. J. Ch. 522.

7899. Appointment of receiver—Under Railway Companies Act, 1867 (c. 127), s. 4.]—The appointment of a receiver of the undertaking of a railway co. under the above sect. does not affect the right of a judgment creditor to issue execution against unpaid capital under 1845 Act, s. 36.—*Re WEST LANCASHIRE RY. Co.* (1890), 63 L. T. 56; 6 T. L. R. 425.

(d) Practice and Procedure.

See, now, R. S. C., Ord. 42, r. 23.

7900. Affidavit in support of application—How

Sect. 6.—Membership: Sub-sect. 4, B. (d); sub-sect. 5. Sect. 7: Sub-sect. 1.]

entitled.]—The affidavits upon a motion for a *sci. fa.* against a shareholder in a railway co. are properly intitled in the original action.—EDWARDS v. KILKENNY & GREAT SOUTHERN & WESTERN RY. CO., *Re* ROBERTS (1858), 3 C. B. N. S. 786; 140 E. R. 952.

7901. — Sufficiency of contents.]—An affidavit in support of an application, under 1845 Act, for a *sci. fa.* for execution against a shareholder on a judgment against a railway co., stated that the deponent “having been foiled in his attempts to obtain a sight of the register, & so obtain authentic & official information on the subject, deponent instituted inquiries *aliunde* as to who really were the shareholders of the co., & hath been credibly informed by parties officially connected with the said railway, & which information deponent verily believes to be true, that the said F., who has been a director of the said co. from the commencement, was a duly registered shareholder of seventy shares in the said co., & that £1,085 was due thereon in respect of subscriptions not called up, the shares in the said co. being £20 shares, & only £4 10s. per share having been paid up or called”:—*Held*: this affidavit unanswered was good *prima facie* evidence of the party being a shareholder of the co.—RASTRICK v. DERBYSHIRE, STAFFORDSHIRE & WORCESTERSHIRE JUNCTION RY. CO. (1853), 9 Exch. 149; 7 Ry. & Can. Cas. 799; 23 L. J. Ex. 2; 22 L. T. O. S. 79; 17 Jur. 977; 2 W. R. 14; 156 E. R. 64.

7902. — —.]—A *sci. fa.* will not be granted upon an affidavit merely stating that the judgment has been obtained against the co., & that two writs of *fi. fa.* issued against them, & had been returned *nulla bona*.—*Re* EMERY, HITCHINS v. KILKENNY & GREAT SOUTHERN & WESTERN RY. CO. (1850), 10 C. B. 160; 20 L. J. C. P. 31; 16 L. T. O. S. 194; 15 Jur. 336; 138 E. R. 66; *sub nom.* HICHINS v. KILKENNY GREAT SOUTHERN & WESTERN RY. CO., 1 L. M. & P. 712.

*Annotations:—***Refd.** Devereux v. Kilkenny & G. S. & W. Ry., *Re* Emery (1850), 5 Exch. 834; Kilkenny & G. S. & W. Ry. v. Feilden (1851), 6 Exch. 81.

7903. —.]—To entitle a judgment creditor of a railway co. to a *sci. fa.* against a shareholder, under 1845 Act, s. 36, it is not enough to show that a *fi. fa.* has been issued against the co., & returned *nulla bona*: the affidavit must go on to allege circumstances to satisfy the ct. that due diligence has been used by pltf. to discover property of the co. out of which he might obtain satisfaction of the judgment.—HITCHINS v. KILKENNY & GREAT SOUTHERN & WESTERN RY. CO. (1854), 15 C. B. 459; 2 C. L. R. 1755; 139 E. R. 504.

7904. — —.]—On an application for a *sci. fa.*, under 1845 Act, it is sufficient if, after stating the sheriff's return of *nulla bona* to the writ of *fi. fa.*, the deponent distinctly swears that the co. have not had since the judgment any goods, chattels, etc. in England, Ireland or elsewhere, upon which the debt might be levied; & it is not necessary in that case that he should go on to state any inquiries or any other grounds for his belief or any other writs issued, nor any facts showing that due diligence has been used to discover property of the co.—NIXON v. KILKENNY RY. CO. (1856), 1 H. & N. 47; 2 Jur. N. S. 427; 4 W. R. 490; 156 E. R. 1112; *sub nom.* NIXON v. KILKENNY & GREAT SOUTH-WESTERN RY. CO., *Re* BUCKLEY, 25 L. J. Ex. 249.

*Annotation:—***Consd.** Wyatt v. Darenth Valley Ry. (1857), 2 C. B. N. S. 110.

7905. Service of rule.]—Service of a rule for an execution against a shareholder of a joint-stock co., must be personal, or by leaving it at his place of abode; delivering it to his attorney, though at his request, will not do.—EDWARDS v. KILKENNY & GREAT SOUTHERN & WESTERN RY. CO. (1857), 1 C. B. N. S. 409; 28 L. T. O. S. 289; 140 E. R. 168.

7906. Enlargement of rule—To enable judgment to be set aside—Judgment obtained by collusion.]—On an application for a *sci. fa.* against a shareholder, upon a judgment against the co., the ct. refused to enlarge the rule so as to enable the shareholder to set aside the judgment which he alleged had been obtained by collusion between pltf. and the directors of the co.—EDWARDS v. KILKENNY & GREAT SOUTHERN & WESTERN RY. CO. (1857), 2 C. B. N. S. 397; 140 E. R. 471; *sub nom.* EDWARDS v. KILKENNY & GREAT SOUTHWESTERN RY. CO., *Re* BUTTERWORTH, 26 L. J. C. P. 224; 3 Jur. N. S. 590.

7907. Filing sheriff's return to abortive writs—Time for.]—To entitle a creditor to *sci. fa.* against a shareholder in a railway co., under 1845 Act, s. 36, it is not necessary that the sheriff's returns to abortive writs issued against the co. should have been actually filed at the time of the motion.—ILFRACOMBE RY. CO. v. DEVON & SOMERSET RY. CO. (1866), L. R. 2 C. P. 15.

7908. Form of order.]—The proper form of order, under 1845 Act, s. 36, against shareholders whose shares are not fully paid-up, should direct them to pay the money into ct. by a certain day, unless they show cause against doing so in the meantime.—HEALEY v. CHICHESTER & MIDHURST RY. CO. (1870), L. R. 9 Eq. 148; 39 L. J. Ch. 387; 21 L. T. 811; 18 W. R. 270.

SUB-SECT. 5.—TRUSTEES AND EXECUTORS AS MEMBERS.

7909. Who is trustee—Chairman of company—Holding shares on company's behalf in another company.]—The chairman of a co., with the assent of the co., held in his name shares in another co., which had been purchased with the money of the first named co. The chairman became bkpt.:—*Held*: though the purchase by one co. of shares in another co. was illegal, the shares were not within the order & disposition of the bkpt. so as to pass to his assignees, & he must transfer them as the co. should direct.—GREAT EASTERN RY. CO. v. TURNER (1872), 8 Ch. App. 149; 42 L. J. Ch. 83; 27 L. T. 697; 21 W. R. 163, L. C.

*Annotations:—***Mentd.** Percival v. Wright, [1902] 2 Ch. 421; Young v. Naval, Military & Civil Service Co-op. Soc. of South Africa, [1905] 1 K. B. 687.

7910. Whether company bound to recognise trust.]—The person whose name appears on the register as the holder of shares in a railway co., though he is a mere trustee, is alone liable to the co. for calls; but by special contract the *cestui que trust* may be made liable. The 1845 Act regards only legal relations, & gives no remedy to the co. against the equitable owner of shares to compel him to pay calls in arrear. Though the ct., in the absence of express contract, cannot, at the instance of the co., enforce payment of arrears on calls against a *cestui que trust* of shares, it can enforce trusts, at the instance of the parties to the trust, as against each other.—NEWRY, ETC. RY. CO. v. MOSS (1851), 14 Beav. 64; 20 L. J. Ch. 633; 17 L. T. O. S. 206; 15 Jur. 437; 51 E. R. 211.

*Annotation:—***Refd.** *Re* North of England Joint Stock

Banking Co., *Straffon's Executors' Case* (1852), 1 De G. M. & G. 576.

7911. —.]—*BARTON v. NORTH STAFFORDSHIRE RY. CO.*, No. 8083, *post*.

7912. —.]—*BARTON v. LONDON & NORTH WESTERN RY. CO.*, No. 8063, *post*.

Executor—Liability for calls.]—*See Sect. 8, subsect. 5, D., post*.

SECT. 7.—THE REGISTER OF MEMBERS.

SUB-SECT. 1.—IN GENERAL.

7913. Time for making & sealing.]—The time within which by 1845 Act, s. 9, a register of shareholders is to be made & sealed, is merely directory; & a register containing the several particulars required by the Act, & *bonâ fide* intended to be a register, may be valid, though sealed at a subsequent period. A party may be liable as a shareholder for calls, under sect. 27, although the register may not have been made & sealed within the time prescribed by sect. 9.—*WOLVERHAMPTON NEW WATERWORKS CO. v. HAWKSFORD* (1861), 11 C. B. N. S. 456; 31 L. J. C. P. 184; 5 L. T. 618; 8 Jur. N. S. 844; 10 W. R. 153; 142 E. R. 874, Ex. Ch.

Annotations:—*Consd. Irish Peat Co. v. Phillips* (1861), 1 B. & S. 629. *Distd. East Gloucestershire Ry. v. Bartholomew* (1867), L. R. 3 Exch. 15. *Consd. Burke v. Lechmere* (1871), L. R. 6 Q. B. 297. *Refd. Portal v. Emmens* (1876), 1 C. P. D. 201; *Re Printing, Telegraph & Construction Co. of the Agence Havas, Cammell's Case* (1894), 63 L. J. Ch. 536.

7914. —.]—*BURKE v. LECHMERE*, No. 7864, *ante*.

7915. Form—Amalgamation of several companies into one.]—*MANCHESTER RY. CO. v. BLINKHORN* (1849), 14 L. T. O. S. 131.

7916. —.]—(1) It is no plea in bar to an action for calls that the co., after bringing their action, have, under the power of their Acts of Parliament, forfeited & cancelled the shares, & issued new shares in lieu thereof, & by that means have supplied the deficient capital, but in the event of new shares being issued, the ct. will stay proceedings on debt's paying the portion of the debt & costs beyond the value of the new shares. There is no substantial difference, as far as the shareholder's liability for calls is concerned, between the forfeiture & the cancellation of the shares in respect of which the calls are sued for.

(2) Where a co. for convenience keep their register of shareholders in several volumes, it is a sufficient compliance with 1845 Act, s. 9, that the last volume of the series be authenticated with the common seal of the co. *Semble*: the last volume need not contain a recapitulation of the contents of the prior volumes.

A meeting of a committee of directors was adjourned, & a minute of the adjourned meeting only was signed by the chairman of both meetings, but subsequent minutes treated both as one meeting, & a witness proved that he was present at both, & that they were one continuous meeting:—*Held*: (3) the unsigned minute was admissible in evidence of what took place the first day; (4) what then took place could also be proved by the witness who was present.—*INGLIS v. GREAT NORTHERN RY. CO.* (1852), 19 L. T. O. S. 149; 16 Jur. 895; 1 Macq. 112, H. L.

7917. Mode of keeping—Necessity for strict compliance with statutory provisions.]—The Companies Clauses Consolidation (Scotland) Act, 1845 (c. 17), s. 9, requires, in the same terms as 1845 Act, a book to be kept, containing, in alphabetical order the names of the shareholders,

with the number of the shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, & the amount of the subscriptions paid on such shares. Sect. 29 of the former Act makes such book *primâ facie* evidence of a person being a shareholder, & of the number & amount of his shares:—*Held*: (1) as this was an exceptional privilege in favour of the co., the provisions of the former Act with respect to the mode of keeping the book must be strictly complied with; (2) an entry in the book, describing A. as possessed of a certain number of shares, numbered from one given number to another given number, & stating a gross amount as paid upon these shares, was a sufficient compliance with those provisions, so as to render the book admissible in evidence.

(3) The former Act requires that a book, to be called the "Register of Shareholders" shall be kept. The book actually kept was marked "Register of Proprietors":—*Held*: this variation in the title did not prevent it from being given in evidence.—*BAIN v. WHITEHAVEN & FURNESS JUNCTION RY. CO.* (1850), 3 H. L. Cas. 1; 10 E. R. 1, H. L.

Annotation:—*As to* (1) *Refd. East Gloucestershire Ry. v. Bartholomew* (1867), L. R. 3 Exch. 15.

7918. —.]—1845 Act, s. 8, enacts that a person shall be deemed a shareholder "who shall have subscribed, etc., & whose name shall have been entered on the register of shareholders hereinafter mentioned:" sect. 9 prescribes the mode of making & keeping the register & (*inter alia*) that it shall "distinguish each share by its number:"—*Held*: sect. 8 was complied with, although the register did not show the distinguishing numbers of debt's shares, it being proved, *aliunde*, that the shares were in fact numbered. *Semble*, the provisions in sect. 9, as to the mode of keeping the register are directory only, except with reference to the use of the register as *primâ facie* evidence under sect. 28. Pltf.'s special Act provided, "that the co. should not issue any shares created under the authority of this Act, nor should any share vest in the person accepting the same, until one-fifth of the amount of the share was paid up":—*Held*: the word "issue" referred to the issuing of certificates of shares, & the word "vest" to the vesting of shares so as to be property & capable of transfer; but that the sect. did not make the payment of one-fifth a condition precedent to the liability as a shareholder of the person accepting the share.

In an action for calls, brought by a co. incorporated under 1845 Act, debts' names were upon the register of shareholders kept under the 9th sect. of the Act, & it was proved that they had executed the subscription contract, & that their shares were distinguished by specific numbers, in accordance with sect. 6 of the Act. The register did not, however, contain the numbers by which the shares were distinguished:—*Held*: the omission so as to distinguish the shares in the register did not prevent the company from recovering.

Semble: if the register had been relied on under sect. 28 of the Act as *primâ facie* evidence that debts. were shareholders, & no other evidence had been given of their liability, the co. could not have succeeded, as there would then have been no proof that the shares were distinguished by numbers, in accordance with sect. 6.—*EAST GLOUCESTERSHIRE RY. CO. v. BARTHOLOMEW* (1867), L. R. 3 Exch. 15; 37 L. J. Ex. 17; 17 L. T. 256.

Annotations:—*Consd. Portal v. Emmens* (1876), 1 C. P. D.

Sect. The Sub-sects. 1 & 2.]
 201; *Re* Printing, Telegraph & Construction Co. of Agence Havas, *Ex p.* Cammell. No. 2 (1894), 38 Sol. Jo. 437. *Refd.* *Re* Bahia & San Francisco Ry. (1868), L. R. 3 Q. B. 584; *Re* West London Wharves & Warehouses Co., Purdey's Case (1868), 16 W. R. 660; McEuen v. West London Wharves & Warehouses Co. (1871), 6 Ch. App. 655; McIlwrath v. Dublin Trunk Connecting Ry. (1871), 7 Ch. App. 134; *Re* Lotheby & Christopher, Jones's Case (1904), 52 W. R. 460.

——— To make register admissible in evidence.]—See Sub-sect. 2, *post*.

7919. *How entitled.*]—BAIN v. WHITEHAVEN & FURNESS JUNCTION RY. CO., No. 7917, *ante*.

7920. *Removal of seal—Mandamus.*]—The ct. will not grant a *mandamus* commanding a railway co. to take the seal off the register of shareholders, on a suggestion that it was affixed without authority, & contrary to 1845 Act, ss. 9, 66, 75, 90.—*Ex p.* NASH (1850), 15 Q. B. 92; 19 L. J. Q. B. 296; 15 L. T. O. S. 111; 117 E. R. 393; *sub nom.* *Re* WATERFORD, WEXFORD, WICKLOW & DUBLIN RY. CO., *Ex p.* NASH, 14 Jur. 574.

SUB-SECT. 2.—AS EVIDENCE.

7921. *General rule.*]—By 51 Geo. 3, c. lx, the register book of the B. C. Co. is evidence, in an action brought by them for calls, of deft.'s being proprietor of the number of shares affixed to his name.—BRISTOL CANAL CO. v. AMOS (1813), 1 M. & S. 569; 105 E. R. 212.

7922. —.]—In an action by a railway co. for calls, *pltf.* produced a sealed register containing the name of deft. as the holder of certain shares. They also gave evidence of his handwriting to a letter, requesting the secretary of the co. to register his shares. The secretary stated that that letter was his only authority for placing deft.'s name on the register; & deft. then gave the strongest evidence that the letter was not in his handwriting. The learned judge then told the jury that the sealed register of shares was made by 1845 Act, s. 28. *primâ facie* evidence that the persons named therein were shareholders; & that the question for them was whether that *primâ facie* evidence had been rebutted; & that though deft. had disproved his writing the letter, they might not be satisfied that he had not authorised some one else to write it:—*Held*: no misdirection.

As to the first call I cannot help thinking that the effect of the Acts was this, that any call previous to the amalgamation was to be considered as a call upon a share in the new co., & if so it necessarily follows that the right to the call is vested in the new co. & that the new co. may sue assuming that they have created new shares & done what was necessary to give them the right (PATTESON, J.).—MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. v. BLINKHORN (1849), 13 L. T. O. S. 70.

7923. —.]—MIDLAND GREAT WESTERN RY. CO. OF IRELAND v. LEECH, No. 7857, *ante*.

7924. *Seal not affixed—To register.*]—By 6 Will. 4, c. lxxvii, in an action for calls on shares in the Cheltenham & Great Western Union Ry. Co., the book of shares, under the seal of the co., shall be *primâ facie* evidence that a party is proprietor of shares. A call was made in Oct. 1836, & the book of shares, which contained the name of deft. as a shareholder, was made up before the end of Sept. 1836, from claims sent in by different parties, but the seal was not affixed to it till Nov. 1836:—*Held*: this book was no evidence that

deft. was a proprietor of shares at the time of the call in Oct. 1836.—CHELTENHAM RY. CO. v. PRICE (1839), 9 C. & P. 55, N. P.

Annotation:—*Refd.* London Grand Junction Ry. v. Freeman (1841), 2 Ry. & Can. Cas. 468.

7925. — To all entries.]—A railway Act, 6 & 7 Will. 4, c. civ, s. 145, directed that the co. should cause "the names of the several corps., & the names & additions of the several persons who shall then be or who shall from time to time thereafter become entitled to shares in the said undertaking, with the number of shares they are respectively entitled to, & the amount of the subscriptions paid thereon, & also the proper number by which every share shall be distinguished to be fairly & distinctly entered in a book to be kept by the said co., & after such entry made to cause their common seal to be affixed thereto." By sect. 147 the co. was also required to keep a book containing "a true account of the place of abode of the several proprietors of the said undertaking." By sect. 152, in any action to be brought by the co. against any proprietor for the time being of any share in the said undertaking, to recover money due in respect of any call, it was enacted that, "in order to prove that deft. was a proprietor of such share in the said undertaking as alleged, the production of the book in which the said co. is by this Act directed to enter & keep the names & additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, & of the places of abode of the several proprietors of the said undertaking, & of the several persons & corps. who shall from time to time become proprietors thereof, or be entitled to shares therein, shall be *primâ facie* evidence that such deft. is a proprietor, & of the number & amount of his shares therein":—*Held*: (1) the book referred to in sect. 152 was the book which the co. were directed to keep by sect. 145; (2) a book kept by them which was intended to be kept under the provisions of the last-mentioned clause, containing the names & additions of all persons whom the co. supposed to be the persons entitled to shares, together with the numbers of those shares, though not in all cases the amount of subscription paid thereon, & also the proper number by which each share was distinguished, & which book was sealed from time to time by the common seal of the co., was a sufficient compliance with the Act, so as to render the book admissible in evidence, notwithstanding the book contained the names of persons not entitled to shares, & omitted those of others who were, & although there were some entries to which no seal had ever been affixed; (3) the *primâ facie* evidence of deft. being a proprietor, established by the production of the book, was not rebutted by proof that a third party was the original subscriber in respect of the shares in question, & the shares had not been conveyed to deft. by deed as required by sect. 155 of the Act.—LONDON GRAND JUNCTION RY. CO. v. FREEMAN (1841), 2 Man. & G. 606; 2 Ry. & Can. Cas. 468; 2 Scott, N. R. 705; 133 E. R. 888, Ex. Ch.

Annotations:—As to (1) *Folld.* Birmingham, Bristol & Thames Junction Ry. v. Locke (1841), 1 Q. B. 256; London Grand Junction Ry. v. Graham (1841), 2 Ry. & Can. Cas. 870. *Refd.* Cheltenham & Great Western Union Ry. v. Daniel, Cheltenham & Great Western Union Ry. v. De Medina (1841), 2 Ry. & Can. Cas. 728; Mid. G. W. Ry. v. Gordon (1847), 5 Ry. & Can. Cas. 76. As to (2) *Apld.* West London Ry. v. Bernard (1843), 3 Ry. & Can. Cas. 649; Wolverhampton New Waterworks Co. v. Hawksford (1860), 7 C. B. N. S. 795. *Refd.* Portal v. Emmens (1876), 1 C. P. D. 201. As to (3) *Refd.* *Re* North of England Joint Stock Banking Co., *Stratton's* Executors' Case (1852), 1 De G. M. & G. 576.

Mentd. Aylesbury Ry. v. Thompson (1841), 2 Ry. & Can. Cas. 668.

7926. Register not kept in strict compliance with statutory provisions—Number of shares omitted.]—By 6 Will 4, c. xxix, s. 84, it is provided that in an action for calls, in order to prove that deft. was a proprietor of such shares in the undertaking as alleged, the production of the book in which the secretary of the co. is directed to enter & keep a list of the names, etc. of the several proprietors of shares, with the number of shares they are respectively entitled to hold, shall be *prima facie* evidence that such deft. is a proprietor, & of the number or amount of his shares therein. Sect. 89 requires the co. from time to time to cause the names, etc., of the persons from time to time entitled to shares, with the number of their shares & amount of subscriptions paid thereon, & the proper number by which every such share shall be distinguished, to be entered in a book to be kept by the secretary:—**Held:** (1) the provision as to the making the entries was only directory, & an omission or irregularity in the entries in the book, relating to other shareholders, did not render the book inadmissible against deft., as being the book kept under the act; (2) it was not necessary that the entries should be made by the secretary's hand.

Sect. 63 directs, that the orders & proceedings of every meeting of the co. shall be entered in a book to be kept for that purpose, & shall be signed by the chairman at such meeting: & when so entered & signed, as also the minutes or entries hereinafter provided to be kept, shall be deemed original order & proceedings, & shall be allowed to be read in evidence in all cts. etc., without proof of such meeting having been duly convened, or of the persons making or entering such orders, etc., being proprietors or directors of the co. Sect. 75 provides that the directors shall keep a regular minute & entry of the orders & proceedings at every meeting of directors, which shall be signed by the chairman at each respective meeting:—**Held:** (3) the signature of the minutes by the chairman of the meeting, when presiding at the subsequent meeting, was sufficient; (4) the terms "directors" & "court of directors" were equivalent, so that the calls might be made by a ct. of directors, & a general meeting was not necessary for that purpose.

Sect. 84, giving the form of declarations for calls, & the proofs necessary, provides that the co. shall recover what shall appear due, including interest at £5 per cent.:—**Held:** (5) it was not necessary to inset a count for interest, which might be added by the jury to the debt claimed for the calls.—**SOUTHAMPTON DOCK CO. v. RICHARDS** (1840), 1 Man. & G. 448; 2 Ry. & Can. Cas. 215; 1 Scott, N. R. 219; 133 E. R. 408.

Annotations:—As to (1) **Folld.** London Grand Junction Ry. v. Freeman (1842), 2 Man. & G. 606. **Apld.** Wolverhampton New Waterworks v. Hawksford (1860), 7 C. B. N. S. 795. **Refd.** Portal v. Emmens (1876), 1 C. P. D. 201. As to (3) **Folld.** Miles v. Bough (1842), 3 Q. B. 845; West London Ry. v. Bernard (1843), 3 Q. B. 873. As to (4) **Refd.** Re British Sugar Refining Co. (1857), 3 K. & J. 408.

7927. ———.]—BAIN v. WHITEHAVEN & FURNESS JUNCTION RY. CO., No. 7917, ante.

7928. ———.]—EAST GLOUCESTERSHIRE RY. CO. v. BARTHOLOMEW, No. 7918, ante.

7929. ——— Amount of subscriptions paid omitted.]—LONDON GRAND JUNCTION RY. CO. v. FREEMAN, No. 7925, ante.

7930. ———.]—BIRMINGHAM, BRISTOL & THAMES JUNCTION RY. CO. v. LOCKE, No. 8108, post.

7931. ———.]—BAIN v. WHITEHAVEN & FURNESS JUNCTION RY. CO., No. 7917, ante.

7932. ——— Additions of other shareholders omitted—Name & addition of defendant properly described.]—LONDON & BRIGHTON RY. CO. v. FAIRCLOUGH, No. 7991, post.

7933. ——— Names of some shareholders omitted.]—LONDON GRAND JUNCTION RY. CO. v. FREEMAN, No. 7925, ante.

7934. ———.]—A railway Act enacted that the co. should, at a meeting, & from time to time afterwards, enter in a book, to be kept by them, the names & additions of the persons who should then be, or should thereafter from time to time become, entitled to shares, & the number of shares held, & the amount of subscription paid by each. Power was given to the co. to make calls, & recover the amount by action; & in actions for calls, the book was to be *prima facie* evidence that the party registered therein was a proprietor, & of the number & amount of his shares. The Act also empowered proprietors to sell their shares; the conveyance to be in a certain written or printed form, & stamped, & a memorial thereof to be entered; & till such entry the seller was to remain liable for calls, & the buyer have no right to profits.

Before the passing of the Act, A. & B. became respectively possessed of scrip certificates of certain shares which had belonged to subscribers. The certificates stated respectively that the holders, having signed the parliamentary contract required by the standing orders, & agreed to pay all calls, were the proprietors of shares, etc. After the passing of the Act, the co. advertised for holders of scrip to bring it in to be registered. A. & B. brought in their certificates accordingly; & the shares were registered in their respective names. No memorial of a sale to either was ever entered. A. afterwards attended a half-yearly meeting of the co.; & B. paid a call on his shares. In actions against A. & B. for calls:—**Held:** (1) the want of a memorial did not prevent A. or B. from being liable as a proprietor; (2) the book, containing the requisite particulars as to A. & B., was evidence against them, though it did not contain the names of all the original subscribers.—**LONDON GRAND JUNCTION RY. CO. v. GRAHAM** (1841), 1 Q. B. 271; 2 Ry. & Can. Cas. 870; 113 E. R. 1133.

7935. ——— Names of persons not entitled to shares inserted.]—LONDON GRAND JUNCTION RY. CO. v. FREEMAN, No. 7925, ante.

7936. Whether proof of sealing necessary.]—In an action by a railway co. for calls, the register of shareholders produced by an officer of the co., purporting to bear the seal of the co., is admissible in evidence under 1845 Act, s. 28, without proof that the seal was affixed at an ordinary meeting of the shareholders as directed in sect. 9 of the Act.—**DERBYSHIRE RY. CO. v. TOMLINSON** (1848), 12 L. T. O. S. 124.

7937. ———.]—Under 1845 Act, s. 28, the register of shareholders, having thereon the seal of the co., is admissible in evidence, without proof that the seal was duly affixed to the document at an ordinary meeting of the co., in pursuance of sect. 9 of the Act.—**LONDON & NORTH WESTERN RY. CO. v. M'MICHAEL** (1850), 5 Exch. 855; 155 E. R. 374; *sub nom.* NORTH-WESTERN RY. CO. v. M'MICHAEL, 20 L. J. Ex. 6; 16 L. T. O. S. 129; *sub nom.* NORTH-WESTERN RY. CO. v. M'DANIEL, 14 Jur. 987.

7938. Entry of trustee shareholders as "B. & others"—Whether evidence against B.'s co-trustees—Names set out at length in list of shareholders.]—Shares were allotted to B. & T., &

Sect. 7.—The register of members: Sub-sects. 2, 3

4. Sect. 8: Sub-sects. 1, 2 & 3.]

another, as trustees, & their names were entered on the alphabetical list of shareholders, pursuant to 1844 Act, s. 9; but the sealed register of the co. described the holders of the shares to be "B. & others." The secretary notified to B. the allotment of the shares, & B. wrote in reply accepting them:—*Held*: the sealed register only, is, by sect. 28 of the above Act, made *prima facie* evidence of a party being a shareholder; here it was no evidence against T., who was not individually named in it; & there was no proof that T. agreed to accept the shares allotted to him & his co-trustees.—*BIRKENHEAD, LANCASHIRE & CHESHIRE JUNCTION RY. CO. v. BROWNRIGG* (1849), 4 Exch. 426; 6 Ry. & Can. Cas. 47; 19 L. J. Ex. 27; 14 L. T. O. S. 135; 13 Jur. 943; 154 E. R. 1279.

7939. In criminal prosecution.]—On an indictment for forging & uttering a transfer of shares in a railway co.:—*Held*: the register of shareholders bearing the seal of the co., & kept according to 1845 Act, s. 9, is evidence to show that an individual is a shareholder, without further authentication; & in order to prove that such individual is liable to be defrauded by the forging & uttering of a transfer of the shares, it is not necessary to give further proof of his title to the shares.—*R. v. NASH* (1852), 2 Den. 493; 21 L. J. M. C. 147; 16 J. P. 376; 16 Jur. 553, C. C. R.

SUB-SECT. 3.—INSPECTION.

7940. Nature of right to inspect—1845 Act, ss. 45, 63.]—*HOLLAND v. DICKSON*, No. 8461, *post*.

7941. — Includes right to take copies.]—*MUTTER v. EASTERN & MIDLANDS RY. CO.*, No. 8459, *post*.

7942. — Shareholders' address book.]—The right given to a shareholder by 1845 Act, s. 10, to have a copy of the shareholders' address book is a private right conferred on him as a member of the co. & not as a member of the public. The appropriate remedy for enforcing this right is either an injunction to restrain the co. from refusing to supply or a mandatory injunction directing the co. to supply him with the copy required. In granting this relief there is no jurisdiction to inquire into the motives of appct.—*DAVIES v. GAS LIGHT & COKE CO.*, [1909] 1 Ch. 708; 78 L. J. Ch. 445; 100 L. T. 553; 25 T. L. R. 428; 53 Sol. Jo. 399; 16 Mans. 147, C. A.

7943. Who may exercise right—Shareholder acting as solicitor for litigant against company.]—T. was a solr. to a client who had a litigation with the W. Co., of which T. was a shareholder. T. demanded inspection of the shareholders' list of the W. Co. with a view to get the addresses of & canvass the other shareholders not to carry on further litigation with T.'s client:—*Held*:—T. was entitled to a *mandamus* to inspect the shareholders' register, as the object was not necessarily improper.—*R. v. WILTS & BERKS CANAL NAVIGATION* (1874), 29 L. T. 922; 38 J. P. 311.

7944. — Nominee of rival company.]—*MUTTER v. EASTERN & MIDLANDS RY. CO.*, No. 8459, *post*.

— Judgment creditor of company applying to issue execution against shareholder—Execution against company unsatisfied.]—*See* Nos. 7881, 7882, 7886, *ante*.

7945. How right enforced—Application by judgment creditor.]—(1) Under 1845 Act, s. 36, a

party who has recovered judgment against a co. is not precluded from issuing execution against the shareholders who have not paid up for their shares, though lands of the co. have been delivered on *elegit*, if the proceeds of the lands be insufficient to satisfy the debt.

(2) In such a case, a *mandamus* issued commanding the co. to give the creditor inspection of the register of shareholders.—*R. v. DERBYSHIRE, ETC. RY. CO.* (1854), 3 E. & B. 784; 2 C. L. R. 1653; 23 L. J. Q. B. 333; 23 L. T. O. S. 155; 18 Jur. 1054; 118 E. R. 1335; *sub nom.* *R. v. WORCESTERSHIRE & STAFFORDSHIRE RY. CO.*, 2 W. R. 489.

Annotation:—As to (1) *Folld. Addison v. Tate* (1855), 11 Exch. 250.

7946. — — —.]—Sect. 36 of 1845 Act, gives a judgment creditor of a joint-stock co. a right to inspect the list of shareholders if he cannot have execution against the co. This right may be enforced by rule of ct. or order of a judge.—*MEADER v. ISLE OF WIGHT FERRY CO.* (1861), 9 W. R. 750.

7947. — — —.]—*HOLLAND v. DICKSON*, No. 8461, *post*.

7948. — — —.]—*DAVIES v. GAS LIGHT & COKE CO.*, No. 7942, *ante*.

7949. — Costs of application.]—Upon a rule for *mandamus* to inspect the register of debts.' co. by one of the proprietors, debts. opposed on the ground that appct. was prompted by improper motives. Although the majority made the rule absolute, one of the ct. expressed his opinion that the object of the application was not justifiable, & dissented from the decision:—*Held*: this was no ground for setting aside the ordinary rule, by which costs are given to the successful party.—*R. v. WILTS & BERKS CANAL NAVIGATION* (1874), 30 L. T. 498.

SUB-SECT. 4.—RECTIFICATION.

7950. By company—Grounds for rectifying.]—By the Acts of Parliament incorporating & regulating debts., a railway co., they were required to keep a register of the proprietors of stock in the co.; each proprietor was empowered to transfer his stock by a prescribed form of transfer, executed by the transferor & the transferee; & each transfer was to be registered by debts., the transferee to take no interest until such registration. A judgment obtained by debts. against M., a widow, in May, 1857, being still unsatisfied, she in the following Oct. furnished a married woman, D., with money to buy stock for her in debts.' co. On Oct. 14, D. bought the stock, & took & signed a transfer of it, which was in due form, in the name of W., widow. Debts. registered this transfer, & transferred the stock into that name. On Aug. 29, 1858, D., by M.'s directions, resold the stock in the name of W. Pltfs. then purchased it *bond fide*, & in the belief that D.'s name was W., & that she was a widow. A formal transfer from D., by that name & description, to pltfs. was, on Sept. 10, 1858, registered by debts., & the stock transferred into pltfs.' names. D. paid over to M. the money received from pltfs. for the stock. Both in the original purchase & in the resale, D. acted without her husband's knowledge or intervention, & in collusion with & for the sole benefit of M., in order to prevent debts. from satisfying their judgment. Debts. believed both transactions to be *bond fide*, & that D. was the person whom she represented herself to be. On Sept. 6, 1858, M., who had not then received from D. the money paid by pltfs. for the stock, petitioned the Insolvent Ct., & the

next day that ct. made a vesting order. On Sept. 17, 1858, defts. first discovered the real state of facts. On Oct. 21, 1858, they cancelled the entry in their books of the transfer of the stock to pltfs., & transferred the stock into the name of M.'s assignee appointed by the Insolvent Ct. Thereupon pltfs. brought this action, in which they claimed a *mandamus* to defts. to register the transfer to them, & to enter their names as proprietors of the stock. On a case stated, after writ & without pleadings, setting out the above facts:—*Held*: pltfs. were entitled to be replaced on the register, no fraud on their part being shown, & they having a title, whether legal or merely equitable was immaterial, to the stock; their names, having been once placed by defts. on the register, were not removable therefrom at the mere will of defts., but only on proof, of which there was none, of a better title in some other person.—*WARD v. SOUTH-EASTERN RY. CO.* (1860), 2 E. & E. 812; 29 L. J. Q. B. 177; 2 L. T. 212; 6 Jur. N. S. 890; 8 W. R. 468; 121 E. R. 304.

Annotation:—*Consd. R. v. Charnwood Forest Ry.* (1884), Cab. & El. 419.

SECT. 8.—SHARES.

SUB SECT. 1.—IN GENERAL.

Nature—Generally.—*See* Part III., Sect. 14, *ante*.

— **Whether “goods & chattels”**—*Within Bankruptcy Acts.*—*See* BANKRUPTCY & INSOLVENCY, Vol. V., pp. 748, 749, Nos. 6456–6462.

7951. — **Whether subject to dower as realty.**—The shares in the navigation of the river Avon, under 10 Anne, are real estate, & subject to dower.—*BUCKERIDGE v. INGRAM* (1795), 2 Vcs. 652; 30 E. R. 824.

Annotations:—*Refd.* *Bligh v. Brent* (1837), 2 Y. & C. Ex. 268. *Mentd.* *Sheddon v. Goodrich* (1803), 8 Ves. 481; *R. v. Bates* (1816), 3 Price, 341; *Portmore v. Bunn* (1823), 1 B. & C. 694; *R. v. Avon Navigation Co.* (1829), 4 Man. & Ry. K. B. 23; *Playters v. Abbott* (1833), 3 L. J. Ch. 57; *Re Bute, Bute v. Ryder* (1884), 27 Ch. D. 196; *Hastings v. N. E. Ry.*, [1898] 2 Ch. 674.

7952. — **Whether bonâ notabilia in diocese wherein will of deceased shareholder proved.**—*R. v. WORCESTER & BIRMINGHAM CANAL NAVIGATION CO. & HODGKINSON*, No. 8095, *post*.

7953. **Classes of shares—Class rights—Division of shares into preferred & deferred half shares—Assent of holders of preferred half shares to scheme of arrangement by railway company.**—A ry. co. were empowered by their Act to divide their ordinary shares into preferred & deferred half shares & a large number of their shares were divided accordingly. There was no other power in the Act to issue preference shares. The co. filed a scheme of arrangement with their creditors under Railway Companies Act 1867 (c. 127), s. 6, to which they obtained the assent of the debentureholders, & also of the ordinary shareholders, including the holders of preferred & deferred half shares, at an extraordinary general meeting:—*Held*: the holders of preferred half shares did not form a class of preference shareholders whose

separate assent must be obtained under sect. 12 of the Act.—*Re BRIGHTON & DYKE RY. CO.* (1890), 44 Ch. D. 28; 59 L. J. Ch. 329; 62 L. T. 353; 38 W. R. 321, C. A.

See, further, RAILWAYS & CANALS.

SUB-SECT. 2.—THE CONTRACT TO TAKE SHARES.

Company as “person.”—*See* CORPORATIONS, Vol. XIII., pp. 351–353.

7954. **Whether within Public Authorities Protection Act, 1893 (c. 61)—Commercial company performing duties of public utility.**—*A.-G. v. MARGATE PIER & HARBOUR (COMPANY OF PROPRIETORS)*, No. 7818, *ante*.

—*See, further*, PUBLIC AUTHORITIES & OFFICERS.

7955. **How proved.**—*MILES v. BOUGH*, No. 8157, *post*.

SUB-SECT. 3.—SHARE CERTIFICATES AND SCRIP.

Compare Part III., Sect. 18, *ante*.

7956. **Share certificates—Nature of—Mere admission that shares registered in name of holder.**—

(1) A certificate of shares is merely a solemn affirmation under the seal of the co. that a certain amount of stock stands in the name of the individual mentioned in the certificate. (2) It is the duty of a person receiving, as an equitable mtge. of railway stock, the certificates of the shares thereof, to inquire what is the real position of the person pretending to mortgage it, for if such person has only the legal title by having the certificates in his possession, but is, in truth, merely the trustee for another, the equitable mtgee. will be unable to enforce his claim in opposition to the original *cestui que trust*.—*H.*, a banker, was the banker of a railway co., he was also one of its directors. Under certain business arrangements of the co. he was entrusted with the possession of certificates which represented shares, & those shares he held as trustee for the co.; he converted the shares; the conversion was noticed; he gave an explanation, replaced the shares, & continued to hold the certificates as before, & stood on the register as the apparent owner of them. He borrowed money of *R.*, & deposited the certificates with *R.*, who held them for some time, & died without having taken any step to be registered as the owner of the shares. *R.*'s widow & extrix. applied to be registered as the owner; her application was refused. She moved for a *mandamus* to compel registration:—*Held*: this was the ordinary case of a trustee abusing his trust; if *R.* had made proper inquiries he would have found that *H.* was only a trustee; negligence sufficient to affect their equitable title could not be imputed to the directors & the co., & consequently, the equitable title of *R.* could not prevail against the earlier equitable title of the co.

(3) Whether a transfer of shares in a co. can or cannot be made without the production of the

PART IX. SECT. 8, SUB-SECT. 2.

7955 i. **How proved.**—Pltf. subscribed to the list of subscribers for stock in proposed deft. co., subsequently formed, under the Rural Telephone Act, which list was forwarded with the petition as part of the information required by sect. 4, & paid for his share, the money going into the treasury of the co., but he did not subscribe

to the memorandum of assocn. of the co. nor was there any register of customers:—*Held*: pltf. was entitled to recognition as a shareholder.—*LINDSAY v. RED JACKET RURAL TELEPHONE CO.*, [1919] 3 W. W. R. 161.—CAN.

PART IX. SECT. 8, SUB-SECT. 3.

t. **Whether issue of scrip neces-**

sary.—The subscription to a stock book of a ry. co. is sufficient evidence of the person subscribing being a shareholder under the definition of that term, & the Railway Clauses Consolidation Act, & it is not necessary that scrip should be issued for the stock to constitute such a subscriber a shareholder.—*SMITH v. SPENCER* (1862), 12 C. P. 277.—CAN.

Sect. 8.—Shares: Sub-sects. 3 & 4, A., B. & C.]

certificates of the shares, is a matter entirely within the discretion of the directors (LORD CAIRNS, C.).

—SHROPSHIRE UNION RAILWAYS & CANAL CO. v. R. (1875), L. R. 7 H. L. 496; 45 L. J. Q. B. 31; 32 L. T. 283; 23 W. R. 709, H. L.; *reversg.* S. C. *sub nom.* R. v. SHROPSHIRE UNION RAILWAYS & CANAL CO. (1873), L. R. 8 Q. B. 420, Ex. Ch.

Annotations:—*As to (1) Reqd.* Rimmer v. Webster, [1902] 2 Ch. 163; Longman v. Bath Electric Tramways, [1905] 1 Ch. 646. *As to (2) Reqd.* Ortigosa v. Brown (1878), 47 L. J. Ch. 168; R. v. Charnwood Forest Ry. (1884), Cab. & El. 419; *Re* Vernon, Ewens, & Co. (1886), 33 Ch. D. 402; Roots v. Williamson (1888), 38 Ch. D. 485; Carritt v. Real & Personal Advance Co. (1889), 42 Ch. D. 263; Powell v. London & Provincial Bank, [1893] 1 Ch. 610; Lloyd's Bank v. Bullock, [1896] 2 Ch. 192; Rimmer v. Webster, [1902] 2 Ch. 163; Burgis v. Constantine, [1908] 2 K. B. 484; Coleman v. London County & Westminster Bank, [1916] 2 Ch. 353. *As to (3) Consd.* Rainford v. Keith & Blackman Co., [1905] 1 Ch. 296. *Reqd.* Ortigosa v. Brown (1878), 47 L. J. Ch. 168; Soc. Général de Paris v. Walker (1885), 11 App. Cas. 20. *Generally, Mentd.* Bradley v. Riches (1878), 9 Ch. D. 189; R. v. Lambourn Valley Ry. (1888), 22 Q. B. D. 463; Union Bank of London v. Kent (1888), 39 Ch. D. 238; *Re* Richards, Humber v. Richards (1890), 45 Ch. D. 589; Taylor v. Russell, [1891] 1 Ch. 8; Ward v. Duncombe, [1893] A. C. 369; *Re* Wasdale, Brittin v. Partridge, [1899] 1 Ch. 163; Lloyd's Bank v. Pearson, [1901] 1 Ch. 865; Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231; Walker v. Linom, [1907] 2 Ch. 104; Hill v. Peters, [1918] 2 Ch. 273.

7957. ——— Primâ facie evidence of title only.]—A certificate of shares is only *primâ facie* evidence that the holder is entitled to the same, and a co. is justified in refusing to place either of two rival claimants upon the register of shareholders unless he shows that he has a good & sufficient title to the shares; & where a co. has issued certificates to two persons in respect of the same shares, neither of whom has been registered as holder thereof under the Cos. Acts, a prerogative *mandamus* will not lie to compel the co. to register the person to whom the second certificates were issued. Share certificates will not operate as an estoppel where one of two rival claimants seeks by a prerogative *mandamus* to compel the co. to place his name on the register.—R. v. CHARNWOOD FOREST RY. CO. (1885), 1 T. L. R. 501, C. A.

7958. ——— Form & contents of—Tender by vendor of certificates—Not containing name of vendor as original shareholder nor having thereon indorsement of transfer.]—HARE v. WARING, No. 8075, *post*.

7959. ——— Misrepresentation in—As to nature of stock issued.]—EAGLESFIELD v. LONDON-DERRY (MARQUIS), No. 7843, *ante*.

7960. Scrip—Whether scrip holders liable as members—Provisionally registered company afterwards incorporated by statute.]—JACKSON v. COCKER (1841), 4 Beav. 59; LONDON GRAND JUNCTION RY. CO. v. GRAHAM (1841), 1 Q. B. 271; MIDLAND GREAT WESTERN RY. CO. (IRELAND) v. GORDON (1847), 16 M. & W. 804; BECKITT v. BILBROUGH (1850), 8 Hare, 188.

7961. ——— Whether option to exchange scrip for shares exercised.]—Pltf. applied for scrip in a co., the prospectus of which stated that on registration of the scrip, of which due notice would be given, the £50 scrip certificates would be divided into shares of £10 each. One hundred scrip certificates were allotted to pltf., & he paid the deposit thereon. The co. afterwards brought an action against him for money due on calls in respect of 500 shares, to which he pleaded that he was not a shareholder. He afterwards attended a meeting of the co., & signed proxy-papers for votes at another meeting. His name had been placed on the register as a holder of 500 shares, but no notice of this was given to him until long

afterwards:—**Held:** pltf. was entitled to have his name removed from the register of the shareholders. **Qu.:** whether he could, as against creditors of the company, have contended that he was not a shareholder.

I think that the only thing I have to consider in this case is the position of pltf. with the co. First, did he originally, & by his application, enter into a contract to take shares? Secondly, if no such contract was then entered into, has his subsequent conduct been such as to create a contract, so that we must thenceforth be treated as a member of the co. The original contract was simply a contract which would entitle the holder of a scrip certificate at some future period to apply for shares, & this was the privilege for which he paid his deposits, subjecting himself to no liability (LORD HATHERLEY, C.).—McILWRAITH v. DUBLIN TRUNK CONNECTING RY. CO. (1871), 7 Ch. App. 134; 41 L. J. Ch. 262; 25 L. T. 776; 20 W. R. 156, L. C.

SUB-SECT. 4.—ALLOTMENT AND ISSUE OF SHARES.**A. In General.**

7962. Meaning of “issue.”]—EAST GLOUCESTERSHIRE RY. CO. v. BARTHOLOMEW, No. 7918, *ante*.

7963. Agreement to issue—Under ultra vires scheme—Power of court to restrain.]—(1) Where a railway co. enter into an agreement with another co., part of which is legal, but part *ultra vires*, without the assistance of Parliament, a ct. of equity will declare such an agreement illegal where the purpose is to work out something illegal. There is nothing, however, *primâ facie* illegal in a small co. agreeing with a great co. to amalgamate with & hand over all its property to it, & apply to Parliament to carry that out.

(2) Where railway cos., by their directors, agree to do acts which they have power to do as well as others which they have not power to do, a ct. of equity will restrain them by injunction from acting on the agreement at all.

(3) A ct. of equity will not restrain railway directors from acting as such, because it is in the power of the shareholders to prevent them so doing, & might seriously interfere with the business of the co.

(4) Where, under an agreement between railway cos., part of which is *ultra vires*, it is proposed to issue shares to a nominee of one co., a ct. of equity will restrain such issue because it is part of an illegal scheme.—HATTERSLEY v. SHELBURNE (EARL) (1862), 31 L. J. Ch. 873; 7 L. T. 650; 10 W. R. 881.

Annotation:—*As to (1) Reqd.* Maunsell v. Mid. G. W. (of Ireland) Ry. (1863), 32 L. J. Ch. 513.

7964. Validity—Issue under old resolution—Particular purpose for which authority given not available.]—The directors of a railway co. are not justified in acting on an old resolution authorising the issue of shares after the particular purpose for which the authority was given had ceased to be available; nor in issuing shares, supposing them to have the power, for the express purpose of creating votes to influence a coming general meeting; & an injunction will be issued to restrain the issue of such shares; it not being a question of the internal management of the co., but an attempt on the part of the directors to prevent such management from being legitimately carried on.—FRASER v. WHALLEY, GARTSIDE v. WHALLEY (1864), 2 Hem. & M. 10; 11 L. T. 175; 71 E. R. 361.

Annotations:—*Apld.* Punt v. Symons, [1903] 2 Ch. 506; Piercy v. Mills, [1920] 1 Ch. 77.

7965. Issue to create votes—To influence approaching meeting.]—FRASER v. WHALLEY, GARTSIDE v. WHALLEY, No. 7964, ante.

7966. Acquiescence in allotment—By shareholder—What amounts to.]—By an agreement, dated July, 1847, A., for the considerations therein-after mentioned, agreed with an incorporated railway co. to take certain shares & to pay £4 per share in respect thereof on or before Aug. 15, 1847, & so soon as £15 per share should have been paid on the shares, & the co. was in a position legally to do so, it should deliver to A. mtge-debentures of the railway co., bearing interest, for the sum of £24,675, being at the rate of £5 per share. This agreement was duly confirmed by the co. & A.'s name was, in consequence of it, & without any other authority, entered in the register of shareholders, & he had notice of such entry & register on such authority, & confirmed & ratified the same & assented thereto. A. was elected & acted as a director of the co. after the making the agreement, & his name remained on the register as the person entitled to these shares, until a call was, in Dec. 1847, duly made upon them, of which he had due notice. In an action against A. to recover the call, the register of shareholders, duly authenticated, & containing an entry of A.'s name as a shareholder, was produced at the trial. On a special verdict finding these facts:—*Held*: A. was liable as a registered shareholder to the call.—**WEST CORNWALL RY. CO. v. MOWATT** (1850), 15 Q. B. 521; 19 L. J. Q. B. 478; 15 L. T. O. S. 247; 15 Jur. 101; 117 E. R. 556; *previous proceedings, sub nom. MOWATT v. WEST CORNWALL RY. CO.* (1849), 12 L. T. O. S. 444.

Annotations:—**Reid**. Waterford, Wexford, Wicklow & Dublin Ry. v. Pidcock (1853), 8 Exch. 279. **Mentd.** Brighton Arcade Co. v. Dowling (1868), 37 L. J. C. P. 125.

B. Issue of New Shares.

7967. Offer to existing shareholders—Time for acceptance.]—A railway co. having resolved, on July 25, to create a certain number of new shares, gave, at the same time, an option to every registered proprietor to take a certain number of those shares, provided he declared such option on or before Aug. 10 following. One of the registered proprietors, who was resident at N. was not apprised of the resolutions until Aug. 12. But on that day he wrote to the secretary to the co. declaring his option to take his proportion of the new shares:—*Held*: the time fixed by the resolutions was final, & consequently, pltf.'s declaration was too late.—**PEARSON v. LONDON & CROYDON RY. CO.** (1845), 14 Sim. 541; 4 Ry. & Can. Cas. 62; 14 L. J. Ch. 412; 9 Jur. 341; 60 E. R. 468.

7968. ———.]—A railway co. resolved to raise a sum of money upon loan notes, payable at the end of five years, bearing interest at £5 per cent in the meantime, with an option to the holders to convert them, at the expiration of three years, into shares of the co., at a certain rate per share, under the powers of an Act of Parliament, to be applied for as early as possible; & the co. advertised for tenders accordingly, one-half of the loan to be paid to the co. when the tenders should be accepted, Feb. 1842, one-quarter on or before Apr. 15, & the other quarter on or before July 15 following. The loan was made by various persons, to whom, on the payment of the last instalment, July, 1842, loan notes were delivered, promising to pay the sums expressed therein on Feb. 15, 1847, with an indorsement thereon referring to the resolution, & intimating that in pursu-

ance thereof application was intended to be made to Parliament for an Act, under the terms of which the bearer would be entitled, on Feb. 15, 1845, provided previous notice was given, to convert the loan notes into shares, at the price mentioned in the resolution. An Act was afterwards obtained, enabling the co., for the purposes therein mentioned, to issue new shares of such amount, & to be appropriated & disposed of in such manner, for such prices, & by such ways & means, as by the order of a meeting of the co. should be determined. By a meeting of the co., subsequently held, it was resolved that the new shares authorised by the Act should be raised & allotted to & amongst the holders of loan notes, in the manner & upon the terms directed by the Act:—*Held*: (1) the effect of the Act, & the subsequent resolution of the co., was not to allot the new shares amongst all the loan note-holders unconditionally, but only as they had acquired a right to such allotment by virtue of their antecedent contract; (2) the term of five years, at the end of which the notes were to be paid off, must be reckoned from Feb. 1842, when the first instalment of the loan was advanced; & the three years, during which the holders were to have the option of converting the notes into shares, must be reckoned from the same time; (3) from the nature of the property which was the subject of the option, time was of the essence of the contract; (4) the indorsement on the loan notes did not enlarge the time of the option by continuing it until limited by an Act of Parliament or otherwise.

Qu.: whether the co. had power to restrict the option by requiring notice before Feb. 15, 1845, the end of the three years, or whether the loan note-holders accepting the notes with the indorsement expressing that restriction, without objection or protest, would be bound thereby.—**CAMPBELL v. LONDON & BRIGHTON RY. CO.** (1846), 5 Hare, 519; 4 Ry. & Can. Cas. 475; 8 L. T. O. S. 184; 11 Jur. 651; 67 E. R. 1017.

Issue at discount—Validity.]—See No. 7970, *post*.

C. Issuing of Shares at a Discount.

7969. Validity—Fully paid-up stock.]—A co. regulated by 1845 Act & Companies Clauses Act, 1863 (c. 118), may, in the absence of any special prohibition, issue fully-paid capital stock at a discount; & a co. empowered to raise or borrow money on debentures, whether such co. be regulated by the Cos. Clauses Consolidation Acts or by the 1862 & 1867 Acts, may, in the absence of any special prohibition, issue debentures at a discount.

The authorities, such as *Re Compagnie Generale de Bellegarde*, *Campbell's Case*, No. 5006, *ante*, which show that debentures can be issued at a discount, are as applicable to cos. governed by the Cos. Clauses Consolidation Acts as to cos. governed by the 1862 Act, to which those decisions more particularly relate.

Qu.: whether shares in cos. governed by 1845 Act, & liable to calls, can be issued at a discount.—**WEBB v. SHROPSHIRE RYS. CO.**, [1893] 3 Ch. 307; 63 L. J. Ch. 80; 69 L. T. 533; 9 T. L. R. 607; 7 R. 231, C. A.

7970. ——— Original shares & new shares.]—A co. governed by 1845 Act, & the Acts amending it, may issue fully-paid original shares at a sum less than their nominal amount in the same manner as new shares can, under the authority of those Acts, be issued.—**STATHAM v. BRIGHTON MARINE PALACE & PIER CO.**, [1899] 1 Ch. 199; 68 L. J. Ch. 172; 80 L. T. 73; 47 W. R. 185; 43 Sol. Jo. 126; 6 Mans. 308.

Sect. 8.—Shares : Sub-sect. 5, A. & B.]**SUB-SECT. 5.—CALLS ON SHARES.****A. In General.**

Compare Part III., Sect. 21, *ante* ; Part XIV., Sect. 2, sub-sect. 4, B., *post*.

7971. Meaning.]—AMBERGATE, NOTTINGHAM & BOSTON & EASTERN JUNCTION RY. CO. *v.* MITCHELL, No. 7984, *post*.

7972. — Whether made when resolution to call passed or when notice of call given.]—SHAW *v.* ROWLEY, No. 8079, *post*.

7973. — —.]—R. *v.* HEMMING, No. 8031, *post*.

7974. — —.]—Under 1845 Act, s. 22, a call of money on shares is made, in point of time, when the resolution to call is passed, not when notice of the call is given to the shareholder. Therefore, by sect. 16, a shareholder cannot legally transfer his share after the passing of such resolution, without paying the call, though he has executed a deed of transfer before notice of the call was served upon him.—R. *v.* LONDONDERRY & COLERAINE RY. CO. (1849), 13 Q. B. 998 ; 116 E. R. 1544 ; *sub nom.* *Re* LONDONDERRY & COLERAINE RY. CO., *Ex p.* TOOKE, 6 Ry. & Can. Cas. 1 ; 18 L. J. Q. B. 343 ; 13 Jur. 939.

Annotations :—Folld. North American Colonial Asscn. of Ireland *v.* Morison (1851), 17 L. T. O. S. 271. **Expld. & Distd.** Hawkins *v.* Maltby (1867), 3 Ch. App. 188. **Mentd.** R. *v.* Lambourn Valley Ry. (1888), 22 Q. B. D. 463.

7975. Must be made equally—On all shares—Shares held by directors as trustees for company.]—The directors of a joint-stock co., in order to procure their Act of Parliament, subscribed for a large number of shares, & signed a declaration that they held them in trust for the co., but did not pay the deposit on, or register them. Afterwards, at a special general meeting of the co., it was resolved that the trust should be annulled, & the shares transferred to the secretary, to be held by him at the disposal of the board. The directors then proceeded to make calls on the registered shares :—**Held :** (1) the said directors were primarily liable in respect of the shares subscribed for in trust for the co., as any other trustee would be, although they might be entitled to indemnity from their *cestuis que trust* ; (2) they were not relieved from such liability by the proceeding taken to annul the trust & transfer the shares ; (3) it was the duty of the directors to make the calls in respect of all such shares, equally with the calls on the registered shares ; & the ct. would compel the directors to put all the shareholders on an equal footing according to their proportions, with respect to the calls to be made upon them ; (4) a suit for restraining the directors from declaring pltf.'s shares forfeited was well framed by pltf. on behalf of himself & all other members not defts., against those parties as defts., who subscribed for the additional shares.—PRESTON *v.* GRAND COLLIER DOCK CO. (1840), 11 Sim. 327 ; 2 Ry. & Can. Cas. 335 ; 59 E. R. 900 ; *sub nom.* PRESTON *v.* GUYON, PRESTON *v.* HALL, 10 L. J. Ch. 73 ; 5 Jur. 146.

Annotations :—*As to* (1) & (2) **Refd.** Foss. *v.* Harbottle (1843), 2 Hare. 461. *As to* (3) **Apld.** Galloway *v.* Hallé Concerts Soc., [1915] 2 Ch. 233.

7976. Time for making—Whether before authorised capital subscribed.]—The statute establishing a particular co., provided that “the whole of the said sum of £100,000 shall be subscribed before any of the powers & provisions given by the Act shall be put in force.” The co made a call on the shares before the subscriptions were complete, & commenced an action for the call after

they were so :—**Held :** such action was not maintainable, the completion of the subscription list being necessary to enable the co. to make the call, as well as to bring the action.—NORWICH & LOWESTOFT NAVIGATION (COMPANY OF PROPRIETORS) *v.* THEOBALD (1828), Mood. & M. 151, N. P.

7977. — —.]—By 10 & 11 Vict. c. lxi., s. 22, it is enacted that, “so soon as the sum of £1,500,000 shall have been subscribed, it shall be lawful for the co. to put in force all the powers of the said Act authorising the construction of the said railway, & of the Acts therein recited,” viz., Lands Clauses Consolidation Act, 1845 (c. 18), & Railways Clauses Consolidation Act, 1845 (c. 20), as regards that portion of the said railway, situate, etc. :—**Held :** the raising of the sum of £1,500,000 was not a condition precedent to the power of the co. to make a call, but merely to their right to exercise the compulsory powers given them for taking land, etc., in the construction of the line.—WATERFORD, WEXFORD, WICKLOW & DUBLIN RY. CO. *v.* DALBIAC (1851), 6 Exch. 443 ; 6 Ry. & Can. Cas. 753 ; 20 L. J. Ex. 227 ; 155 E. R. 616.

7978. How payable—Order to pay at specified bank—To account of treasurer of company.]—MILES *v.* BOUGH, No. 8157, *post*.

7979. — May be made payable by instalments—1845 Act, ss. 21, 22.]—A call made payable by instalments, under the above Act is good ; but an action of debt will not lie for the recovery of an instalment, before the time for the payment of all the instalments has arrived.—AMBERGATE, NOTTINGHAM & BOSTON & EASTERN JUNCTION RY. CO. *v.* COULTHARD (1850), 5 Exch. 459 ; 6 Ry. & Can. Cas. 218 ; 19 L. J. Ex. 311 ; 15 L. T. O. S. 232 ; 14 Jur. 625 ; 155 E. R. 200.

Annotations :—**Distd.** Architects, Civil Engineers, etc. Insee. *v.* Wilson (1850), 16 L. T. O. S. 124. **Apld.** *Re* Jennings, *Ex p.* Belfast & County Down Ry. (1851), 17 L. T. O. S. 133. **Refd.** L. & N. W. Ry. *v.* McMichael (1851), 20 L. J. Ex. 233.

7980. — — —.]—Under the above sects. a call may be made payable by instalments.—BIRKENHEAD, LANCASHIRE & CHESHIRE JUNCTION RY. CO. *v.* WEBSTER (1851), 6 Exch. 277 ; 6 Ry. & Can. Cas. 498 ; 20 L. J. Ex. 234 ; 16 L. T. O. S. 442 ; 155 E. R. 546.

Annotations :—**Refd.** Ambergate, Nottingham, & Boston Junction Ry. *v.* Paynton, Same *v.* Hodgson (1850), 16 L. T. O. S. 127 ; Ambergate, Nottingham, Boston & Eastern Junction Ry. *v.* Norcliffe (1851), 6 Exch. 629.

7981. — — —.]—Under the above sects. a call may be made payable by instalments.—NORTH WESTERN RY. CO. *v.* MCMICHAEL (1851), 6 Exch. 273 ; 6 Ry. & Can. Cas. 495 ; 20 L. J. Ex. 233 ; 16 L. T. O. S. 442 ; 155 E. R. 544.

7982. — — —.]—**Held :** on error, under the above Act a call made payable by instalments is valid.—AMBERGATE, NOTTINGHAM, BOSTON & EASTERN JUNCTION RY. CO. *v.* NORCLIFFE (1851), 6 Exch. 629 ; 6 Ry. & Can. Cas. 500 ; 20 L. J. Ex. 234 ; 17 L. T. O. S. 146 ; 155 E. R. 695, Ex. Ch.

7983. Power of directors—To make call—Exercise of power by “court of directors.”]—SOUTHAMPTON DOCK CO. *v.* RICHARDS, No. 7926, *ante*.

7984. — — —.]—A railway Act provided that, for the purpose of voting, £25 of the capital should represent a share, & that no one should vote in respect of any less proportion. Sect. 22 of 1845 Act, empowered the co. to make calls. Sect. 90 authorised the directors to exercise all the powers of the co. except as to matters directed by that & the special Act to be transacted by a

general meeting of the co. Neither 1845 Act nor the special Act directed calls to be made at a general meeting of the co. The special Act directed that three months at least should be the interval between successive calls. After the formation of the co., the shares were altered to £20 each. The directors, on Jan. 11, passed a resolution for a call to be paid on Feb. 15, & on May 8 a resolution for a second call to be paid on June 19 :—*Held*: in an action against a shareholder to recover the amount of these calls, (1) the calls were not illegal, by reason of the shares having been altered to £20 ; (2) it was competent for the directors to make a call ; (3) an interval of three months had elapsed between the two calls pursuant to the Act.

(4) The term call is susceptible of three meanings. It may mean either the resolution itself, or the time of its notification, or the time when the money is made payable. It must mean one of these three (PARKE, B.).—AMBERGATE, NOTTINGHAM & BOSTON & EASTERN JUNCTION RY. CO. v. MITCHELL (1849), 4 Exch. 540 ; 6 Ry. & Can. Cas. 235 ; 19 L. J. Ex. 89 ; 14 L. T. O. S. 134 ; 154 E. R. 1328.

— To assign call—By way of mortgage.]—See Sect. 14, *post*.

7985. Effect of amalgamation—Call made before amalgamation—Right of new company to recover.]—MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. v. BLINKHORN, No. 7922, *ante*.

—.]—See, also, Nos. 7857, 7858, *ante*.

B. Formalities of Valid Call.

Compare Part III., Sect. 21, *ante*.

7986. Interval between calls—Series of calls by one resolution—Dates of payment separated by prescribed interval.]—An Act of Parliament, creating a joint-stock railway co., gave power from time to time to make calls, not to exceed £10 per share ; so that no calls be made but at the distance of two months from each other, & 28 days' notice of all such calls should be given by advertisement :—*Held*: this did not justify a general sweeping call of £10 on Oct. 28, £10 on Dec. 28, £10 on Feb. 28, £10 on Apr. 28, & £4 on June 28.—STRATFORD & MORETON RY. CO. v. STRATTON (1831), 2 B. & Ad. 518 ; 9 L. J. O. S. K. B. 268 ; 109 E. R. 1235.

Annotations:—*Consd.* Birkenhead, Lancashire & Cheshire Junction Ry. v. Webster, Same v. Barclay, Same v. Lawrence (1850), 15 L. T. O. S. 479. *Refd.* Shackelford, Ford v. Dangerfield (1868), L. R. 3 C. P. 407. *Mentd.* Smith v. Goldsworthy (1843), 4 Q. B. 430.

7987. — Must comply with constitution of company.]—By Act of Parliament, authorising a joint-stock co. to raise £80,000 in shares of £25 each, the directors were empowered to make such calls for money on the subscribers to the undertaking as they should from time to time find necessary for the purpose of carrying on the same, but no such call should exceed £10 per cent, & one month at least should intervene between the calls. The directors brought an action against one of the subscribers for the amount of two

calls made on his shares, on the same day, & that subscriber brought a counter action against the directors for the value of his shares as at a certain period, on the ground that they had, without his consent, engaged in speculations foreign to the co.'s undertaking, & at last abandoned that undertaking & united themselves with another co. Both actions were referred to an arbitrator under an order of ct. ; & he found, (a) that the directors were entitled to decree for the amount of the two calls, with interest ; (b) that the subscriber was entitled to decree for a certain sum as the ascertained price of his shares, which sum, under deduction of what was awarded for the calls, he was entitled to recover from the co. on surrendering or transferring his shares to them, or to any person they might direct :—*Held*: the award was bad, inasmuch as finding (a) for the amount of two calls made in one day was contrary to the Act of incorporation, which required the distance of a month at least between two calls, & finding (b) was not final & conclusive, but held the subscriber entitled to recover the sum awarded to him upon condition only of transferring his shares.—BAILLIE v. EDINBURGH OIL GAS LIGHT CO. (1835), 3 Cl. & Fin. 639 ; 6 E. R. 1577, H. L.

7988. — Resolution separated by prescribed interval—Dates of payment separated by prescribed interval—Resolution for second call within prescribed period from payment of first.]—AMBERGATE, NOTTINGHAM & BOSTON & EASTERN JUNCTION RY. CO. v. MITCHELL, No. 7984, *ante*.

7989. Resolution by directors—To make call prospectively—Validity.]—(1) A railway Act empowered the directors of a railway co. to make such calls from the proprietors, on their respective shares, as they from time to time should find necessary, so that no call should exceed £10 on each share, & that there should be an interval of three calendar months between each successive call, & 21 days' notice should be given of every such call by advertisement, in the local newspapers ; & the proprietors were thereby required to pay the calls on their shares to such person, at such time, at such place, & in such manner, as the directors should from time to time direct or appoint. The directors made a resolution for a call, specifying therein the amount of the call, & the day of payment, but not the place where, or the person to whom, the payment was to be made ; but a notice of that call, subsequently inserted in the local newspapers, according to the directions of the Act, specified all those matters. In an action for the amount of such call against a party who was a proprietor at the date of the resolution, of the notice, & of the day appointed for payment, it not appearing also that there was any change in the directory during that interval : *Held*: the directors might fix the time, place & manner of payments after the original resolution had been made, & by a distinct act, & the call was properly made.

(2) By another resolution, made on Mar. 13 the directors resolved that a call of £5 should be made on Mar. 30 inst., to be paid on May 1 :—*Held*:

PART IX. SECT. 8, SUB-SECT. 5.—B.

a. Interval between calls—Series of calls by one resolution.]—The Act of Assembly, 5 Will. 4, c. 48, s. 3, creating the St. Johns Bridge Co., required thirty days' notice to be given for the payment of each instalment of the capital stock & that no amount greater than ten per cent should be called in at any one time :—*Held*: (1) the full time of thirty days must elapse between the time appointed

for the payment of each separate instalment & it was not sufficient merely to give thirty days' notice for the payment of each instalment on separate days ; (2) one call made without sufficient notice would not vitiate subsequent calls.—ST. JOHN BRIDGE CO. v. WOODWARD (1840), 1 Kerr, 29.—CAN.

b. —.]—*Seemle*: where an Act says, "that no instalment shall be called for except after the lapse

of one calendar month from the time when the last instalment was called for," calls made for 1st May, June, July, & August, would be illegally made. *Qu.*: also, whether the four calls could regularly be made at one time.—GAS CO. v. RUSSELL (1850), 6 U. C. R. 567.—CAN.

c. Irregularity in incorporation.]—An instrument under the Road Act, 12 Vict. c. 84, was signed by deft. & others for the formation of a road co.,

the call was not invalid because the resolution was prospective.

(3) Some of the directors by whom the resolutions for the calls were made, were members of a banking co., who were the bankers & treasurers of the railway co., & as such received & gave receipts for calls, & paid cheques drawn by the directors, etc. Sect. 150 of above Act enacted, that no person concerned or interested in any contract with the co. should be capable of being chosen a director, & that if any director should directly or indirectly be concerned in any contract with the co., he should thereupon be immediately, & was thereby, discharged from the direction:—*Held*: that this sect. applied only to contracts made with the co. in prosecution of its enterprise, & did not disqualify the directors above mentioned.

(4) Sect. 159 directed that the orders & proceedings of the directors should be entered in a book, & signed by the chairman of the meeting, & enacted, that when so entered & signed, they should be deemed originals, & be read in evidence without proof of the persons making or entering them being directors, or of the signature of the chairman:—*Held*: a book of proceedings, purporting to be signed "W. S., deputy-chairman," was evidence *per se*, without proof that W. S. was in fact deputy-chairman, or as such presided at the meeting.

(5) A transfer of railway shares from an original subscriber to the undertaking, made before the formation of a register of proprietors pursuant to the Act, but after the passing of the Act of Parliament, is good, although the transferor be never registered as a proprietor.

Where the Act required such transfer to be by deed, & a transfer of shares was executed by the seller with a blank for the purchaser's name, & stating the consideration untruly, but the purchaser afterwards signed & transmitted to the co., in pursuance of the act, a proxy paper describing him as the proprietor of the shares:—*Held*: in an action by the co. against him for calls on such shares, that he was precluded from disputing the validity of the transfer.—*SHEFFIELD, ASHTON-UNDER-LYNE & MANCHESTER RY. CO. v. WOODCOCK* (1841), 7 M. & W. 574; 2 Ry. & Can. Cas. 522; 11 L. J. Ex. 26; 151 E. R. 894.

Annotations:—As to (5) *Appld.* Cheltenham & Great Western Union Ry. v. Daniel (1841), 2 Q. B. 281. *Consd.* Bargate v. Shortridge (1855), 5 H. L. Cas. 297; Swan v. North British Australasian Co. (1862), 7 H. & N. 603. *Refd.* London Grand Junction Ry. v. Freeman (1841), 2 Ry. & Can. Cas. 468; Harrison v. Heathorn (1843), 6 Man. & G. 81; Re North of England Joint Stock Banking Co., Straffon's Executors' Case (1852), 1 De G. M. & G. 576; New Brunswick & Canada Land & Ry. v. Muggeridge (1859), 4 H. & N. 580; Re North British Australasian Co., *Ex p.* Swan (1859), 7 C. B. N. S. 400; Swan v. North British Australasian Co. (1863), 2 H. & C. 175; Bloxam v. Metropolitan Cab & Carriage Co. (1864), 4 New Rep. 51.

Place of payment & payee omitted
Included in notice.—The directors of a railway co. were empowered by an Act of Parliament to make calls, the aggregate amount not to exceed £100, & no call to exceed £10 upon each share, & an interval of three calendar months was to elapse between the days of payment of each call. It also required that 21 days' notice should be given of every call, by advertisement in certain newspapers, & enacted that all money so called for

should be paid to such persons, at such times & places, as in the said notice should be appointed. A resolution of the directors was made for a call of £8 per share; but the resolution, although it mentioned the period within which the call was to be paid, did not specify the place where, or person to whom the payment was to be made. The notice of that call, inserted in the local newspapers, according to the directions of the Act specified the time & place of payment & the persons to whom payment was to be made:—*Held*: (1) the publication of the notice must be assumed to be the act of the directors; (2) the call was properly made.—*GREAT NORTH OF ENGLAND RY. CO. v. BIDDULPH* (1840), 7 M. & W. 243; 2 Ry. & Can. Cas. 401; H. & W. 30; 10 L. J. Ex. 17; 5 Jur. 221; 151 E. R. 756.

Annotations:—As to (1) *Consd.* Johnson v. Lyttle's Iron Agency (1877), 5 Ch. D. 687. *Refd.* Newry & Enniskillen Ry. v. Edmunds (1848), 2 Exch. 118.

7991. — Time & place of payment omitted.—The B. Railway Act, 1 Vict. c. cxix, s. 140, requires the co. to enter the names & additions of the shareholders in a book, under the seal of the co.; & by sect. 142, requires that they shall in a proper book, to be provided by the co., enter the names & places of abode of the shareholders. Sect. 148 enacts, that in an action for calls, it shall only be necessary to prove that deft. was a proprietor of the shares & had notice of the calls, & that the production of the books above referred to shall be *prima facie* evidence of deft. being such proprietor. Sect. 155 gives a form for the transfer of shares, & directs that the co. shall enter in some book to be kept for that purpose a memorial of such transfer, & indorse the entry of such memorial on the deed of transfer; & that until such memorial is made, the seller shall remain liable for calls. In an action against a shareholder for calls:—*Held*: (1) it was not necessary that the resolution for making such calls should specify either time or place of payment; (2) the production of the sealed register of shareholders containing deft.'s name as proprietor of the shares in question, was not sufficient *prima facie* evidence of deft. being proprietor of such shares; (3) a deed of transfer of certain shares to the deft., which had been executed by the vendor to one H. as purchaser, & upon which transfer the consideration was paid, & which was afterwards altered by having the name of H. struck out, & the name of deft. inserted, & in that state re-executed by the vendor without being re-stamped, was void; (4) it was no objection to a deed of transfer of shares that there was no proof of any entry of a memorial pursuant to sect. 155; (5) in order to show proprietorship under sect. 142, it was incumbent on the co. to produce as well the book required to be kept by sect. 140, as that required by sect. 142; but provided the name & addition of deft. are properly described, it will be no objection to the sufficiency of the evidence that the additions of other proprietors are omitted.—*LONDON & BRIGHTON RY. CO. v. FAIRCLOUGH* (1841), 2 Man. & G. 674; 2 Ry. & Can. Cas. 544; Drinkwater, 196; 3 Scott, N. R. 68; 10 L. J. C. P. 133; 5 J. P. 513; 133 E. R. 916.

Annotations:—As to (2) *Refd.* Fuller v. Earle (1852), 21 L. J. Ex. 314; Nannoy v. Morgan (1887), 37 Ch. D. 346. As to (3) *Refd.* Nannoy v. Morgan (1887), 37 Ch. D. 346. *Generally, Mentd.* S. E. Ry. v. Hebblewhite (1840), 12 Ad. & El. 497; Flory v. Denny (1852), 7 Exch. 581;

deft. agreeing to take three shares. The directors named met on May 27, 1850, & called in four instalments, each of 10 per cent on each share. The 6 per cent required by the statute was at the same meeting paid by the

promissory note of the directors to the treasurer, who then signed a receipt for the money, & afterwards registered the instrument. By Nov. 20, 1850, the treasurer had received, by means of the call, a sum equal to the

6 per cent, & he then destroyed the note. On Jan. 13, 1854, another call was made, payable by six instalments; & this action was brought for the four instalments of the first call, & the first three instalments due on the second:—

Martin v. Reid (1862), 11 C. B. N. S. 730; *Cochrane v. Moore* (1890), 25 Q. B. D. 57.

7992. — Included in notice—1845 Act, s. 26.]—(1) Under the above Act a resolution by directors to make "a call" need not specify either the time or place for payment, but the directors must appoint a time & place, which must be notified to the shareholder by a notice allowing 21 days for payment.

(2) A purchaser of script certificates for shares in a railway co. is not liable for calls until his name is entered on the sealed register of shares.—*NEWRY & ENNISKILLEN RY. CO. v. EDMUNDS* (1848), 2 Exch. 118; 5 Ry. & Can. Cas. 275; 17 L. J. Ex. 102; 10 L. T. O. S. 395; 12 Jur. 101; 154 E. R. 429.

Annotations:—As to (1) *Apprvd. Shackleford, Ford v. Dangorfield* (1868), L. R. 3 C. P. 407. *Consd. Johnson v. Lyttle's Iron Agency* (1877), 5 Ch. D. 687. *Refd. Shaw v. Rowley* (1847), 16 M. & W. 810. As to (2) *Refd. Re North Shields, etc. Co., Davidson's Case* (1858), 4 K. & J. 688; *Wolverhampton New Waterworks Co. v. Hawksford* (1860), 7 C. B. N. S. 795; *Portal v. Emmens* (1876), 1 C. P. D. 201.

7993. — Time, place & mode of payment omitted—Subsequently fixed by distinct act.]—*SHEFFIELD, ASHTON-UNDER-LYNE & MANCHESTER RY. CO. v. WOODCOCK*, No. 7989, *ante*.

7994. Amount of calls allowed in one year limited—First call alleged to be invalid—Stands until withdrawn.]—*WELLAND RY. CO. v. BERRIE*, No. 8517, *post*.

C. Notice of Call.

7995. Necessity for—Notice not expressly required by special Act.]—*MILES v. BOUGH*, No. 8157, *post*.

7996. Time for—Whether before or after call made.]—The notice required is of a call having been made, & not that a call would be made (*ROLFE, B.*).—*NEWPORT & ABERGAVENNY RY. CO. v. BROWN, SAME v. ELLIS* (1849), 13 L. T. O. S. 214.

7997. Sufficiency of—Notice signed by clerk employed by trustees' clerks.]—*MILES v. BOUGH*, No. 8157, *post*.

7998. — Notice signed by one of two joint clerks to trustees.]—*MILES v. BOUGH*, No. 8157, *post*.

7999. — —.]—Where the Act for building a suspension-bridge directed that the notices of calls on persons who had agreed to advance money on the security of the tolls, should be signed by the clerk or clerks appointed or to be appointed, & two clerks having been appointed, issue was taken in an action for the amount of calls, on the fact, whether the notice of the calls had been signed by both the clerks:—*Held*: the jury was not warranted, by proof that one of the clerks had signed, in presuming that he signed for both, with the authority of his colleague.—*MILES v. COOTE* (1844), 3 L. T. O. S. 281.

8000. — Application for shares on behalf of third parties—Notices addressed to third parties per applicant.]—*MILES v. COOTE* (1844), 2 L. T. O. S. 307.

Proof of.]—See No. 8033, *post*.

D. Liability.

(a) Who are Liable.

See, generally, Sect. 6, sub-sect. 2, *ante*; compare Nos. 8028, 8029, *post*.

Held: the first call could not be recovered, for when it was made the 6 per cent had not been in fact paid, but that the plffs. might recover the second call, for on Jan. 13, the 6 per cent had been actually paid; & the co. having proceeded *bond fide* in the construction of this road, the irregu-

larity in registering the instrument of incorporation before such payment was cured by 16 Vict. c. 190, s. 55.—*NIAGARA FALLS ROAD CO. v. BENSON* (1852), 8 U. C. R. 307.—CAN.

PART IX. SECT. 8, SUB-SECT. 5.—C. d. *Sufficiency of.*]—The day ap-

8001. As between vendor & purchaser—Calls made before transfer.]—*LONDON & BRIGHTON RY. CO. v. FAIRCLOUGH*, No. 8042, *post*.

8002. — —.]—*AYLESBURY RY. CO. v. THOMPSON*, No. 8076, *post*.

8003. — —.]—*R. v. LONDONDERRY & COLERAINE RY. CO.*, No. 7974, *ante*.

8004. — Shares not conveyed by deed—As required by special Act.]—*LONDON GRAND JUNCTION RY. CO. v. FREEMAN*, No. 7925, *ante*.

8005. — No memorial of sale entered.]—*LONDON GRAND JUNCTION RY. CO. v. GRAHAM*, No. 7934, *ante*.

8006. — Calls made after transfer.]—*HUDDERSFIELD CANAL CO. v. BUCKLEY*, No. 8020, *post*.

8007. — —.]—*AYLESBURY RY. CO. v. THOMPSON*, No. 8076, *post*.

8008. — Name of purchaser not entered on sealed register of shareholders.]—*NEWRY & ENNISKILLEN RY. CO. v. EDMUNDS*, No. 7992, *ante*.

8009. — No registration by transferee of transfer.]—By 1845 Act, s. 15, until the transfer-deed has been delivered to the secretary for registration, the vendor of shares shall be liable for calls; & the purchaser shall not be entitled to any profits, or to vote in respect of such shares. Pltf., the registered owner of railway shares, transferred them to deft. by deed regularly executed whereupon it was the duty of deft. to have procured that deed to be registered. Deft. omitted to do so, & sold the shares to another party, & pltf. was called upon to pay subsequent calls:—*Held*: pltf. could not recover the amount against deft. upon a count for money paid.—*SAYLES v. BLANE* (1849), 14 Q. B. 205; 6 Ry. & Can. Cas. 79; 19 L. J. Q. B. 19; 14 Jur. 87; 117 E. R. 82; *sub nom. SALES v. BLANE*, 14 L. T. O. S. 176.

8010. — Sale to jobber—Resale to transferee.]—A shareholder in an incorporated railway co. instructed a stockbroker to sell his shares. The broker agreed with a jobber for the sale, but the name of the purchaser was not mentioned. The jobber had been instructed to purchase by B., another broker, who, as the jobber knew, was not purchasing on his own behalf. B. afterwards requested time for completion, his principal not being ready; & the jobber granted the time on B. giving his own name as that of the principal. A deed of assignment was prepared from the vendor to B., who paid the price to the vendor, & took the deed of assignment executed by the vendor:—*Held*: B. was bound to execute the assignment, to procure himself to be registered, & to pay the calls made since the execution of the assignment by the vendor, & to indemnify the vendor against future calls.—*WYNNE v. PRICE* (1849), 3 De G. & Sm. 310; 5 Ry. & Can. Cas. 465; 12 L. T. O. S. 531; 13 Jur. 295; 64 E. R. 493.

Annotations:—*Consd. Walker v. Bartlett* (1856), 18 C. B. 845; *Evans v. Wood* (1867), L. R. 5 Eq. 9. *Refd. Sayles v. Blane* (1849), 14 Q. B. 205; *Re Monmouthshire & Glamorganshire Joint-Stock Banking Co., Ex p. Cape's Exor.* (1852), 22 L. J. Ch. 601; *Coles v. Bristowe* (1868), L. R. 6 Eq. 149.

Compare Part III., Sect. 21, sub-sect. 4, B. (b), *ante*.

8011. On death of subscriber—Before Act authorising undertaking passed.]—The administrator of a deceased subscriber to a projected canal, who had died before the Act passed for

pointed for payment of last instalment may be deemed day upon which call is payable & 21 days' notice previous thereto is a valid notice within Companies Clauses Consolidation Act, s. 22.—*Re JENNINGS, Ex p. BELFAST & COUNTY DOWN RY. CO.* (1851), 1 I. Ch. R. 654.—IR.

Sect. 8.—Shares: Sub-sect. 5, D. (a) & (b), & E

making it, cannot be sued as a subscriber to the undertaking or proprietor of shares.

Semble: where the Act indemnified exors. & administrators against their *cestuis que trust* if they should pay calls upon the shares of deceased persons out of their effects & enabled the co., if the exors. had no assets, or refused to pay, to transfer the shares to others who would repay to the administrators the calls paid on the shares & pay the future calls; & if no persons would take them, then to declare the shares forfeited to the co., no action can be maintained against an administrator though he has paid one call, for not paying subsequent calls.—*WEALD OF KENT CANAL CO. v. ROBINSON* (1814), 5 Taunt. 801; 128 E. R. 907.

8012. On death of shareholder—Liability of estate—Calls made before & after death.—A., at his decease, was a registered owner of shares in the E. C. R. Co., in respect of which calls had been made upon him, but nothing paid by him in his lifetime. Other calls were, after his decease, made upon his exors.:—*Held*: his estate was liable for all the calls.—*FYLER v. FYLER* (1842), 2 Ry. & Can. Cas. 873; 7 Jur. 185, L. C.

8013. ———.]—A testator bequeathed some G. W. Ry. Co. shares, in respect of which he had executed the parliamentary contract, & also some shares in that co. which he had purchased before the Act passed, from a person who had subscribed the contract. All the calls on these shares had not been paid at the time of testator's death:—*Held*: as between testator's estate & the legatee, testator's estate was liable to pay the future calls on both sets of shares.—*JACQUES v. CHAMBERS* (1846), 16 L. J. Ch. 243; *sub nom. JACQUES v. CHAMBERS*, 4 Ry. & Can. Cas. 499; 11 Jur. 295.

Annotations:—*Folld. Clive v. Clive* (1854), Kay, 600. *Consd. Armstrong v. Burnet* (1855), 20 Beav. 424; *Day v. Day* (1860), 1 Drew. & Sm. 261. *Distd. Re Box* (1863), 1 Hem. & M. 552. *Mentd. Fitzwilliams v. Kelly* (1852), 10 Hare, 266.

8014. ———.]—Calls made upon shares in an incorporated co. after the death of the owner are payable out of his general personal estate, & not by the legatee for life under a gift of all testator's shares in the co.—*CLIVE v. CLIVE* (1854), Kay, 600; 2 Eq. Rep. 913; 23 L. J. Ch. 981; 24 L. T. O. S. 33; 69 E. R. 255.

Annotations:—*Refd. Armstrong v. Burnet* (1855), 20 Beav. 424; *Re Box* (1863), 1 Hem. & M. 552. *Mentd. Wright v. Tuckett* (1860), 1 John. & H. 266; *Bates v. Mackinley* (1862), 31 Beav. 280; *Browne v. Collins* (1871), L. R. 12 Eq. 586.

(b) Extent of Liability.

8015. Interest.—*SOUTHAMPTON DOCK CO. v. RICHARDS*, No. 7926, *ante*.

8016. ——— **No notice of calls.**—*Re LEOMINSTER & BROMYARD RY. CO.* (1890), 6 T. L. R. 440.

8017. ——— **How amount ascertained.**—The ct. will not grant a rule to compute, in an action for calls due on shares in a co., on which interest is also payable.

I think that I ought not to grant a rule to com-

pute. It will be too involved & intricate a calculation, as to the interest, for the master to compute, but a writ of inquiry must be issued (*WILLIAMS, J.*).—*CHELtenham & GREAT WESTERN UNION RY. CO. v. FRY* (1839), 2 Will. Woll. & H. 48; 3 Jur. 316.

8018. ——— **Payable by company on paid-up calls until completion of undertaking—Set off against sums due for unpaid calls.**—*Semble*: where, by a railway co.'s Act, interest was chargeable in respect of calls not paid, & the co. were empowered, under certain conditions, to declare the shares forfeited, & to sell the same, & the directors were empowered, until the completion of the railway, to pay interest on the calls paid up, such interest to cease while any call should remain unpaid, a party is not entitled to set off interest upon calls paid up against sums due for calls unpaid.—*NAYLOR v. SOUTH DEVON RY. CO.* (1846), 1 De G. & Sm. 32; 8 L. T. O. S. 183; 11 Jur. 31; 63 E. R. 959.

*E. Action for Calls.**(a) In General.*

8019. When action lies—Call payable by instalments.—*AMBERGATE, NOTTINGHAM & BOSTON & EASTERN JUNCTION RY. CO. v. COULTHARD*, No. 7979, *ante*.

Compare No. 2108, *ante*.

8020. Form of action—Action in tort.—(1) By a navigation Act the shares were declared to be vested in the subscribers, their exors. & assigns, with power to the subscribers to assign their shares; & a committee to be appointed under the Act were authorised to make calls on the proprietors of shares at such time as they should think fit:—*Held*: an original subscriber is not liable for any call made by the committee after assigning his share.

The same Act empowered the co. to sue for calls, etc., "by action of debt or on the case":—*Held*: an action on the case in tort lay.—*HUDDERSFIELD CANAL CO. v. BUCKLEY* (1796), 7 Term Rep. 36; 101 E. R. 842.

8021. Venue.—A public local Act, 1 Vict. c. xcvi. for making a railway in Ireland, provided that if any proprietor of shares should refuse to pay a call, it should be lawful for the co. to sue for it, in any of the Queen's Cts. of Record in Dublin; & gave a general form of declaration:—*Held*: the debt & the remedy being created by the statute, the co. were bound to pursue the remedy pointed out by it, & could not bring an action for a call, & declare in the general form, in an English Ct.—*DUNDALK WESTERN RY. CO. v. TAPSTER* (1841), 1 Q. B. 667; 2 Ry. & Can. Cas. 586; 1 Gal. & Dav. 657; 10 L. J. Q. B. 186; 5 Jur. 699; 113 E. R. 1287.

Annotations:—*Refd. Bank of Australasia v. Nias* (1851), 20 L. J. Q. B. 284; *St. Pancras Vestry v. Batterbury* (1857), 2 C. B. N. S. 477. *Mentd. Cleeve v. Harwar, Wilde v. Stanner* (1857), 1 H. & N. 873; *Sheehy v. Professional Life Assoc.* (1857), 2 C. B. N. S. 211.

8022. Pleading.—In an action for a call, due upon shares in the A. Ry. Co., the declaration

PART IX. SECT. 8, SUB-SECT. 5.—E. (a).

e. Form of action.—Pltfs. were incorporated by Provincial Act, 27 Vict. c. 43, for the purpose of constructing a railway, the capital stock to be two millions of dollars, & the co. to proceed to locate & complete the road as soon as \$50,000 of the stock were paid in. The directors were authorised to make equal assessments on the shares from time to time, as they might deem

necessary, to be paid to the treasurer, & in case any subscriber for stock neglected to pay the assessment on his shares for 30 days after notice, the directors might order his shares to be sold at auction, & in case of any deficiency, he should be accountable to the co. for the balance. By Act 32, Vict. c. 54, to amend the Act of Incorporation, after reciting that it was doubtful whether the subscribers for shares were legally liable to pay assess-

ments unless the whole amount of the capital stock has been subscribed for, & \$50,000 paid in, & also, whether the notices of assessments had been given in accordance with the Act of Incorporation, it was enacted: 1. That the subscribers for stock should be liable in the same manner & to the same extent as if the whole capital stock had been fully subscribed, & as if the \$50,000 had been paid in, in the manner directed by the Act of

stated, that deft., before the commencement of the suit, to wit, on Mar. 6, 1838, being the proprietor of divers, to wit, fifty shares in the undertaking, was, & deft., before & at the commencement of the suit, was & still is indebted to the co. in the sum of £250, for a call of £5 upon each of the said shares, etc., whereby & by reason of the said sum of £250 being & remaining wholly unpaid, deft. still is indebted to pltfs. in the same, & an action hath accrued, etc. Plea, stating that the deft., before Apr. 9, 1838, when the said call was payable, had disposed of all his said shares to one T. & had transferred them to him, according to the provisions of the Act. Upon special demurrer:—*Held*: (1) the plea was bad, as an argumentative denial that deft. ever was indebted; (2) the declaration was good in substance, under sect. 98 of the Aylesbury Railway Act, 6 Will. 4, c. xxxvii.—*AYLESBURY RY. CO. v. MOUNT* (1843), 7 Man. & G. 898; 3 Ry. & Can. Cas. 469; 8 Scott, N. R. 586; 12 L. J. Ex. 474; 135 E. R. 364, Ex. Ch.

Annotation:—*Generally, Mentd. Re British Provident Life & Fire Assco., Orpen's Case* (1863), 2 New Rep. 225.

8023. Statutory declaration—Whether strict adherence necessary.—(1) In an action for calls, upon 1845 Act the declaration purported to be drawn in compliance with the requisition of sect. 26 of that Act, but omitted to state that the action had accrued by virtue of that & the special Act:—*Held*: such omission was insufficient to arrest the judgment.

(2) The evidence given as to the notices were left to the jury, & they held it to be sufficient. If the service had not been in time, deft. having, most probably, the notices in his possession, could have disproved the fact, had it been so (POLLOCK, C. B.).—*LONDONDERRY & ENNISKILLEN RY. CO. v. PRANCE* (1847), 9 L. T. O. S. 58.

8024. — — — — —.]—The Act does not give the words as absolutely necessary to be followed (MAULE, J.).—*KILLARNEY & VALENCIA RY. CO. v. HAGGARD* (1849), 13 L. T. O. S. 284.

8025. — — — — —.]—A declaration for calls by a railway co. stated, that whereas deft. is the holder of divers shares in the said co., & is indebted to the said co. in a large sum of money, in respect of two several calls, duly made by the co., whereby an action accrued to the co., by virtue of 1845 Act, & also of the special Act, to demand & have of & from the deft. the said sum, parcel of the sum above demanded, yet deft. had not paid the sum above demanded, or any part thereof. *Seemle*: bad, on special demurrer, for not following the form given by 1845 Act, s. 26.—*NEWPORT RY. CO. v. ILAWES* (1849), 3 Exch. 476; 154 E. R. 932.

8026. — — — — —.]—In an action of debt for calls, where the declaration followed the form given by 1845 Act, s. 26, & something more is stated in addition, which may be struck out, so that the residue is sensible, & makes a good declaration according to the form as given by the statute:—*Held*: upon special demurrer, the declaration was good, & the part which could be so struck out may be treated as surplusage.—*EAST LANCASHIRE RY. CO. v. CROXTON* (1850),

5 Exch. 287; 1 L. M. & P. 298; 6 Ry. & Can. Cas. 214; 19 L. J. Ex. 313; 15 L. T. O. S. 116.

Annotation:—*Mentd. Inglis v. G. N. Ry.* (1852), 19 L. T. O. S. 149.

8027. — — — — —.]—*WOLVERHAMPTON NEW WATERWORKS CO. v. HAWKESFORD*, No. 7862, *ante*.

8028. — — — — — **Allegation that defendant is "holder" of shares—Holder when call made.**—In the general form of declaration given by 1845 Act, s. 26, in actions for calls on shares, the allegation, "that deft. is the holder of shares," means that he was the holder at the time the call was made. Therefore, where a declaration in an action for calls stated, that deft., at the time of the commencement of the suit, was & still is the holder of shares, & at the time of the commencement of the suit, was & still is indebted to pltfs. for calls on those shares, etc., whereby an action accrued, etc., & deft. pleaded, that, at the time of the commencement of the suit, he was not the holder of the said shares, & also that he was not the holder of the shares at the time the calls were made, the ct., on motion, struck out the latter plea, & amended the declaration & former plea by striking out the words "at the commencement of the suit."—*BELFAST & COUNTY DOWN RY. CO. v. STRANGE* (1848), 1 Exch. 739; 5 Ry. & Can. Cas. 548; 10 L. T. O. S. 307; 12 Jur. 19; 154 E. R. 314.

Annotations:—*Folld. Inglis v. G. N. Ry.* (1852), 19 L. T. O. S. 149. *Refd. G. N. Ry. v. Kennedy* (1849), 4 Exch. 417; *Birkenhead, Lancashire & Cheshire Junction Ry. v. Webster* (1850), 19 L. J. Ex. 146.

8029. — — — — —.]—In an action by a railway co. for calls, a declaration framed on 1845 Act, s. 26, alleged that deft. "is the holder of ten shares, & is indebted to the co. in £100 in respect of a call of £10 upon each of the said shares:—*Held*: good, on special demurrer, although it was objected that the declaration did not allege that deft. was the holder of such shares at the time the calls were made.—*WILSON v. BIRKENHEAD, LANCASHIRE & CHESHIRE JUNCTION RY. CO.* (1851), 6 Exch. 626; 6 Ry. & Can. Cas. 771; 20 L. J. Ex. 306; 17 L. T. O. S. 131; 155 E. R. 694, Ex. Ch.

8030. Whether applicable in action against executor—Calls made in testator's lifetime.—The form of declaration given by 1845 Act, s. 26, is not applicable in an action for calls against an exor., where the calls were made in the lifetime of testator.—*BIRKENHEAD, LANCASHIRE & CHESHIRE JUNCTION RY. CO. v. COTESWORTH* (1850), 5 Exch. 226; 1 L. M. & P. 244; 6 Ry. & Can. Cas. 211; 19 L. J. Ex. 240; 15 L. T. O. S. 92; 14 Jur. 354; 155 E. R. 97.

8031. What must be proved—General rule.—(1) By 1845 Act, s. 16, the transfer of shares is prohibited after a call has been made until the call is paid:—*Held*: a call is made within that sect. as soon as the directors of the co. have come to a formal resolution that a call be made.

(2) Under 1845 Act, s. 27, the co., in an action for calls, must prove three things, & it need prove no more; first, that deft. was a holder of shares at the time of making the calls; secondly, that such calls were made; thirdly, that due notice of the making of the calls was given. If the

Incorporation, & as if all assessments on the shares, & the notices given thereof, had been made & given according to the Act. 2. That to entitle the co. to recover against any stockholder, two months' notice of the assessment should be published in a newspaper, & after the expiration of

that time, the co. should be entitled "to sue for, recover, & receive from any stockholder the amount due for unpaid subscribed stock in the same manner as if the calls for assessment had been regularly made" in accordance with the requirements of the Act of Incorporation:—*Held*: an

action of debt could not be maintained under the Act of Incorporation for the assessment of stock; but that the proceeding by sale of the shares must be adopted.—*EUROPEAN & NORTH AMERICAN RY. CO. v. THOMAS* (1872), 1 Pug. 42.—CAN.

Sect. 8.—Shares: Sub-sect. 5, E. (a) & (b); sub-sect. 6, A. & E

notice is part of the act of making the calls, it is unnecessary to add the third, for it is included in the second, & if not, the co. cannot enforce payment of the call from a party who was not a shareholder at the time that the resolution making the call was passed (PATTESON, J.).—*R. v. HEMMING* (1849), 13 L. T. O. S. 527.

— **That defendant holder of shares—Admissibility of register.**—*See Sect. 7, sub-sect. 2, ante.*

8032. — Notice of call—Sufficiency of proof.—*LONDONDERRY & ENNISKILLEN RY. CO. v. PRANCE*, No. 8023, *ante*.

8033. —.]—In order to prove the service of a notice of a call, pltf. proved that it was the duty of C. to fill up the printed notices & direct them to the shareholders; that on the day of the call he had received instructions to send out such notices; that he had been seen in the act of making out such notices, & putting them into a basket ready to be posted, & that he had at that time a list in his hand. It was proved that all the letters in the basket were posted. C. was dead at the time of the trial, but a list, containing the name of the deft. was produced in his hand-writing, with an indorsement by him "letters sent out":—*Held*: this list so indorsed was admissible, as it might reasonably be inferred that it was a contemporaneous entry.—*EASTERN UNION RY. CO. v. SYMONDS* (1850), 5 Exch. 237; 6 Ry. & Can. Cas. 578; 19 L. J. Ex. 287; 155 E. R. 101.

Annotation:—*Mentd. Pell v. Linnell* (1868), 16 W. R. 704.

8034. Discovery—Inspection of books—When granted.—Where, by a railway Act, a power to inspect all books relating to the co. is given to the shareholders, at any general or special meeting, which meetings are required to be holden at intervals not greater than six months, this ct. will not order that a shareholder who has not availed himself of that privilege, & against whom an action for calls has been brought, shall be permitted to inspect the books, & make extracts from them; especially where it appears that the object is to discover what defence can be set up, & not how any particular defence should be placed upon the record.

Semble: taking out a summons before a judge at chambers for such an inspection, is sufficient to show that there has been a demand of inspection from the directors, & a refusal.—*BIRMINGHAM, BRISTOL & THAMES JUNCTION RY. CO. v. WHITE* (1841), 1 Q. B. 282; 2 Ry. & Can. Cas. 863; 4 Per. & Dav. 649; 10 L. J. Q. B. 121; 5 J. P. 528; 5 Jur. 800; 113 E. R. 1139.

8035. Interrogatories — Lost documents.—(1) Interrogatories under Common Law Procedure Act, 1854 (c. 125), as to the contents of a lost document supposed to have been executed by the party interrogated, allowed, upon a *prima facie* case of loss being made out by affidavit, subject to the probably unnecessary condition that the answers were not to be used at the trial unless such evidence was given of the loss of the document as to make secondary evidence of its contents admissible.

(2) In an action for calls by a public co., pltf. was allowed to interrogate deft. as to "whether & when he received from A. B. any writing relating to his becoming a director or shareholder, & what had become of it, & when & where he last saw it," the description of the writing being nothing more than was necessary for its identification.—*WOLVER-*

HAMPTON NEW WATERWORKS CO. v. HAWKSFORD (1859), 5 C. B. N. S. 703; 28 L. J. C. P. 198; 32 L. T. O. S. 296; 5 Jur. N. S. 736; 7 W. R. 244; 141 E. R. 283.

See, generally, DISCOVERY, INSPECTION & INTERROGATORIES.

8036. Stay of proceedings.—*INGLIS v. GREAT NORTHERN RY. CO.*, No. 7916, *ante*.

See, generally, PRACTICE & PROCEDURE.

(b) Defences.

8037. General rule.—By the terms of a railway Act, the directors were entitled to recover for calls in arrear, upon proving that deft. was a proprietor, & that notice of calls was given according to the Act, unless deft. should prove that he had paid the full amount of his subscription. Deft. having pleaded to an action for calls, that he was not indebted, & was not a proprietor, the ct. refused to allow him to add pleas that due notice of the calls was not given; that no time or place was appointed for payment; that the calls were made for purposes other than those warranted by the Act; that they were made after deviations in the line; & that fewer shares were allotted than the Act required.—*LONDON & BRIGHTON RY. CO. v. WILSON* (1839), 6 Bing. N. C. 135; 1 Ry. & Can. Cas. 530; 8 Scott, 347; 9 L. J. C. P. 122; 133 E. R. 53.

Annotations:—*Folld. S. E. Ry. v. Hebblewhite* (1840), 12 Ad. & El. 497. *Refd. Waterford, etc. Ry. v. Logan* (1850), 14 Q. B. 672.

8038. —.]—By the South Eastern Railway Act, 6 & 7 Will. 4, c. lxxv., no proprietor can act or vote as a director till his calls are paid; & four directors are a quorum. The directors have power, from time to time, to make calls, giving certain notice, which the shareholders are to pay, with interest from the day appointed for payment to the actual payment. In case of neglect of payment, the co. may sue in debt, etc., or the directors may declare the shares forfeited, of which forfeiture no advantage shall be taken until notice has been given to the shareholder, & the declaration of forfeiture has been confirmed by a meeting held three months at least after such notice. In any action to recover the money, it is sufficient, by the statute, to declare that deft. being proprietor, is indebted to the co. in the sum in arrear, for a call or so many calls, etc., on a share belonging to deft., whereby an action hath accrued, etc., without setting forth the special matter; & on the trial it is only necessary to prove that deft. was proprietor at the time of making the call, & that the call was in fact made & the notice given, without proving the appointment of the directors who made the calls, or any other matter whatsoever; & the co. is thereupon entitled to recover what appears due, including interest, unless it appears that the call is for more per share, or is made payable earlier, or that more calls have been made than the Act permits, or that notice of the calls has not been given. The co. having declared in debt for calls & interest thereon in the general form given by the Act, the ct., under 4 Ann. c. 16, s. 4, allowed deft. to plead the following pleas: (a) *nunquam indeditatus*; (b) that deft. was not proprietor *modo et formâ*; (c) that the shares have been declared forfeited, & the steps directed by the Act taken thereon. But struck out the following: (d) that there were not present, when the calls were made, four directors who had paid their calls; (e) that there was no notice of the

PART IX. SECT. 8, SUB-SECT. 5.—E. (b).

1. Plea that subscription void.—*PORT DOVER & LAKE HURON RY. CO. v. GREY* (1875), 36 U. C. R. 425.—CAN.

calls; (f) that the directors did not appoint a time & place for receiving the payments; (g) that the calls were made for purposes not authorised by the Act; (h) that they were not made on all the subscribers & proprietors; (i) that they were not made by competent persons, & for the sole purpose of the undertaking.—*SOUTH EASTERN RY. CO. v. HEBBLEWHITE* (1840), 12 Ad. & El. 497; 2 Ry. & Can. Cas. 247; 4 Per. & Dav. 246; 113 E. R. 900; *sub nom.* *SOUTH EASTERN RY. CO. v. HEBBLEWHITE, SAME v. HAMOR, SAME v. WRIGHT, SAME v. BANNER*, 9 L. J. Q. B. 324; 4 Jur. 1184.
Annotation:—*Expld. Eastern Counties Ry. v. Cooper, Same v. Fairclough* (1840), 10 L. J. Q. B. 8.

See, now, R. S. C., Ord. 21, r. 1.

8039. Misrecital in special Act—Defendant estopped by conduct from alleging.—An Act of Parliament, 6 Geo. 4, c. xxx., to enable a co. to form a railway, prescribed the form of action against the proprietors for calls, & enacted, that it should only be necessary to prove that deft. was a proprietor, & that the calls had been made in pursuance of the Act; it also recited, that a sum of money had been subscribed by the proprietors, under a contract binding their heirs; whereas, in fact, the sum had not been subscribed, & no contract under seal had been executed by the proprietors:—*Held*: a deft. who, with a knowledge of the misrecital, had paid previous calls, & acted as a proprietor, was estopped from questioning the validity of the act, upon the ground of the misrecital; & it was not incumbent upon plffs. to show that deft. had executed a contract under seal, in order to prove that he was a proprietor within the Act.—*CROMFORD RY. CO. v. LACEY* (1829), 3 Y. & J. 80; 148 E. R. 1101.

Annotation:—*Refd. Portal v. Emmens* (1876), 1 C. P. D. 201.

8040. Plea of "never indebted"—What defences open under.—*EDINBURGH & LEITH RY. CO. v. HEBBLEWHITE* (1840), 6 M. & W. 707; *AYLESBURY RY. CO. v. MOUNT* (1843), 4 Man. & G. 651; *SHROPSHIRE UNION RAILWAY & CANAL CO. v. ANDERSON* (1849), 3 Exch. 401; *BIRKENHEAD, LANCASHIRE, & CHESHIRE JUNCTION RY. CO. v. BROWNRIGG* (1849), 4 Exch. 426.

See, now, R. S. C., Ord. 21, r. 1.

8041. Plea that defendant was not shareholder—What defences open under.—*SHROPSHIRE UNION RAILWAY & CANAL CO. v. ANDERSON*, (1849), 3 Exch. 401; 6 Ry. & Can. Cas. 56; 18 L. J. Ex. 232; 12 L. T. O. S. 406; 13 Jur. 175; 154 E. R. 900.

8042. Forfeiture & cancellation.—By a railroad Act it was enacted that in an action for calls it should be sufficient for the co. to prove that deft. was a proprietor of shares at the time of the calls for which the action is brought. The ct. refused to allow deft. in such an action to plead, in addition to never indebted, & not a proprietor, that he had forfeited his shares before the calls in question were made; or, that he had forfeited his shares & ceased to be proprietor after the calls & before action.—*LONDON & BRIGHTON RY. CO. v. FAIRCLOUGH* (1840), 6 Bing. N. C. 270; 8 Scott, 540; 4 Jur. 89; 133 E. R. 106.

Annotation:—*Folld. S. E. Ry. v. Hobbblewhite* (1840), 12 Ad. & El. 497.

8043. —.—*SOUTH EASTERN RY. CO. v. HEBBLEWHITE*, No. 8038, *ante*.

8044. —.—*INGLIS v. GREAT NORTHERN RY. CO.*, No. 7916, *ante*.

— **What amounts to valid forfeiture.**—*See Sub-sect. 9, post.*

Infancy.—*See Sect. 6, sub-sect. 1, ante.*

8045. Statutes of Limitation—Civil Procedure Act, 1833 (c. 42), s. 3.—An action for calls, under

1845 Act is an action upon a specialty. A railway co. brought such action against one of the shareholders & declared in the form given by sect. 26 of 1845 Act. Deft. pleaded that the action was upon contracts without specialty & that the alleged causes of action did not accrue within six years before the suit:—*Held*: on demurrer, the plea was bad, & the action was within Civil Procedure Act, 1833 (c. 42), s. 3, & might be brought within 20 years after the cause of action & the allegation in the plea that the action was upon contracts without specialty, was a false allegation of matter of law, & therefore immaterial.—*CORK & BANDON RY. CO. v. GOODE* (1853), 13 C. B. 826; 1 C. L. R. 345; 22 L. J. C. P. 198; 21 L. T. O. S. 141; 17 Jur. 555; 1 W. R. 410; 138 E. R. 1427.

Annotations:—*Consd. Re Royal Bank of Australia, Robinson's Exor's Case* (1856), 6 De G. M. & G. 572. *Distd. Thomson v. Clanmorris*, [1900] 1 Ch. 718. *Refd. Shepherd v. Hills* (1855), 11 Exch. 55; *Re Manchester & Milford Ry., Ex p. Cambrian Ry.* (1896), 45 W. R. 331. *Mentd. Re Manchester & Milford Ry.*, [1897] 1 Ch. 276; *Shepherd v. Bray* (1906), 75 L. J. Ch. 633.

8046. Plea that shares issued as fully paid-up.—Where a co. issue shares to directors as fully paid-up shares, & afterwards endeavoured to recover a call on such shares:—*Held*: the co. were prevented by estoppel from recovering the amount of such calls.—*CHRISTCHURCH GAS CO. v. KELLY* (1887), 51 J. P. 374; 3 T. L. R. 634.

Compare Sect. 18, sub-sect. 3, ante.

SUB-SECT. 6.—TRANSFER OF SHARES.

A. The Right to Transfer.

8047. Original subscriber—Never registered as shareholder.—*SHEFFIELD, ASHTON-UNDER-LYNE & MANCHESTER RY. CO. v. WOODCOCK*, No. 7989, *ante*.

8048. Transfers changing original intention & prospects of company.—A majority of the shareholders in the E. & C. Ry. Co. passed a resolution in favour of leasing their railway to the T. V. Co., which was worked upon the narrow-gauge principle. A majority of the directors of the E. & C. Co., being desirous of leasing the line to the B. & E. Co., upon the broad-gauge principle, refused to carry out the wishes of the co., & retained possession of the common seal. The minority of the directors, who concurred with the shareholders, filed a bill in the name of the co. for an injunction against the majority directors, to restrain them from leasing the railway to the B. & E. Co., & from opening the line upon the broad-gauge. The injunction was granted.

A motion was then made to dissolve the injunction, on the ground that the majority against the opening of the railway upon the broad-gauge principle had been obtained by an improper sale of shares to the S. W. Ry. Co.:—*Held*: the ct. could not interfere to prevent the shareholders from disposing of their interest in any legal manner, although such transfer of interest might entirely change the original intention & prospects of the co.—*EXETER & CREDITON RY. CO. v. BULLER* (1847), 5 Ry. & Can. Cas. 211; 16 L. J. Ch. 449; 9 L. T. O. S. 194, 263; 11 Jur. 532.

Annotations:—*Mentd. Cooper v. Shropshire Union Ry. & Canal Co.* (1848), 6 Ry. & Can. Cas. 136; *Edwards v. Shrewsbury & Birmingham Ry.* (1848), 2 De G. & Sm. 537; *Yetts v. Norfolk Ry.* (1848), 5 Ry. & Can. Cas. 487; *East Pant Du United Lead Mining Co. v. Merryweather* (1864), 4 New Rep. 511.

B. Contract for Sale of Shares.

8049. Necessity for writing—Whether interest in or concerning land—Statute of Frauds, s. 4.—

Sect. 8.—Shares: Sub-sect. 6, B. & C. (a), (b), (c), (d) & D.]

The ct. will decree a specific performance of an agreement for the sale of a certain number of shares in a railway co. A parol agreement for the sale of such shares is binding; for they are neither an interest in or concerning lands, within above sect.; nor goods, wares, or merchandise within sect. 17.—*DUNCUFT v. ALBRECHT* (1841), 12 Sim. 189; 59 E. R. 1104, I. C.

Annotations:—Folld. Cheale v. Kenward (1858), 3 De G. & J. 27. *Refd. Watson v. Spratley* (1854), 10 Exch. 222; *Colonial Bank v. Whinney* (1885), 30 Ch. D. 269. *Mentd. Bennett v. Blain* (1863), 15 C. B. N. S. 518.

8050. — Whether goods, wares or merchandise — Statute of Frauds, s. 17.] — DUNCUFT v. ALBRECHT, No. 8049, ante.

—.]—*Compare* Part III., Sect. 23, sub-sect. 2, B., ante.

8051. Sale of shares on which nothing paid—Agreement by purchaser to indemnify vendor against calls—Validity.]—C. entered into an agreement with K. to transfer ten railway shares to him on which no deposit had been paid; these shares K. agreed to accept, & to indemnify C. from all liabilities in respect of deposit or future calls. No money consideration passed between the parties. On K. afterwards refusing to accept the transfer, C. filed a bill for specific performance:—*Held*: the agreement was not *nudum pactum*, but a contract which might be specifically enforced in equity.—*CHEALE v. KENWARD* (1858), 3 De G. & J. 27; 27 L. J. Ch. 784; 31 L. T. O. S. 323; 4 Jur. N. S. 984; 6 W. R. 810; 44 E. R. 1179, L. C. *Annotation:—Mentd. Lambert v. Overton* (1864), 11 L. T. 503.

See, generally, CONTRACT, Vol. XII., pp. 172 et seq.

8052. Remedies for breach of contract—Specific performance.]—DUNCUFT v. ALBRECHT, No. 8049, ante.

—.]—*Compare* Part III., Sect. 23, sub-sect. 2, C. (e), ante.

C. The Transfer.

(a) What amounts to a Transfer.

8053. Voluntary conveyance for nominal consideration.]—The holder of shares in a railway co., whose Act incorporated the 1845 Act, conveyed the shares, along with much other property, by deed, in consideration of 10s. & the natural love & affection which he bore to his sister C., to a trustee in trust for her:—*Held*: this conveyance, though not a sale, was a transfer within the meaning of 1845 Act, ss. 14, 15, 16, & not a transmission within ss. 18, 19.—*COPELAND v. NORTH EASTERN RY. CO.* (1856), 6 E. & B. 277; 2 Jur. N. S. 1162; 119 E. R. 867; *sub nom. COPLAND v. NORTH EASTERN RY. CO.*, 27 L. T. O. S. 151.

Annotations:—Apld. R. v. General Cemetery Co. (1856), 6 E. & B. 415. *Consd. Hare v. L. & N. W. Ry.* (1860), John. 722. *Apld. Nanney v. Morgan* (1887), 35 Ch. D. 598. *Refd. Freeman v. I. R. Comrs.* (1871), L. R. 6 Exch. 101; *R. v. Charnwood Forest Ry.* (1884), Cab. & El. 419; *Nanney v. Morgan* (1887), 37 Ch. D. 346.

8054. Delivery of scrip certificates—No transfer executed.]—MCLEUEN v. WEST LONDON WHARVES & WAREHOUSES CO., No. 7867, ante.

(b) Mode of Transfer.

8055. Necessity for deed.]—The Brighton Railway Act, 1 Vict. c. cxix., s. 155, requires the conveyance of shares to be by writing, duly stamped, to be under the hands & seals of both parties. The clause afterwards calls the instrument “deed or conveyance,” & a “deed of sale or transfer”:—*Held*: this conveyance must, in order to satisfy

the statute, be by deed; & therefore an instrument of transfer of shares, executed by the proprietor of such shares, with the name of the purchaser in blank, & handed over by him to pltf., by whom, on the sale of such shares to deft., deft.’s name was inserted as the purchaser, was void.—*HIBBLEWHITE v. M’MORINE* (1840), 6 M. & W. 200; 9 L. J. Ex. 217; 4 Jur. 769; 151 E. R. 380; *sub nom. HEBBLEWHITE v. M’MORINE*, 2 Ry. & Can. Cas. 51.

Annotations:—Consd. Tayler v. Great Indian Peninsular Ry. (1859), 28 L. J. Ch. 285; *Powell v. London & Provincial Bank*, [1893] 2 Ch. 555. *Refd. Cheltenham & Great Western Union Ry. v. Daniel* (1841), 2 Q. B. 281; *L. & B. Ry. v. Fairclough* (1841), 2 Man. & G. 674; *Swan v. North British Australasian Co.* (1862), 7 H. & N. 603; *France v. Clark* (1884), 26 Ch. D. 257; *Soc. Générale de Paris v. Walker* (1885), 11 App. Cas. 20; *Magnus v. Queensland National Bank* (1887), 36 Ch. D. 25; *Burgis v. Constantine*, [1908] 2 K. B. 484. *Mentd. De Medina v. Norman* (1842), 9 M. & W. 820; *Davidson v. Cooper* (1844), 13 M. & W. 343; *Sims v. Marryat* (1851), 17 Q. B. 281; *Enthoven v. Hoyle* (1852), 18 L. T. O. S. 317; *Fazakerly v. M’Knight* (1856), 26 L. J. Q. B. 30; *Tupper v. Foulkes* (1861), 9 C. B. N. S. 797.

—.]—*See, also, No. 7989, ante.*

8056. — Transfer of railway stock belonging to lunatic—Into name of Accountant-General.]—The stock of a railway co., though transferable only by deed under 1845 Act, is included in the description of “stock” as defined by the Lunacy Regulation Act, 1853 (c. 70), & an order may therefore be made under sect. 140 of the latter Act for the transfer into the name of the Accountant-General of stock of that description belonging to a lunatic.—*Re IVES* (1863), 3 De G. J. & Sm. 453; 2 New Rep. 2; 32 L. J. Ch. 673; 8 L. T. 266; 9 Jur. N. S. 611; 11 W. R. 578; 46 E. R. 710, L. JJ.

See, further, LUNATICS & PERSONS OF UNSOUND MIND.

8057. Necessity for compliance with statutory form—Right of company to refuse to register deed differing from statutory form.]—A co. incorporated under an Act containing clauses to the same effect as 1845 Act, were called upon to register a memorial of a deed conveying much other property, & also some shares in the co., by way of mtge. They refused to do so, on the ground that the deed was not to the like effect with the statutable form of transfer given by the Act:—*Held*: they were justified in refusing to register the deed, as it differed from the simple statutable form of conveyance.—*R. v. GENERAL CEMETERY CO.* (1856), 6 E. & B. 415; 25 L. J. Q. B. 342; 27 L. T. O. S. 123; 119 E. R. 920; *sub nom. Re GENERAL CEMETERY CO.*, 2 Jur. N. S. 972.

Annotation:—Refd. R. v. Lambourn Valley Ry. (1888), 22 Q. B. D. 463.

8058. — True consideration not stated.]—The sole exor. & residuary legatee of the surviving trustee of a marriage settlement was the registered holder of a sum of stock of a co. regulated by 1845 Act, which was part of the trust fund. He deposited with a bank as security for an advance the stock certificate, a loan note undertaking to execute a proper assignment when required, & a blank transfer executed by himself. This transfer was not stamped & was expressed to be in consideration of 5s. The bank, who had no notice of the trust, subsequently inserted their own name in the blank transfer & executed it; but the deed was not redelivered by the borrower, nor executed in his presence, nor by his authority under seal. The transfer was duly registered by the co., of which the bank informed the borrower:—*Held*: (1) the transfer was not the deed of the borrower & did not pass the legal title to the stock; (2) although the bank were not affected with notice

of the breach of trust, their title must be postponed to the prior equitable title of the persons interested under the trust. *Semble*: the fact that the blank transfer was not stamped & did not state the true consideration would not in itself have invalidated the deed, the provisions on that subject in the Act being merely directory.—**POWELL v. LONDON & PROVINCIAL BANK**, [1893] 2 Ch. 555; 62 L. J. Ch. 795; 69 L. T. 421; 41 W. R. 545; 9 T. L. R. 446; 37 Sol. Jo. 476; 2 R. 482, C. A.

Annotations:—*Generally*, *Mentd.* Fry v. Smellie, [1912] 3 K. B. 282; *Re* Seymour, *Flelding v. Seymour*, [1913] 1 Ch. 475.

— — — — —.]—*See, also*, No. 7989, *ante*.

8059. — Transfer not stamped.—**POWELL v. LONDON & PROVINCIAL BANK**, No. 8058, *ante*.

8060. Necessity for production of share certificates—Discretion of directors.—**SHROPSHIRE UNION RAILWAYS & CANAL CO. v. R.**, No. 7956, *ante*.

8061. Necessity for delivery of transfer to secretary.—It is essential to the legal efficacy of a transfer of stock or shares of a co. under 1845 Act, that the deed of transfer should be delivered to the secretary of a co., & be kept by him in accordance with sect. 15.

Where, therefore, a deed of transfer of stock was delivered to the secretary of a co. for registration, but was returned by him unregistered to the transferor, on the ground that it was improperly stamped & dated, & was unaccompanied by the stock certificate, & the stock remained standing in the name of the transferor:—*Held*: as the deed of transfer had not been delivered to the secretary as required by sect. 15, the legal title to the stock had not vested in the transferee.—**NANNEY v. MORGAN** (1887), 37 Ch. D. 346; 57 L. J. Ch. 311; 58 L. T. 238; 36 W. R. 677; 4 T. L. R. 129, C. A.

Annotations:—*Consd.* *Roots v. Williamson* (1888), 38 Ch. D. 485. *Refd.* *Re* Dodds, *Ex p. Brown & Coates* (1891), 60 L. J. Q. B. 599; *Powell v. London & Provincial Bank*, [1893] 1 Ch. 610; *Rimmer v. Webster*, [1902] 2 Ch. 163.

8062. Transfer by joint shareholders—Necessity for execution of transfer by all—Co-executors.—**BARTON v. NORTH STAFFORDSHIRE RY. CO.**, No. 8083, *post*.

8063. — — — — —.]—When, under 1845 Act, s. 18, the names of exors. of a deceased shareholder in a co. are placed on the register of shareholders in respect of shares which belonged to their testator, they become joint shareholders in their individual capacity, although they may be described as exors. in the register; & consequently the shares can only be transferred by means of a transfer executed by all of them. Application having been made to a co. to register a transfer of stock, the co. sent a letter giving notice of it to the holder of the stock on the register, & stating that, unless they heard from her to the contrary, the stock would be transferred in their books. She did not answer the letter, & the co. subsequently registered the transfer. Her signature to the transfer being a forgery, she brought an action against the co. claiming to have her name replaced on the register as holder of the stock:—*Held*: she was not estopped from alleging that the transfer was invalid, & was entitled to the relief claimed.—**BARTON v. LONDON & NORTH WESTERN RY. CO.** (1889), 24 Q. B. D. 77; 59 L. J. Q. B. 33; 62 L. T. 164; 38 W. R. 197; 6 T. L. R. 70, C. A.; *affg.* *S. C. sub nom.* **BARTON v. LONDON & NORTH-WESTERN RY. CO.**, *SAME v. SCINDE, PUNJAUB & DELHI RY. CO.*, 5 T. L. R. 644.

Annotation:—*Refd.* *Oliver v. Bank of England* (1902), 71 L. J. Ch. 388.

(c) Compliance with Formalities.

Necessity for.—*See* Sub-sect. 6, C. (b), *ante*.

8064. Non-compliance—Effect of.—**NANNEY v. MORGAN**, No. 8061, *ante*.

8065. — Waiver of—Claim of transferee to be registered.—The C. & G. W. U. Ry. Act, s. 138, prescribed the mode in which the transfer of shares should be effected, & by sect. 148, allowing the transfer of shares, subject to certain conditions, enacted, that until a memorial of the transfer shall have been made, the seller shall remain liable for all future calls, & the purchaser shall have no part of the profits, nor any interest in respect of the shares; & the scrip certificates delivered to the original subscribers, contained a clause declaring that they were not transferable before the passing of the Act. An original subscriber parted with certain shares to deft., but the forms prescribed by the Act were not followed. Deft. sent in a claim to be registered in respect of those shares, & his name was entered & registered as a proprietor in respect thereof, & he paid two of the calls. In an action by the co. for the remaining calls on such shares:—*Held*: he was precluded from disputing the validity of the transfer to him, notwithstanding he had subsequently sold them.—**CHELtenham & GREAT WESTERN UNION RY. CO. v. DANIEL** (1841), 2 Q. B. 281; 114 E. R. 110; *sub nom.* **CHELtenham & GREAT WESTERN UNION RY. CO. v. DANIEL**, **CHELtenham & GREAT WESTERN UNION RY. CO. v. DE MEDINA**, 2 Ry. & Can. Cas. 728; 6 Jur. 577.

Annotations:—*Apprvd.* *Re* North of England Joint Stock Banking Co., *Straffon's Exors.' Case* (1852), 1 De G. M. & G. 576. *Distd.* *New Brunswick & Canada Ry. v. Muggeridge* (1859), 4 H. & N. 580. *Refd.* *Irish Post Co. v. Phillips* (1861), 30 L. J. Q. B. 114; *Swan v. North British Australasian Co.* (1862), 7 H. & N. 603; *Spackman v. Evans* (1868), L. R. 3 H. L. 171; *Kipling v. Todd* (1878), 3 C. P. D. 350.

8066. Transferee signing proxy describing him as shareholder.—**SHEFFIELD, ASHTON-UNDER-LYNE & MANCHESTER RY. CO. v. WOODCOCK**, No. 7989, *ante*.

(d) Blank Transfers.

Compare Part III., Sect. 23, sub-sect. 3, D., *ante*.

8067. Validity—Where deed necessary.—**HIBBLEWHITE v. M'MORINE**, No. 8055, *ante*.

— — — — —.]—*See also*, No. 7989, *ante*.

8068. — — — — — Blanks completed after execution by transferor—Not deed of transferor.—**POWELL v. LONDON & PROVINCIAL BANK**, No. 8058, *ante*.

D. Rights and Duties of Transferor and Transferee.

8069. Transferee—Duty to tender transfer for execution.—To enforce a contract for transfer of railway shares, if such transfer requires a deed, the purchaser must tender a conveyance to the vendor for execution; the same rule prevailing as on sales of real property.—**STEPHENS v. DE MEDINA** (1843), 4 Q. B. 422; 3 Ry. & Can. Cas. 454; 3 Gal. & Dav. 110; 12 L. J. Q. B. 120; 114 E. R. 957.

Annotations:—*Apld.* *Cobbold v. Peto* (1872), 27 L. T. 130. *Folld.* *Birkett v. Cowper-Coles* (1919), 35 T. L. R. 298. *Refd.* *Bowlby v. Bell* (1846), 3 C. B. 284.

8070. — — — — —.]—Deft. authorised pltf., a broker, to sell certain shares in a railway, then lying at the co.'s office for registration. Pltf. sold them to R. Some correspondence took place between pltf. & deft. on account of some delay in the transfer of the shares, & ultimately deft. wrote a letter to pltf. requesting that all further communication should be made to his attorney. The transfer not having been made, R., after

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giving pltf. notice, bought the same number of shares at an advance in price, & charged pltf. with the difference, which pltf. paid & then sued deft. for the amount:—*Held*: (1) pltf. was authorised to sell registered shares only; (2) inasmuch as no valid transfer could be made except by deed under 1845 Act, s. 14, R. was bound to have tendered a deed of transfer before he could have recovered against pltf., & not having done so, pltf. made the payment to him in his own wrong; (3) the above-mentioned letter did not amount to a refusal to complete the contract so as to dispense with a tender of a deed of transfer.—*BOWLBY v. BELL* (1846), 3 C. B. 284; 4 Ry. & Can. Cas. 692; 16 L. J. C. P. 18; 7 L. T. O. S. 300; 10 Jur. 669; 136 E. R. 114.

Annotation:—*As to* (2) *Consd.* Bayley v. Wilkins (1849), 7 C. B. 886.

8071. ———.]—In an action for a breach of contract in refusing to accept, at the time appointed by the contract, & to pay for, certain shares in a water, gas, & market co., such shares being by the co.'s Act of Parliament made personal estate, & a form of transfer under seal being thereby given, it is sufficient to aver that pltf., the vendor, "had always been ready & willing to do all things, & that all things had happened, etc., necessary to entitle him to the performance by deft. of his agreement"; & notice to deft. of pltf.'s readiness & willingness to transfer the shares is not necessary, or a condition precedent, to pltf.'s right to recover, it being on the contrary the duty of deft., the purchaser, to prepare & tender a transfer for execution by pltf.; & a plea of want of such notice is bad, & no defence to the action.—*COBBOLD v. PETO* (1872), 27 L. T. 130.

8072. ——— *Duty to procure registration transfer.*]
—*SAYLES v. BLANE*, No. 8009, *ante*.

——— *Duty to indemnify transferor against calls.*]
—*See Sub-sect. 5, D. (a), ante*.

E. Registration of Transfers.

Refusal of company to register transfer—Calls unpaid.]—*See Nos. 8077, 8078, 8080, post*.

——— **Non-compliance with formalities.**]—*See Nos. 8057, 8061, ante*.

8073. Proof of entry of memorial of transfer—Necessity for—To enable company to recover calls.]
—*LONDON & BRIGHTON RY. CO. v. FAIRCLOUGH*, No. 7991, *ante*.

8074. Omission to enter memorial of transfer—Forfeiture of shares for non-payment of calls by transferor—Liability of company to transferee.]
—*CATCHPOLE v. AMBERGATE, ETC., RY. CO.*, No. 8112, *post*.

8075. Transfer-book—As evidence—Of ownership of shares.]—To prove the ownership of shares under the Great Western Railway Act, 5 & 6 Will. 4, c. cvii., it is not enough to show that the alleged owner's name is entered as vendee of the shares in the co.'s register book of transfers.

The certificates tendered by pltf. neither contained their names as original proprietors, nor showed any indorsement to them as transferees, but were in the names of third parties:—*Held*: such certificates were insufficient, as not showing a title to convey in the party conveying.—*HARE v. WARING* (1838), 3 M. & W. 362; 1 Horn. & H. 90; 7 L. J. Ex. 118; 150 E. R. 1184.

Annotations:—*Refd.* London Grand Junction Ry. v. Freeman (1841), 2 Man. & G. 606. *Mentd.* Alsager v. Close (1842), 10 M. & W. 576.

8076. ——— *Time of transfer.*]—(1) A railway Act enabled proprietors to dispose of their shares, subject to certain rules & required

that the deed of sale should be kept by the co., & that the secretary or clerk should enter in a book a memorial of the transfer. An entry of a transfer appeared in the book, with a memorial dated Apr. 7:—*Held*: this was sufficient evidence of the time of transfer, so as to make deft. a proprietor from that date, without any evidence to show when the entry was in fact made.

(2) In an action for two calls, it appeared that twenty-one days' notice of them was required by the Act; which also provided, that if any proprietor "for the time being" should not pay his ratable proportion, he should also pay interest, etc. The Act also provided, that upon the trial of an action for calls, it should only be necessary to prove that deft. at the time of making such respective calls was the proprietor of a share in the undertaking. Notice of the first call was given upon Mar. 6, to be payable on Apr. 9 of the second, on June 23, to be payable on July 23:—*Held*: deft., having become a proprietor on Apr. 7 was liable only to the second call.—*AYLESBURY RY. CO. v. THOMPSON* (1841), 2 Ry. & Can. Cas. 668; *sub nom.* BIRMINGHAM & AYLESBURY RY. CO. v. THOMPSON, 10 L. J. Q. B. 124; 5 J. P. 529.

Annotation:—*Refd.* Aylesbury Ry. v. Mount (1842), 2 Ry. & Can. Cas. 679.

F. Transfers when Calls Unpaid.

Compare Nos. 2393-2401, ante.

8077. Application of 1845 Act, s. 16—General rule.]—1845 Act, s. 16, enacting that no shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof until he shall have paid such call, applies only as between the shareholder & the co., & not between the vendor & purchaser.—*HAWKINS v. MALTBY* (1867), 3 Ch. App. 188; 37 L. J. Ch. 58; 17 L. T. 397; 16 W. R. 209, L. C.; *subsequent proceedings* (1869), 4 Ch. App. 200, L. C.

Annotations:—*Refd.* Davis v. Haycock (1869), L. R. 4 Exch. 373. *Mentd.* Coles v. Bristowe (1868), L. R. 6 Eq. 149; Grissell v. Bristowe (1868), L. R. 3 C. P. 112; Hodgkinson v. Kelly (1868), L. R. 6 Eq. 496; Torrington v. Lowe (1868), 17 W. R. 78; Maxted v. Paine (1871), L. R. 6 Exch. 132; *Re* International Contract Co., Hughes' Claim (1872), L. R. 13 Eq. 623.

8078. ——— **Transfer of fully paid-up shares—Transferor holder of shares on which calls unpaid.**]—1845 Act, s. 16, enacts that no shareholder shall be entitled to transfer any share after any call has been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him:—*Held*: the sect. only applies to the transfer of shares on which a call can be & has been made, & has no application to the transfer of shares on which all the calls have been paid; & a co. therefore is bound to register a transfer of stock, although the transferor be the holder of shares on which there are calls unpaid.—*HUBBERSTY v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.* (1867), L. R. 2 Q. B. 471; 8 B. & S. 420; 36 L. J. Q. B. 198; 16 L. T. 425; 15 W. R. 793, Ex. Ch.

Annotation:—*Consd.* *Ex p.* Stringer (1882), 9 Q. B. D. 436.

——— **"After any call made"—Whether after resolution to call passed or after notice of call given.**]—*See Nos. 7979-7982, ante*, No. 8157, *post*.

8079. Effect of transfer—As between transferor & transferee—Refusal of purchaser to accept shares—Right of vendor to sue for price.]—(1) On Oct. 15, defts. bought of pltf. 100 railway shares, to be paid for on Oct. 31. On Oct. 14, a call was made upon the shares. On Nov. 1, pltf. applied to defts. for a name to be inserted in the deed of transfer, which, by the custom of the share

market, was to be prepared by the vendors. Defts. refused to give a name, & subsequently, on a tender of the shares being made, declined to accept them. Sect. 16 of 1845 Act prohibits a shareholder from transferring his share until he shall have paid all calls due upon his share. Pltfs. had not paid all the calls due upon the shares:—*Held*: in an action against defts. for the price of the shares, pltfs. were entitled to the verdict on the issue raised on the plea that they were not ready & willing to transfer the shares, as they were in a condition, by paying the calls, to make a valid transfer.

(2) A call may be considered to be made as soon as a notice announcing that the directors have resolved to make a call has been sent to the shareholders.—*SHAW v. ROWLEY* (1847), 16 M. & W. 810; 5 Ry. & Can. Cas. 47; 16 L. J. Ex. 180; 11 Jur. 911; 153 E. R. 1419.

Annotations:—As to (1) *Reid*. *Hanslip v. Padwick* (1850), 5 Exch. 615. *Generally*, *Mentd.* *Sims v. Marryatt* (1851), 17 Q. B. 281.

— — — — —.]—*See, also*, No. 8077, *ante*.

8080. — As between transferor & company—Right of company to refuse to register transfer.—

A shareholder in an incorporated co. within 1845 Act, who has not paid up all calls due upon his shares, cannot, by sect. 16, execute a deed of transfer of any of such shares which shall be valid as against the co.: & the co. may refuse to register such deed.—*R. v. WING* (1851), 17 Q. B. 645; 117 E. R. 1429; *sub nom.* *Re HALL & NORFOLK ESTUARY CO.*, 7 Ry. & Can. Cas. 503; 21 L. J. Q. B. 94; 19 L. T. O. S. 104; 16 Jur. 149.

Annotation:—*Reid*. *Re Pierse* (1854), 24 L. T. O. S. 192.

— — — — — **Fully paid-up shares.**—*See* No. 8078, *ante*.

8081. — Transfer registered.—(1) If a transfer of shares in a co. subject to 1845 Act, on which calls are due, has been registered, the transfer is not, under sect. 16 of the Act, rendered invalid; the former shareholder is not a contributory, & is merely a debtor to the co. for the amount of the calls; & the directors may be liable for any loss to the co. occasioned by the transfer.

(2) Resp.'s costs of an unsuccessful appeal by the official liquidator were ordered to be paid by the liquidator.—*Re HOYLAKES RY. CO.*, *Ex p.* *LITTLEDALE* (1874), 9 Ch. App. 257; 43 L. J. Ch. 529; 30 L. T. 213; 22 W. R. 443, L. JJ.

Annotations:—As to (2) *Folld.* *Re United Ports Co.*, *Beck's Case* (1874), 43 L. J. Ch. 531. *Reid.* *Re Angerstein*, *Ex p.* *Angerstein* (1874), 43 L. J. Ch. 131.

— — — — —.]—*See, also*, No. 8077, *ante*.

G. Transfers effected by Forgery.

Compare Part III., Sect. 23, sub-sect. 12, D., *ante*; *BANKERS & BANKING*, Vol. III., p. 276, No. 862.

8082. Position of original shareholder—In relation to company—As to replacement of stock—Right of shareholder's administrator to sue.—

Certain stock of a railway co. was standing in the books of the co. in the names of two persons, T. & B. B., by a transfer executed by himself, & to which he forged the signature of T., transferred the stock to a third person, whose name was substituted upon the register for the names of B. & T. T. died soon afterwards:—*Held*: the personal representative of T. had a legal right to call on the co. to replace the stock, though the right of action at law was gone.—*MIDLAND RY. CO. v. TAYLOR* (1862), 8 H. L. Cas. 751; 31 L. J. Ch. 336; 6 L. T. 73; 8 Jur. N. S. 419; 10 W. R. 382; 11 E. R. 624, H. L.; *affg.* *S. C. sub nom.* *TAYLOR v. MIDLAND RY. CO.* (1860), 28 Beav. 287.

Annotations:—*Consd.* *Barton v. North Staffordshire Ry.*

(1888), 38 Ch. D. 458. *Reid.* *Sutton v. Wilders* (1876), L. R. 12 Eq. 373; *Barton v. L. & N. W. Ry.* (1888), 38 Ch. D. 144. *Mentd.* *Swan v. North British Australian Co.* (1862), 10 W. R. 841.

8083. — When cause of action arises.—One of two exors. at various periods, some of which were more than six years before the commencement of the action, forged his co-exor.'s signature to transfers of stock, which were duly registered. He applied the proceeds of the transfers to his own purposes, but continued to pay the amounts of the dividends to the persons entitled. The other exor., on discovery of the fraud, informed the railway co. that the transfers were invalid, & demanded that the stock should be registered in the names of herself & another, who had been appointed trustees of the will. The railway co. declined to accede to this request, & the present action was brought that the co. might be ordered to register pltfs. as owners of the stock:—*Held*: (1) Stat. Limitations was no defence to the action, as time did not begin to run until there was a complete cause of action, & there was no such cause of action until the refusal of the railway co. to register the stock in the names of pltfs.; (2) one of the co-exors. could not transfer stock registered in the names of both; (3) the transfers were not good as to one moiety of the stock; (4) though the fraudulent exor. was estopped by his own action from denying the validity of the transfers, such estoppel did not affect his innocent co-exor.; (5) the innocent exor. had in equity a sufficient interest in the stock to enable her to sue against her fraudulent co-exor. & the railway co.—*BARTON v. NORTH STAFFORDSHIRE RY. CO.* (1888), 38 Ch. D. 458; 57 L. J. Ch. 800; 58 L. T. 549; 36 W. R. 754; 4 T. L. R. 403.

Annotations:—As to (1) *Consd.* *Re Severn & Wye & Severn Bridge Ry.*, [1896] 1 Ch. 559. As to (2) *Folld.* *Barton v. L. & N. W. Ry.*, *Same v. Scinde, Punjab, & Delhi Ry.* (1889), 5 T. L. R. 644. *Generally*, *Mentd.* *The Pongola* (1895), 73 L. T. 512; *Oliver v. Bank of England*, [1902] 1 Ch. 610; *Bank of England v. Cutler*, [1908] 2 K. B. 208.

8084. — As to cancellation of transfer.—

Pltf., the owner of railway shares in two cos., took certificates from the cos., for which he gave receipts. In so doing he gave his address, in one instance, at the office of a banking co., in the other at a club. He deposited the certificates with the manager of the bank for safe custody. The manager fraudulently sold the shares, & forged the name of pltf. to transfer deeds of the shares. The cos. wrote to the pltf. informing him of the transfers; & receiving in one instance no answer & in the other an answer purporting to come from pltf., but in reality forged by the manager, registered the transfer. On bill against one of the cos. & the purchaser, praying that the purchaser might be decreed to deliver up the certificate to pltf. that the co. might be decreed to cancel the alleged transfer, & the entry of it in their books, to deliver to pltf. a stock certificate, & pay the dividend then due, & all future dividends:—*Held*: (1) pltf. was entitled to the relief prayed, but without prejudice to any question at Law or in Equity between the co-defts.; (2) the negligence or mistaken confidence of pltf. disentitled him to costs against either deft.—*JOHNSTON v. RENTON*, *JOHNSTON v. PARSEY* (1870), L. R. 9 Eq. 181; 39 L. J. Ch. 390; 22 L. T. 90; 18 W. R. 284.

Annotations:—As to (1) *Consd.* *Re United Service Co.*, *Johnston's Claim* (1871), 6 Ch. App. 212. *Reid.* *Sheffield Corpn. v. Barclay*, [1903] 2 K. B. 580. As to (2) *Consd.* *Re United Service Co.*, *Johnston's Claim* (1871), 6 Ch. App. 212. *Generally*, *Mentd.* *Brooklesby v. Temperance Permanent Bldg. Soc.*, [1893] 3 Ch. 130.

8085. — Action for recovery of shares—Costs.—J., the owner of railway shares in two cos., deposited the certificates for safe custody with a

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banking co., who undertook to receive the dividends for a small commission. On receiving the certificates from the railway cos., J. gave his address in one instance at the office of the bank, & in the other at a club. The manager of the bank, who had the key of the safe where the certificates were kept, fraudulently sold the shares, & forged the names of J. to the transfer. The cos. wrote to J., informing him of the transfers, & receiving, in one instance, no answer, & in another in answer to J.'s name forged by the manager, registered the transfer. J. afterwards, on discovery of the fraud, brought suits against the two cos. & the transferees of the shares, in which he recovered the shares, but the ct. gave him no costs. The banking co. being wound up, J. claimed to prove against the co. for the amount of his costs in the suits which had been occasioned by their negligence:—*Held*: the banking co. were bailees for reward of the certificates, & they had been guilty of culpable negligence in keeping them; (2) the loss of the costs was too remote a consequence of the negligence of the co. for them to be held liable for it.—*Re UNITED SERVICE CO., JOHNSTON'S CLAIM* (1871), 6 Ch. App. 212; 40 L. J. Ch. 286; 24 L. T. 115; 19 W. R. 457, L. J. J. Annotations:—*As to* (1) *Refd.* *Leese v. Martin* (1873), L. R. 17 Eq. 224; *Re Cooper, Cooper v. Vesey* (1882), 20 Ch. D. 611; *Jobson v. Palmer*, [1893] 1 Ch. 71. *As to* (2) *Refd.* *Re Cooper, Cooper v. Vesey* (1882), 20 Ch. D. 611. *Generally, Mentd.* *Arnold v. Cheque Bank* (1876), 34 L. T. 729.

8086. — Estoppel of shareholder—Forgery by one of two joint holders.]—BARTON v. LONDON & NORTH WESTERN RY. CO., No. 8063, ante.

8087. — — —.]—BARTON v. NORTH STAFFORDSHIRE RY. CO., No. 8083, ante.

8088. Position of transferee—Alteration of transfer—Transferor's initials added without authority—Transferee ignorant of facts.]—(1) Railway stock was purchased for pltf. & paid for by him. By a mistake of the broker, the transfer was executed by the vendor to a wrong transferee. The name of the transferee was afterwards struck out, & pltf.'s name interlined, the initials of the vendor being placed, without his authority, opposite to the correction. The transfer so altered was executed by pltf. & registered by the co., in ignorance of the fact that the initials were not written by the vendor. The vendor made no claim to the stock, & pltf. afterwards instituted a suit on behalf of all the shareholders to set aside a traffic agreement between the co. & certain other railways. The co., after the institution of the suit, being informed by the vendor that the initials were not in his handwriting, retransferred the stock into the name of the vendor, & pleaded that pltf. was not a shareholder:—*Held*: pltf. was not a shareholder, & had no interest to entitle him to maintain the suit, & this would have been so, even if the co. had abstained from striking his name off the register; & the bill was dismissed accordingly.

(2) The purchase of shares in a co., for the purpose of instituting a suit to restrain the carrying out of an agreement alleged to be illegal, is not maintenance, or anything savouring of maintenance.—*HARE v. LONDON & NORTH-WESTERN RY. CO.* (1860), John. 722; 2 L. T. 229; 8 W. R. 352; 70 E. R. 610.

8089. Rights of company—Rectification of register—Whether estopped by issue of certificate.]—C., pltf. in the second action, had been since 1875 the proprietor of certain stock in the L. & S.-W. Ry. Co. P., the confidential clerk of C., feloniously got possession of a certificate for £1,000

of the stock & sold that amount. Subsequently he forged C.'s name to the transfer, & forwarded it, together with the certificate, to the brokers of W., pltf. in the first action, who had purchased the stock from T., a member of the Stock Exchange. The brokers forwarded the transfer & the certificate to the co. for registration. The co. thereupon wrote to C. at his usual address, inquiring if the transfer were correct. The letter was intercepted by P., who replied in a way which appeared not quite satisfactory. The co. forwarded a second letter, which was also intercepted by P., who gave the co. an explanation, with which they were satisfied, & they immediately sent a new certificate to Major W.'s brokers. The fraud was subsequently discovered, & now W. sought to recover from the co. on the ground that (*inter alia*) he was entitled to rely upon the certificate of registration, which the co. were estopped from questioning, as he, W., relying upon it had so prejudicially altered his position as to bring the case within the authorities upon estoppel. Pltf. in the second case sought to have his name replaced in the books of the co. as the owner of the stock:—*Held*: (1) the co. having issued the certificate without any want of care & *bonâ fide* were not estopped from contesting its validity; (2) the judgment must be for defts. in the first action, & for pltf. in the second action with costs.—*WATERHOUSE v. LONDON & SOUTH-WESTERN RY. CO., COATES v. SAME* (1879), 41 L. T. 553; 44 J. P. 154.

8090. Practice—Action by original shareholder against company—Service of transferee under Ord. 16, r. 48.]—In giving leave to a deft. to serve notice of claim for contribution or indemnity on a third party the ct. will not consider whether the claim is a valid one, but only whether the claim is *bonâ fide* & whether if established, it will result in contribution or indemnity. Pltf., who was the owner of stock in a public co. registered in her name, ascertained that it had been transferred to F., by virtue as she alleged of a forged transfer. She brought an action against the co. to have her name reinstated in the books of the co. The co. obtained leave to serve F. with a claim for indemnity:—*Held*: leave to serve F. was rightly given.—*CARSHORE v. NORTH EASTERN RY. CO.* (1885), 29 Ch. D. 344; 54 L. J. Ch. 760; 52 L. T. 232; 33 W. R. 420, C. A.

Annotation:—Mentd. *Birmingham & District Land Co. v. L. & N. W. Ry.* (1886), 34 Ch. D. 261.

8091. Right of transferee to defend action.]—An action was brought against a railway co. to compel them to retransfer stock which pltf. alleged to have been transferred out of their names by means of forged transfer deeds. The transferees were not made parties, but the co., under Ord. 16, r. 48, served them with third party notices, claiming indemnity. The co., in their defence, set up all the grounds of defence that could be relied on against pltf.'s claim. Some of the third parties desired to defend, & the judge gave them liberty to appear at the trial, & take such part as the judge should direct. Two of them appealed from this Ord., asking that they might be at liberty to deliver a defence, appear at the trial, & put in evidence, & cross-examine pltf.'s witnesses:—*Held*: the third parties were not, under the old practice, necessary parties to the action & as the co. had raised all proper grounds of defence, & was *bonâ fide* defending the action, the order gave the third parties all reasonable protection, & the appeal must be dismissed, for while on the one hand the ct. ought to take care that the third parties had full opportunity of seeing that the questions in the cause were fairly

tried, it ought, on the other hand, to take care that pl'tfs. were not embarrassed & put to expense by unnecessarily allowing persons, who were not necessary parties to the action, to take all the same steps as if they had been made defts.—*BAR-TON v. LONDON & NORTH WESTERN RY. CO.* (1888), 38 Ch. D. 144; 57 L. J. Ch. 676; 59 L. T. 122; 36 W. R. 452; 4 T. L. R. 420, C. A.

Annotation:—*Distd. Baxter v. France*, [1895] 1 Q. B. 455.

H. Transfers to Avoid Liability.

Compare Part III., Sect. 23, sub-sect. 13, *ante*.

8092. Validity.—A solr., who was a shareholder in an incorporated co., knowing it to be in difficulties, transferred his shares to his farm bailiff, a man without property. The transfer purported to be made for £50, but no such sum was ever paid, nor had transferee ever agreed to pay any sum. The transferor admitted that he had made the transfer to get rid of his liability, & had asked transferee to take the shares off his hands. He also stated that he had informed transferee, who had no other advice, that the co. was in difficulties; that the shares were worthless; & that a liability might attach to the ownership. The transferee stated that he had never looked upon himself as owner; that he had always considered that the shares were merely put into his name to serve some purpose of transferor's, & that he had always understood that he should be indemnified. The co. having been ordered to be wound up, transferor, as solr. of transferee, but without communication with him, made an offer to contribute a sum towards the debts of the co. to escape all further liability. He admitted that this sum was to have come out of his own pocket:—*Held*: the transfer must be held to have been merely colorable, & transferor was a contributory.—*Re ELECTRIC TELEGRAPH CO. OF IRELAND, BUDD'S CASE* (1861), 3 De G. F. & J. 297; 31 L. J. Ch. 4; 5 L. T. 332; 10 W. R. 51; 45 E. R. 892, L. J.

Annotations:—*Folld. Re Phoenix Life Assce., Ex p. Hatton* (1862), 31 L. J. Ch. 340. *Appld. Re Consols Insee. Asscn., Benham's Case* (1865), 11 Jur. N. S. 381. *Folld. Re Discoverers Finance Corp., [1908] 1 Ch. 141. Expld. Re Discoverers Finance Corp., Lindlar's Case, [1910] 1 Ch. 312. Refd. R. v. Midland Counties & Shannon Junction Ry. (1863), 9 L. T. 151; Re Overend, Gurney, Musgrave & Hart's Case (1867), L. R. 5 Eq. 193; Re Financial Insee. Bishop's Case (1869), 7 Ch. App. 296, n.; Re European Bank, Deering's Case (1871), 7 Ch. App. 294, n. Mentd. Ilfracombe Ry. v. Nash (1870), 18 W. R. 431.*

8093. —.]—A shareholder in a joint-stock co. having executed a transfer of his shares for the purpose of avoiding liability, & the transferee being a person in insolvent circumstances, the co. refused to register the transfer. An application for a writ of *mandamus* to the co., requiring them to register the transfer, was dismissed on the ground that another remedy by action of *mandamus* was open to the app't.

If the transfer be real, it will be upheld, although it be made to a pauper & to avoid future liability.—*R. v. LAMBOURN VALLEY RY. CO.* (1888), 22 Q. B. D. 463; 58 L. J. Q. B. 136; 60 L. T. 54; 53 J. P. 248; 5 T. L. R. 78.

Annotations:—*Mentd. R. v. St. George the Martyr, Southwark Vestry* (1892), 61 L. J. Q. B. 398; *R. v. L. & N. W. Ry., [1894] 2 Q. B. 512; R. v. Incorporated Law Soc. (1895), 64 L. J. Q. B. 797; R. v. L. & N. W. Ry. & G. W. Ry. (1896), 65 L. J. Q. B. 516; R. v. St. Giles, Camberwell Vestry (1897), 66 L. J. Q. B. 337; Smith v. Chorley District Council (1897), 66 L. J. Q. B. 427; Davies v. Gas Light & Coke Co. [1909] 1 Ch. 248; R. v. Wilts & Berks Canal Co., Ex p. Berkshire County Council (1912), 107 L. T. 765.*

I. Restraint of Transfers.

8094. By injunction—Grounds for granting—Transfer of shares to obtain voting power.—*MANN*

v. PATENT CABLE TRAMWAYS CORPN. (1886), 2 T. L. R. 454.

SUB-SECT. 7.—TRANSMISSION OF SHARES.

8095. Entry of probate of will of deceased shareholder—On books of company—How enforced.—*Semble*: shares in a Canal co., which, by the act creating the co., are declared to be personal property, are *bonâ notabilia* in the diocese wherein testator died, & wherein the shares are registered at the offices of the co., although the canal may pass through other dioceses.

The ct. will grant a *mandamus* to a canal co., to enter upon their books the probate of the will of a deceased shareholder; leaving any question as to the validity & effect of the probate to be raised by a return to the writ.—*R. v. WORCESTER & BIRMINGHAM CANAL NAVIGATION & HODGKINSON* (1828), 1 Man. & Ry. K. B. 529; 1 Man. & Ry. M. C. 195; 6 L. J. O. S. K. B. 173.

Liability of estate for calls.—*See No. 2067, ante.*

SUB-SECT. 8.—MORTGAGE OF SHARES.

8096. Deposit of certificates—Effect of—Accompanied by blank transfer.—A railway Act prescribed a form of instrument for the transfer of shares, & provided that a memorial of the transfer should be entered in the co.'s books, & that until such memorandum should be made, the purchaser should have no share in the undertaking. A shareholder in the railway borrowed money on a deposit of the certificate of his shares, with assignments executed by him, but with the name of the transferee left in blank, & the blanks were not filled up before the shareholder became bkpt:—*Held*: the depositary had a lien on the shares, & the lien extended to sums paid by him in respect of calls.—*Re BOULT & ADDISON, Ex p. DOBSON* (1812), 2 Mont. D. & De G. 685; 11 L. J. Bcy. 49; 6 Jur. 917, Ct. of R.

8097. ——— *Railway shares.*—S., a holder of shares in a railway co., which was subject to the provisions of 1845 Act, was one of the secretaries of the co., & a solr. He borrowed money of a client on a deposit of the certificates of the shares, but no further notice of the deposit was given to the co. On the solr. becoming bkpt:—*Held*: the shares were in his order & disposition with the consent of the client. The knowledge, the notice which S. had, was not knowledge on his part, or notice to him in his character of secretary or joint secretary, or otherwise than in his character of shareholder only, by reason exclusively of his dealing or attempted dealing in that character, with the merely equitable title of his shares. I think that the directors were not bound by that knowledge or notice, & that they were at full liberty & had the power, legally, equitably & safely, at any time between the deposit & the bkpcy., at any time between the memorandum & the bkpcy., to permit any transfer by S. of his shares to any person (KNIGHT BRUCE, L.J.).—*Re SKETCHLEY, Ex p. BOULTON* (1857), 1 De G. & J. 163; 26 L. J. Bcy. 45; 29 L. T. O. S. 71; 3 Jur. N. S. 425; 5 W. R. 445; 44 E. R. 685, L. J.

Annotations:—*Expld. Re Shelley, Ex p. Stewart* (1864), 4 De G. J. & Sm. 543. *Consd. Re Worcester, Ex p. Agra Bank* (1868), 3 Ch. App. 555; *Soc. Générale de Paris v. Tramways Union Co.* (1884), 14 Q. B. D. 424. *Refd. Bartlett v. Bartlett* (1857), 1 De G. & J. 127; *Re Rawbone's Trust* (1857), 3 K. & J. 476; *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426. *Mentd. Cory v. Eyre* (1863), 1 De G. J. & Sm. 149.

Sect. 8.—Shares: Sub-sects. 8 & 9. Sect. 9: Sub-sect. 1.]

8098. Deposit of shares with trustees for creditor—Shares purporting to be paid up—Liability of trustees to execution as shareholders for debt of company.]—*GUEST v. WORCESTER, ETC. RY. CO.*, No. 8368, *post*.

8099. Notice—Necessity for—As against subsequent purchaser for value.]—A. & B. were directors in a co., in which no shareholder can act as a director without holding ten shares. A. & B., being intimate friends, the latter advanced to the former several sums of money. The last of these advances was made on July 23, 1829, on which day A. delivered to B. an order upon the secretary of the co. to transfer A.'s ten shares into B.'s name. B. did not at that time make use of the order, & A. continued to act as director until his death, in May, 1832. A.'s affairs being insolvent, & a suit having been instituted for the administration of his assets, B. then served the order of transfer on the secretary, & presented his petition in the suit, claiming an equitable lien on A.'s ten shares for the amount of his advances, with interest:—*Held*: these circumstances were not sufficient to show an intention to create a lien on the shares; & consequently, B.'s claim was rejected.

Mortgagee of shares in a co. must give notice of his incumbrance to the secretary, or his lien will be lost, as against a subsequent purchaser for valuable consideration without notice: Where the qualification of a party to act as a director of a co., consists of his being the proprietor of a certain number of shares, the qualification will not be lost by a mortgage of those shares.—*CUMMING v. PRESCOTT* (1837), 2 Y. & C. Ex. 488.

*Annotation:—**Refd. Soc. Générale de Paris v. Tramways Union Co.* (1884), 14 Q. B. D. 424.

8100. — What amounts to—Equitable mortgage by secretary of company—Whether knowledge of secretary notice to company.]—*Re SKETCHLEY, Ex p. BOULTON*, No. 8097, *ante*.

8101. Duty of mortgagor to make proper inquiries—As to position of mortgagor.]—*SHROPSHIRE UNION RAILWAYS & CANAL CO. v. R.*, No. 7956, *ante*.

SUB-SECT. 9.—FORFEITURE AND CANCELLATION OF SHARES.

8102. Nature of right—Whether additional to or alternative with right of action for calls.]—The power given by 1845 Act, s. 29, to declare shares forfeited for non-payment of calls, is not an alternative remedy with the right of action for calls; & therefore a declaration of forfeiture cannot be pleaded in bar to, or to the further maintenance of, such action.—*GREAT NORTHERN RY. CO. v. KENNEDY* (1849), 4 Exch. 417; 7 Dow. & L. 197; 6 Ry. & Can. Cas. 5; 19 L. J. Ex. 11; 14 L. T. O. S. 182; 13 Jur. 1008.

*Annotations:—**Apprvd. Inglis v. G. N. Ry.* (1852), 19 L. T. O. S. 149. *Refd. Henry v. G. N. Ry.* (1857), 4 K. & J. 1.

8103. — —.]—*INGLIS v. GREAT NORTHERN RY. CO.*, No. 7916, *ante*.

8104. — Trust for benefit of shareholders.]—(1) Directors had power, on non-payment of calls, to sue for them or forfeit & sell the shares. They proposed to a shareholder to relieve him from further liability, on his consenting to an absolute forfeiture. He assented, but the directors, having afterwards discovered that he was in good circumstances, refused to complete. The ct. declined to compel the directors specifically to perform the contract.

(2) The discretion of directors to forfeit shares for non-payment of calls is a trust, to be exercised for the benefit of all the shareholders.—*HARRIS v. NORTH DEVON RY. CO.* (1855), 20 Beav. 384; 52 E. R. 650.

8105. Validity—Forfeiture not in prescribed form—Power of directors to accept.]—The directors of a railway co. agreed to accept a forfeiture or relinquishment of certain shares, held by pltf., who was at that time a director & he accordingly executed a deed poll relinquishing & transferring such shares to the co., but the forms prescribed by the Act for giving effect to a declaration or forfeiture, or for a purchase of shares by the co., were not observed. Several calls were afterwards made, without any claim upon pltf. in respect of such shares. An action being subsequently brought against pltf., for the arrears of calls upon such shares, the bill was filed, & the common injunction obtained:—*Held*: the injunction could only be continued on the terms of pltf. suffering judgment in the action, & paying the money into ct.

Qu.: As to the power of the directors to accept any relinquishment or transfer of shares in a form not prescribed by the Act.—*PLAYFAIR v. BIRMINGHAM, BRISTOL & THAMES JUNCTION RY. CO.* (1840), 1 Ry. & Can. Cas. 640; 9 L. J. Ch. 253, L. C.

8106. — Necessity for confirmation by company.]—*EDINBURGH & LEITH RY. CO. v. HEBBLEWHITE* (1840), 6 M. & W. 707; 8 Dowl. 802; 2 Ry. & Can. Cas. 237; 10 L. J. Ex. 44; 151 E. R. 597.

*Annotations:—**Appld. Birmingham, Bristol & Thames Junction Ry v. Locke* (1841), 1 Q. B. 256. *Refd. Eastern Counties Ry. v. Cooke* (1840), 2 Ry. & Can. Cas. 250. *Mentd. Welland Ry. v. Blake* (1861), 6 H. & N. 410.

8107. —.]—The Eastern Counties Railway Act, provided, "that if any proprietor of shares neglected or refused to pay his calls, for a certain time after they became due, the amount might be sued for in an action of debt; or the directors might declare the shares to be forfeited; provided, that no advantage should be taken of the declaration of forfeiture, until it should have been confirmed at a general or special general meeting of the co., to be held three calendar months at least from the day on which such notice of forfeiture should have been given." To actions of debt for the amount of calls, debt. pleaded, that before the calls were made, the directors declared the shares in question to be forfeited, but did not go on to say, that the forfeiture had been confirmed by the co. The ct. refused to rescind the order of a judge, allowing these pleas, & to strike out the pleas as frivolous, & pleaded for delay.—*EASTERN COUNTIES RY. CO. v. COOKE* (1840), 2 Ry. & Can. Cas. 250; 4 Jur. 1185; *sub nom.* *EASTERN COUNTIES RY. CO. v. COOPER, SAME v. FAIRCLOUGH*, 10 L. J. Q. B. 8.

8108. — —.]—By 6 & 7 Will. 4, c. lxxix., s. 130, it was enacted, that if any owner or proprietor for the time being of a share should neglect or refuse to pay the calls thereon, the co. might sue for & recover the same, or the directors might declare his shares to be forfeited & order them to be sold, provided that no advantage should be taken for such forfeiture, until notice to the owner that such share hath been declared forfeit, nor until such declaration of forfeiture, shall have been confirmed at a general or special general meeting of the co. In an action for calls, it was proved that the co. gave notice to the debt., that if the calls were not paid by a certain day, the shares would be declared forfeited. The calls were not paid, &

deft. afterwards tendered his vote at a meeting of proprietors, when it was rejected; but the forfeiture was never confirmed by a meeting of the co.:—*Held*: (1) deft. could not avail himself of this state of facts as a defence to the action, on the ground of not being a proprietor, as the forfeiture does not attach till sanctioned by a meeting of proprietors; (2) the register book, though irregularly kept in not containing the amount of the subscriptions paid on the shares, was *prima facie* evidence that deft. was a proprietor.—**BIRMINGHAM, BRISTOL & THAMES JUNCTION RY. CO. v. LOCKE** (1841), 1 Q. B. 256; 2 Ry. & Can. Cas. 867; 113 E. R. 1127.

Annotation:—*Refd.* London Grand Junction Ry. v. Graham (1841), 1 Q. B. 271.

8109. Forfeiture by agreement with shareholder—Whether agreement enforceable.—**HARRIS v. NORTH DEVON RY. CO.**, No. 8104, *ante*.

8110. Relief against—Forfeiture for non-payment after notice of default—Non-receipt of notice—Due to accidental circumstances.—No relief against forfeiture under a bye-law of an incorporated co. for waterworks, which provided that the members shall receive notice of default in paying a call, & incur the forfeiture by non-payment ten days after the notice sent; though the lapse arose from ignorance of the call, from accidental circumstances, & absence from town, when the notice was sent.—**SPARKS v. LIVERPOOL WATERWORKS CO.** (1807), 13 Ves. 428; 33 E. R. 354.

Annotation:—*Refd.* *Hopkinson v. Mortimer, Harley*, [1917] 1 Ch. 646.

8111. Disputed allegation that calls made for improper purpose—Directors' proceedings improper—Money required to satisfy legal obligations of company.—**LOGAN v. COURTOWN (EARL)**, No. 8300, *post*.

8112. — Liability of company in damages—Omission to insert name of transferee in register—& give transferee notice of calls.—A co. omitting to insert the name of a transferee of shares in the register of shareholders, after notice of the transfer, & thus disentitling him to notice of calls being made, is liable in an action at the suit of the transferee for declaring his shares forfeited & selling them in consequence of his not paying up on such shares further calls made by the co.—**CATCHPOLE v. AMBERGATE, ETC. RY. CO.** (1852), 1 E. & B. 111; 7 Ry. & Can. Cas. 221; 22 L. J. Q. B. 35; 20 L. T. O. S. 109; 17 Jur. 345; 1 W. R. 52; 118 E. R. 378.

8113. — Action to restrain forfeiture—Parties.—**PRESTON v. GRAND COLLIER DOCK CO.**, No. 7975, *ante*.

SECT. 9.—DIRECTORS.

SUB-SECT. 1.—APPOINTMENT.

8114. Number to be appointed—Specified in private Act—Whether imperative or directory only.—By a private Act, the business of a co. thereby incorporated was to be carried on by twelve directors; five of whom were to be a quorum. There were provisions in the Act, as to the election of new directors in case of death, etc. The directors were authorised to make calls, & in case of non-payment, the co. had power to sue. An action having been brought for calls, deft. in March suffered judgment by default. In Trinity term following he applied to set aside the judgment, upon the ground that at the time the calls were made, there were only seven directors; & that he had only lately learnt that fact:—*Held*: the

enactment as to the number of directors was only directory: *Semble*: the application was made too late.—**THAMES HAVEN DOCK & RY. CO. v. ROSE** (1842), 4 Man. & G. 552; 2 Dowl. N. S. 104; 3 Ry. & Can. Cas. 177; 5 Scott, N. R. 524; 12 L. J. C. P. 90; 134 E. R. 227.

Annotations:—*Distd.* *Re Alma Spinning Co., Bottomley's Case* (1880), 16 Ch. D. 681. *Refd.* *New Sombrero Phosphate Co. v. Erlanger* (1877), 5 Ch. D. 73; *York Tram. Co. v. Willows* (1882), 8 Q. B. D. 685.

8115. — — — — —.—In an action for calls deft. applied to set aside the proceedings, upon the ground that the co. was virtually extinct, & that the parties who had instituted the action had no authority to do so:—*Held*: (1) the application was too late, it appearing that deft. had known all the facts for a long time; (2) as such parties had been for some time acting as directors, the ct. would not, upon summary application, inquire into the validity of their appointment; although it was provided, by the act incorporating the co., that at the trial it should only be necessary to prove certain matters, without proving the appointment of the directors.—**THAMES HAVEN DOCK & RY. CO. v. HALL** (1843), 5 Man. & G. 274; 3 Ry. & Can. Cas. 441; 6 Scott, N. R. 342; 134 E. R. 568; *sub nom.* **THAMES HAVEN DOCK CO. v. HALL, SAME v. PRICE**, 7 Jur. 238.

Annotation:—*Mentd.* *Kinnell v. Harding, Wace*, [1918] 1 K. B. 405.

8116. Who may appoint—Delegation of power—To another company—Ultra vires.—W. co. being formed for the purpose of making wharves, etc., covenanted by deed with I. co., formed for the purpose of contracting for public works, that the latter co. should construct the works, & should have the privilege of nominating future directors on the board of W. co., & I. co. agreed to perform the works, also to pay until the works were finished seven per cent on the capital from time to time paid up by the shareholders in W. co. I. co. was to act as bankers for W. co., & all moneys received by W. co. were to be paid to I. co., which co. was to render a monthly account of all moneys paid by it by direction & on account of W. co., & W. co. was to repay such moneys, together with a commission of 35 per cent thereon. Both cos. came to a winding up before the contemplated works were commenced. But I. co. received £72,000 from W. co., & paid £50,000 to the order of this co. for the purchase of land:—*Held*: (1) I. co. was not entitled to the commission of 35 per cent on the £50,000 paid to the order of W. co.; for the whole deed was void, W. co. having no power to allow another co. to nominate its directors; (2) the provision as to paying interest on the paid-up capital was illegal, was equivalent to a paying of dividends out of capital, & I. co. was not entitled to recover from W. co. the amount of interest it had actually paid to W. shareholders under that provision.—**JAMES v. EVE** (1873), L. R. 6 H. L. 335; 42 L. J. Ch. 793; 22 W. R. 109, H. L.

8117. — To casual vacancies—General meeting—Failure of directors to appoint.—**ISLE OF WIGHT RY. CO. v. TAHOURDIN**, No. 8179, *post*.

8118. — — — Sole remaining director.—A light railway co. was incorporated by an order which was confirmed by the Board of Trade under the Light Railways Act, 1896 (c. 48). The order incorporated 1845 Act, & provided that the number of directors should be five, but that it might be varied so as not to be less than three, & that there should be a share qualification for directors, & that a quorum of a meeting of the directors, should be three, but that if the number of the directors was reduced to three the quorum should be two.

Sect. 9.—Directors : Sub-sects. 1, 2, 3 & 4.]

Three persons were named in the order as the first directors together with two other persons to be nominated by them. These latter were never nominated, but the number of directors was properly reduced to three, & the three named directors were continued in office. Two of them subsequently ceased to be directors. The sole remaining director thereupon purported to appoint two other persons to be directors who had not the necessary qualification as shareholders at the time of their appointment. At the same meeting or subsequently on the same day the necessary qualification shares were duly allotted to the newly appointed directors, all the parties honestly believing that it was sufficient that, if contemporaneously with, although in point of time immediately after, the appointment the qualifying shares were obtained:—*Held*: having regard to 1845 Act, s. 3, the only remaining director could exercise the powers conferred on the remaining directors by sect. 89 of the Act, & could validly elect new directors to fill up the vacancy caused by the retirement of his two colleagues; but that as he could only appoint persons who had the requisite qualification as shareholders at the time of appointment, the subsequent obtaining of the qualification shares did not validate the purported appointment of the two new directors.

Provisions like 1845 Act, s. 99, are to be construed broadly as between cos. & their members as between cos. & outsiders.—*CHANNEL COLLIERIES TRUST, LTD. v. DOVER, ST. MARGARET'S & MARTIN MILL LIGHT RY. CO.*, [1914] 2 Ch. 506; 84 L. J. Ch. 28; 111 L. T. 1051; 30 T. L. R. 647; 21 Mans. 328, C. A.

8119. Defective appointment—Operation of 1845 Act, s. 99.]—*CHANNEL COLLIERIES TRUST, LTD. v. DOVER, ST. MARGARET'S & MARTIN MILL LIGHT RY. CO.*, No. 8118, *ante*.

SUB-SECT. 2.—QUALIFICATION AND DISQUALIFICATION.

8120. Necessity for holding qualification shares.]—A railway co.'s Act fixed the directors' qualification at fifty shares, & incorporated 1845 Act. B. was appointed a director before the first general meeting in place of one of the directors named in the Act who had died. B. accepted & acted in the office, but never took any shares:—*Held*: (1) 1845 Act makes the holding the specified number of shares a condition precedent to election; (2) B.'s appointment was therefore absolutely void, & he could not be made a contributory.—*Re ELHAM VALLEY RY. CO.*, *BIRON'S CASE* (1878), 38 L. T. 501; 26 W. R. 606.

8121. — At time of election.]—*CHANNEL COLLIERIES TRUST, LTD. v. DOVER, ST. MARGARET'S & MARTIN MILL LIGHT RY. CO.*, No. 8118, *ante*.

Liability in respect of qualification shares.]—*See* Sub-sect. 5, *post*.

8122. Disqualification—Director ceasing to hold qualification shares—Mortgage of shares.]—*CUMMING v. PRESCOTT*, No. 8099, *ante*.

8123. — — —.]—In 1846, L. lent a sum of money to P. to enable him to purchase the requisite amount of shares in two public cos. to qualify him for the office of director in each, & P. assigned the shares in both cos. in which he had become director to L., as a security for the loan. The qualification for the office of director in one of the cos., which was constituted by Act of Parlia-

ment, would have been lost by the disposal or reduction of the amount of that qualification, & the provisions of the deed by which the other co. was constituted required that its directors should be possessed of or entitled to the requisite amount of shares in their own right. In June, 1854, P. signed a declaration of insolvency, upon which he was adjudicated bkpt., the shares then standing in his name, but five days previously, L. gave notice to the directors of both cos. of the assignment to him. At the time of his bkpcy. P. was actually a director of one of the cos., & out of office by rotation in the other, in which he probably would have been re-elected:—*Held*; the shares in neither co. were in the possession, order, or disposition of P. at the time of his bkpcy., with the consent of the true owner.—*Re PEARSE, Ex p. LITLEDALE* (1855), 6 De G. M. & G. 714; 24 L. J. Bcy. 9; 24 L. T. O. S. 318; 1 Jur. N. S. 385; 3 W. R. 307; 43 E. R. 1410, L. C. & L. JJ.

Annotations:—*Refd. Re Sketchley, Ex p. Boulton* (1857), 1 De G. & J. 163; *Soc. Générale de Paris v. Tram. Union Co.* (1884), 14 Q. B. D. 424. *Mentd. Tatham v. Andree* (1863), 1 Moo. P. C. C. N. S. 386.

8124. Director interested in contract with company—Contract not made in prosecution of company's enterprise.]—*SHEFFIELD, ASHTON-UNDER-LYNE & MANCHESTER RY. CO. v. WOODCOCK*, No. 7989, *ante*.

8125. — — —.]—The 1845 Act, s. 85, enacts that "no person holding an office or place of trust or profit under the co., or interested in any contract with the co., shall be capable of being a director; & no director shall be capable of accepting any other office or place of trust or profit under the co., or of being interested in any contract with the co., during the time he shall be a director." Sect. 86 enacts, that, "if any of the directors at any time subsequently to his election accept or continue to hold any other office or place of trust or profit under the co., or be either directly or indirectly concerned in any contract with the co., or participate in any manner in the profits of any work to be done for the co., the office of such director shall become vacant, & thenceforth he shall cease from voting or acting as a director":—*Held*: these sections incapacitate a party contracting with a co. from becoming, or continuing, a director, but do not avoid the contract.—*FOSTER v. OXFORD, ETC. RY. CO.* (1853), 13 C. B. 200; 22 L. J. C. P. 99; 20 L. T. O. S. 224; 17 Jur. 167; 1 W. R. 151; 138 E. R. 1174.

Annotations:—*Consd. Aberdeen Ry. v. Blaikie* (1854), 2 Eq. Rep. 1281. *Refd. Imperial Mercantile Credit Assn. v. Coleman* (1870), 18 W. R. 570; *Kaye v. Croydon Tram. Co.*, [1898] 1 Ch. 358; *Transvaal Lands Co. v. New Belgium (Transvaal) Land & Development Co.*, [1914] 2 Ch. 488. *Mentd. Melliss v. Shirley L. B.* (1885), 16 Q. B. D. 446.

8126. — — —.]—By a provisional agreement made between two cos. for the sale of the undertaking of the one to the other, the purchasing co. agreed to pay, in addition to the sum payable to the selling co., a substantial sum to the directors of the selling co. as compensation for loss of office, & the agreement was made conditional upon its adoption by the shareholders of the selling co. The notice convening the meeting of shareholders to consider the agreement described it simply as an agreement for the sale of the undertaking. The selling co. was governed by 1845 Act:—*Held*: (1) the provision in favour of the directors did not render the agreement *ultra vires*, but, (2) the notice, by reason of its omission to refer to this provision, did not fairly disclose the purpose for which the meeting was convened, & did not comply with sect. 71 of above Act: *Semble*: if the money payable under this agreement to the

directors was a bonus to them in consideration of their facilitating the contract, the agreement would not be binding upon a dissentient shareholder.

The consequences of a director being interested in a contract with the co. are as follows: First, there is the statutory consequence that he ceases to hold office; &, secondly, there is what I may call the general legal consequence, that he cannot enforce, as against the co., any contract which he has entered into with that personal interest. But to say that a contract between two co.'s is to be treated as invalid & beyond the power of one of the co.'s because one of the directors is interested in it, is a proposition which I have never heard advanced before, & which appears to me to be entirely unsound.—*KAYE v. CROYDON TRAMWAYS CO.*, [1898] 1 Ch. 358; 67 L. J. Ch. 222; 78 L. T. 237; 46 W. R. 405; 14 T. L. R. 244; 42 Sol. Jo. 307, C. A.

Annotations:—*As to* (2) *Appl.* *Tiessen v. Henderson*, [1899] 1 Ch. 861. *Distd.* *Torbock v. Westbury*, [1902] 2 Ch. 871. *Appl.* *Baillie v. Oriental Telephone & Electric Co.*, [1915] 1 Ch. 503. *Consd.* *Clarkson v. Davies*, [1923] A. C. 100. *Generally, Mentd.* *Allen v. Gold Reefs of West Africa* (1900), 69 L. J. Ch. 266; *Fuller v. White Feather Reward Co.*, [1906] 1 Ch. 823.

SUB-SECT. 3.—REMUNERATION.

8127. Right to remuneration—No provision in special Act—Company empowered to make bye-laws under seal—Resolution not under seal that remuneration be allowed.]—A co. was incorporated by Act of Parliament, which provided that eighteen shareholders should be directors, & as such should use the common seal & manage the affairs of the co. The co. was empowered to make bye-laws under seal for its government, & for regulating the proceedings of the directors, officers, servants, etc. At a meeting of the co. a resolution was passed, not under seal, that a remuneration should be allowed to every director for his attendance on courts, committees, etc., viz. one guinea for each time:—*Held*: a director who had attended courts, etc., could not maintain an action for payments according to the above resolution, for that it was not a bye-law within the statute, nor a contract to pay the directors or any of them for their attendances, & the directors could not be considered as servants to the co., &, as such, entitled to remuneration for their labour according to its value.—*DUNSTON v. IMPERIAL GAS LIGHT CO.* (1831), 3 B. & Ad. 125; 1 L. J. K. B. 49; 110 E. R. 47.

Annotations:—*Refd.* *Hutton v. West Cork Ry.* (1883), 23 Ch. D. 654; *Re Leicester Club & County Racecourse Co., Ex p. Cannon* (1885), 30 Ch. D. 629; *Re Newspaper Proprietary Syndicate, Hopkinson v. Newspaper Proprietary Syndicate*, [1900] 2 Ch. 349; *Moriarty v. Regent's Garage Co.*, [1921] 1 K. B. 423. *Mentd.* *Clarke v. Imperial Gas Light & Coke Co.* (1832), 2 L. J. K. B. 30; *Beverley v. Lincoln Gas Light & Coke Co.* (1837), 6 Ad. & El. 829; *Gibson v. East India Co.* (1839), 5 Bing. N. C. 262; *South of Ireland Colliery v. Waddle* (1868), L. R. 3 C. P. 463; *Imperial Hydropathic Hotel Co. v. Hampson* (1882), 49 L. T. 150.

8128. — Necessity for resolution of general meeting.]—A director is not allowed to make any profits from the business of the co. while he is director, or to receive any other remuneration

for his services, professional or otherwise, than such as the resolution of a general meeting shall have sanctioned: *Semble*: where a resolution of a general meeting authorises directors to remunerate one of their number for his services to the co., & they award a sum to him accordingly, the confirmation of the award by the next subsequent general meeting is not dispensed with, especially if the award is not made till long after the resolution.—*NORTH EASTERN RY. CO. v. JACKSON* (1870), 19 W. R. 198.

8129. What remuneration justifiable—Remuneration for past services—Company in liquidation.]—Remuneration of directors for past services, & compensation to meritorious officials on dismissal (both of which are gratuitous payments), are justifiable, provided that they are likely to conduce to the advantage of a co. in the future. Therefore, to justify any such payments, the co. must be a going concern.

Where, a co. had ceased to exist as a profit-making co., & only continued for the purpose of regulating their internal affairs, of winding up the same, & distributing when received the sums which had been fixed by arbn. as the purchase-money for their undertaking:—*Held*: (1) it was not within the power of the directors themselves, or of a general meeting of the co., to pass a resolution voting remuneration to the directors for their past services prior to the transfer of the undertaking, & compensation to officials who had been discharged in consequence of such transfer; (2) the co. could in general meeting vote a reasonable sum for remuneration for services during the winding up: *Semble*: a resolution voting the distribution of a sum of money, first in paying certain expenses properly payable thereout, the amount of which can only be estimated, & the balance among the directors by way of remuneration, even though remuneration is properly payable, is bad.

The resolution should take the form of a vote of a sum not exceeding an ascertained amount to be paid out of the balance.—*HUTTON v. WEST CORK RY. CO.* (1883), 23 Ch. D. 651; 52 L. J. Ch. 689; 49 L. T. 420; 31 W. R. 827, C. A.

Annotations:—*As to* (1) *Distd.* *Henderson v. Bank of Australasia* (1888), 40 Ch. D. 170; *Kaye v. Croydon Tram. Co.*, [1898] 1 Ch. 358. *Appl.* *Stroud v. Royal Aquarium & Summer & Winter Garden Soc.* (1903), 89 L. T. 243. *Fold.* *Warren v. Lambeth Waterworks* (1905), 21 T. L. R. 685. *Refd.* *Cyclists' Touring Club v. Hopkinson*, [1910] 1 Ch. 179. *Generally, Refd.* *Re Newman*, [1895] 1 Ch. 674; *Moriarty v. Regent's Garage Co.*, [1921] 1 K. B. 423. *Mentd.* *Re Leicester Club & County Racecourse Co., Ex p. Cannon* (1885), 30 Ch. D. 629; *Tomkinson v. S. E. Ry.* (1887), 35 Ch. D. 675; *Re Newspaper Proprietary Syndicate, Hopkinson v. Newspaper Proprietary Syndicate*, [1900] 2 Ch. 349.

8130. — Compensation for loss of office—On sale of undertaking.]—*KAYE v. CROYDON TRAMWAYS CO.*, No. 8126, *ante*.

SUB-SECT. 4.—POWERS AND DUTIES.

Compare Part III., Sect. 28, *ante*; Part XIV., Sect. 2, sub-sect. 5, *post*.

8131. Relationship between directors & company—Nature.]—The directors of a railway co. are

PART IX. SECT. 9, SUB-SECT. 3.

*g. Right to remuneration—No provision in special Act.]—*Pltf., one of the provisional directors of doft. co., named as such, with his assent, in their Act of incorporation, was, without resigning this office, appointed at a meeting of the provisional directors, provisional secretary & treasurer, & to act in conjunction with

a committee then appointed in procuring municipal aid; & he acted in such capacity, & was chiefly instrumental in procuring the passage of municipal bye-laws for bonuses in aid of the ry. The understanding was, that he should be well paid, but no sum was specified:—*Held*: pltf. continued a director & trustee under the statute for certain specified purposes,

& could not recover for services rendered in matters unauthorised thereby, & beyond the powers & duties of the provisional directors.—*MICHIE v. ERIE & HURON RY. CO.* (1876), 26 C. P. 566.—CAN.

PART IX. SECT. 9, SUB-SECT. 4.

*h. To appoint agent.]—*Under the Act incorporating the Ontario &

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trustees (in an important sense of the word) of their statutory powers, & an agreement entered into by the co. amounting to a breach of trust will not be enforced to the prejudice, or not according to the news of all or some of the shareholders, at the instance of parties cognisant of the circumstances.—**SHREWSBURY & BIRMINGHAM RY. CO. v. LONDON & NORTH WESTERN RY. CO.** (1853), 4 De G. M. & G. 115; 7 Ry. & Can. Cas. 531; 22 L. J. Ch. 682; 22 L. T. O. S. 56; 17 Jur. 845; 1 W. R. 172; 43 E. R. 451, L. JJ.; *affd.* (1857), 6 H. L. Cas. 113, H. L.

Annotations:—*Consd.* Sun Bldg. Soc. v. Western Suburban Bldg. Soc., [1921] 2 Ch. 83. *Mentd.* Eastern Counties Ry. v. Hawkes (1855), 5 H. L. Cas. 331; Lancaster & Carlisle Ry. v. N. W. Ry. (1856), 2 K. & J. 293; Charlton v. Newcastle & Carlisle, & N. E. Rys. (1859), 34 L. T. O. S. 22; London, Brighton, etc. Ry. v. L. & S. W. Ry. (1859), 4 De G. & J. 362; Hare v. L. & N. W. Ry. (1861), 2 John. & H. 80; South Wales Ry. v. Redmond (1861), 10 C. B. N. S. 675; Taylor v. Chichester & Midhurst Ry. (1867), L. R. 2 Exch. 356; Riche v. Ashbury Ry. Carriage Co. (1874), L. R. 9 Exch. 224; Richmond Waterworks Co., & Southwark & Vauxhall Waterworks Co. v. Richmond, Vestry (1876), 34 L. T. 480; A.-G. v. G. E. Ry. (1879), 11 Ch. D. 449; Hire Purchase Furnishing Co. v. Richens (1887), 20 Q. B. D. 387.

8132. ———.]—The shareholders of a railway co., at a general meeting, passed a resolution, by which they placed a large number of shares at the disposal of the directors, who, as a body, did not interfere with the management of the co., but allowed H., their chairman, to exercise a supreme control over the co. & its affairs. The shares were then placed in the share register in the name of H. at the end of the names of shareholders, & he caused numbers of the shares to be transferred into the names of divers persons, & through different brokers sold them in the market at considerable premiums:—*Held*: the office of director is a place of trust: unambiguous expressions alone could confer upon them any special power; a resolution to place shares at the disposal of the directors, without more, did not render them irresponsible; they were bound to give explanations to the shareholders, & could not derive any personal or pecuniary advantage from the mode of dealing with the shares; a suggestion of the application of money for secret purposes will not exonerate directors from accounting, nor can any person in a fiduciary position retain any remuneration for his services; an acquiescence in the acts of directors cannot be raised by a production of the share register books at meetings of the co., & consequently, H. must account for the shares disposed of, & pay the costs, up to the hearing, of resisting the account.—**YORK & NORTH MIDLAND RY. CO. v. HUDSON** (1853), 16 Beav. 485; 22 L. J. Ch. 529; 22 L. T. O. S. 29; 1 W. R. 187, 510; 51 E. R. 866.

Annotations:—*Appld.* Parker v. McKenna (1874), 10 Ch. App. 107, n. *Consd.* Percival v. Wright, [1902] 2 Ch. 421. *Refd.* *Re* Cameron's Coalbrook, etc. Ry., *Ex p.* Bennett (1854), 18 Beav. 339; *Re* Newcastle-upon-Tyne Marine Insee., *Ex p.* Brown (1854), 19 Beav. 97; Williams v. Trye (1854), 18 Beav. 366; Stainton v. Carron Co. (1857), 24 Beav. 346; Bank of London v. Tyrrell (1859), 5 Jur. N. S. 924; Bluck v. Mallaloe (1859), 27 Beav. 398; Chaplin v. Young (1864), 3 New Rep. 600; *Re* Anglo-Greek Steam Co. (1866), L. R. 2 Eq. 1; *Re* Faure Electric Accumulator Co. (1888), 40 Ch. D. 141; *Re* Newman, [1895] 1 Ch. 674.

Quebec Ry. Co., & the Ry. Act of 1868, directors can appoint an agent to negotiate for & obtain municipal aid, & a resolution of the board of directors, or an entry or minute in their record of proceedings is sufficient, without the formality of a bye-law or the seal of the co.—**WOOD v. ONTARIO & QUEBEC RY. CO.** (1874), 24 C. P. 334.—**CAN.**

k. Petition to wind up.]—A co. was incorporated by private act of parliament incorporating Companies Clauses Consolidation Act, 1845.

The directors presented a petition for the winding up of the co. without the authority of the shareholders given at a meeting of the co.:—*Held*: the directors had no power under Companies Clauses Consolidation Act, 1845,

8133. ———.]—**MIDLAND RY. CO. v. HUD-**
(circa 1853), cited 25 Beav. at p. 593.

Annotations:—*Refd.* Williams v. Tyre (1854), 18 Beav. 371; Great Luxembourg Ry. v. Magnay (No. 2) (1858), 25 Beav. 586; Bluck v. Mallaloe (1859), 27 Beav. 398; Chaplin v. Young (1864), 3 New Rep. 600.

8134. ———.]—Certain shareholders of a railway co. commenced a suit against some of the directors, seeking to set aside certain orders which had been made for calls, & to have an account & repayment of their deposits & calls, on the ground that debts were connected with a rival co., & had illegally contrived, by purchasing shares for such rival co., to acquire a preponderating influence in pltf.'s co., & to use it for the purpose of preventing the line of railway being made, whereby the powers to make the railway had expired. It appeared that the aggrieved shareholders had not previously applied for redress to the co. or to the general meetings of the shareholders:—*Held*: suit was incompetent, & a shareholder who is aggrieved must first proceed against the co., whose servants the directors are, unless there is collusion alleged, or the thing complained of was *ultra vires* of the co. as well as of the directors.—**ORR v. GLASGOW, AIRDRIE & MONKLANDS RY. CO.** (1860), 2 L. T. 550; 6 Jur. N. S. 877; 8 W. R. 643, H. L.

Annotation:—*Mentd.* N. B. Ry. v. Coltness Iron Co., Caledonian Ry. v. Coltness Iron Co., G. & S. W. Ry. v. Baird (1911), 14 Ry. & Can. Tr. Cas. 246.

8135. Rights of directors—Indemnity—Against costs of promoting Bill—Application of capital for such purpose not authorised.]—**CALEDONIAN RY. CO. v. SOLWAY JUNCTION RY. CO.**, No. 7848, *ante*.

8136. ——— Delivery & taxation of solicitor's bill—Solicitor employed by directors.]—A shareholder & member of the managing committee of a provisionally registered railway co. held entitled to an order, on petition, for delivery & taxation, after payment, of the bills of solrs. employed by such committee.

A compromise of a solr.'s claim for costs, if effected under circumstances of pressure upon the client, does not oust the jurisdiction of the ct. to tax the bills upon petition.

Where there is a petition & cross-petition, & several respondents in the one unite as co-petitioners in the other, the ct. will not allow such respondents to be heard by separate counsel, except so far as their cases turn upon questions distinct from each other.—*Re* STEPHEN, *Ex p.* BASS (1848), 2 Ph. 562; 4 Ry. & Can. Cas. 723; 17 L. J. Ch. 219; 41 E. R. 1060, L. C.

Annotation:—*Consd.* Stedman v. Collett (1854), 17 Beav. 608.

Powers of companies generally.]—See Sect. 12, *post*.

Control of directors' powers—By general meeting of shareholders—Necessity for special notice.]—See No. 8177, *post*.

8137. Interference by court—To restrain directors from acting as such—Railway directors.]—**HATTERSLEY v. SHELBURNE (EARL)**, No. 7963, *ante*.

As regards contracts.]—See Sub-sect. 4, *post*.

As regards calls.]—See Sect. 8, sub-sect. 5, *ante*.

to present the petition.—*Re* GALWAY & SALTHILL TRAMWAY CO. (1917), 52 L. T. 41.—**IR.**

1. To sell undertaking.]—**LOCHABER DISTRICT COMMITTEE OF INVERNESS-SHIRE COUNTY COUNCIL v. INVERGARRY & FORT AUGUSTUS RY. CO.** (1913), 50 Sc. L. R. 550.—**SCOT.**

SUB-SECT. 5.—LIABILITIES.

8138. In respect of qualification shares—No shares allotted.]—By a local Act, which embodied 1845 Act, it was enacted that A. & all other persons who had already subscribed, or should thereafter subscribe, to the undertaking should be united into a co. for the purposes of the undertaking, that the number of directors should be four, & that the qualification of a director should be the possession of 25 shares in the undertaking; & further, that A. & three other persons named should be the first directors, & should continue in office until the first ordinary meeting, & at such meeting the shareholders might either continue in office the directors appointed by the Act or might elect a new body of directors. At the first meeting directors were appointed other than A. & the three persons named in the Act, & to each of these directors 25 shares were allotted. No other shares were ever allotted. A. never applied for nor had allotted to him, nor paid any sum of money on account of any share in the undertaking:—*Held*: A. must be settled on the list of contributories for 25 shares.—*Re NORTH KENT RY. EXTENSION RY. CO., KINCAID'S CASE* (1870), L. R. 11 Eq. 192; 40 L. J. Ch. 19; 23 L. T. 460; 19 W. R. 122.

Annotations:—*Consd.* *Re Freehold & General Investment Co., Green's Case* (1874), L. R. 18 Eq. 428. *Folld.* *Re Teme Valley Ry., Forbes' Case* (1875), L. R. 19 Eq. 353. *Consd.* *Portal v. Emmens* (1876), 1 C. P. D. 201. *Refd.* *Re Esparto Trading Co.* (1879), 12 Ch. D. 191.

8139. ——— Resignation from directorship.]

By a private Act of Parliament, which incorporated 1845 Act, it was enacted that F., & certain other persons named, & all other persons who had already subscribed, or should thereafter subscribe, to the undertaking should be united into a co. for the purposes therein mentioned; that the number of directors should be six; that the qualification of a director should be the possession of his own right of fifty shares; that F. & certain other persons should be the first directors of the co., & should continue in office until the first ordinary meeting, & that at that meeting the shareholders might either continue in office the directors appointed by the Act, or any of them, or might elect a new body of directors, or directors to supply the place of those not continued in office, the directors appointed by the Act being, if qualified, eligible for re-election. F. acted as a director until the first ordinary meeting, when he retired from office, & never afterwards had anything to do with the co. He never applied for any shares, nor were any ever allotted to him, nor was he ever placed on the register of shareholders:—*Held*: F. must be settled on the list of contributories for fifty shares.—*Re TEME VALLEY RY. CO., FORBES' CASE* (1875), L. R. 19 Eq. 353; 44 L. J. Ch. 356; 23 W. R. 402.

Annotations:—*Consd.* *Re Pelotas Coffee Co., Karuth's Case* (1875), L. R. 20 Eq. 506; *Portal v. Emmens* (1876), 1 C. P. D. 201. *Distd.* *Re East Norfolk Tram. Co., Barber's Case* (1877), 26 W. R. 3. *Consd.* *Re Esparto Trading Co.* (1879), 12 Ch. D. 191. *Refd.* *Portal v. Emmens* (1876), 46 L. J. Q. B. 179; *Re Medical Attendance Assocn., Onslow's Case* (1886), 55 L. T. 162.

8140. ———.]—*KIPLING v. TODD*, No. 7879, *ante*.

8141. ——— Payments received for services as director.]—By a private Act of Parliament which incorporated 1845 Act, it was enacted that the number of directors of a co. should be three; that the qualification of a director should

be the possession in his own right of not less than twenty shares; that P. & certain other persons should be the first directors, & should continue in office until the first ordinary meeting, & that at that meeting the shareholders might either continue in office the directors appointed by the Act, or any of them, or might elect a new body of directors to supply the place of those not continued in office, the directors appointed by the Act being, if qualified, eligible for re-election. No ordinary meeting of the co. was held within six months after passing of Act in Aug. 1876. P. resigned his office as director in May, 1877, & received a cheque for £26 5s. for his services. In Feb. 1878, P. was for the first time placed on the register for twenty shares, & notice of this was sent to him. On Feb. 4, a call of £2 a share was made on all shareholders, including P., who resisted the call on the ground that he was not a shareholder, having never applied for any shares, that he had never attended any director's meetings since the Act was passed, & that he had resigned his office as director & therewith his inchoate right to shares:—*Held*: P. was liable in respect of these twenty qualification shares & must pay the call; the resignation of the office of director did not imply the surrender of the director's qualification shares.—*NORTH & SOUTH WOOLWICH SUBWAY CO. v. PYM* (1878), 39 L. T. 346; 27 W. R. 259.

8142. ———.]—*MAMMATT v. BRETT*, No. 7880, *ante*.

8143. ——— Agreement with promoter for allotment of fully paid-up shares.]—N. became one of the original directors of a railway co. at the solicitation of R., the promoter of, & subsequently solr. to, the co. The qualification of a director was twenty shares, but R. promised N. that he should have twenty fully-paid up shares given to him as his qualification. The co. was not bound by this promise, & had no power to allot paid-up shares except for value received. N. acted as a director of the co., & received fees for his services. He was from time to time present at the sealing of the register, on which his name was entered as the holder of twenty paid-up shares. He also received notices of calls due on these shares, but he took no notice of the applications. He also concurred in a report, which spoke of him as eligible for election as director. Subsequently R. procured twenty fully paid-up shares to be transferred to N., & N.'s name then stood on the register as the holder of twenty fully paid-up shares, & twenty other shares on which nothing had been paid. No letter of allotment was ever sent to N. A writ of *sci. fa.* having been issued against N.:—*Held*: N. was holder as well of the twenty unpaid shares as of the twenty fully paid-up shares.—*ILFRACOMBE RY. CO. v. NASH* (1870), 22 L. T. 209; 18 W. R. 431.

8144. ——— No register formed.]—*PORTAL v. EMMENS*, No. 7878, *ante*.

—— **Calls.]**—*See* Nos. 8138, 8139, *ante*.

—— **Execution for debts of company.]**—*See* Nos. 7878–7880, 8143, *ante*.

8145. In respect of shares held as trustees for company—Subsequent annulment of trust.]—*PRESTON v. GRAND COLLIER DOCK CO.*, No. 7975, *ante*.

8146. In respect of additional shares—Subscribed for in order to procure Act.]—The directors of a joint-stock co., in order to comply with a standing order of the House of Lords, as a means

PART IX. SECT. 9, SUB-SECT. 5.

8139 l. In respect of qualification shares—No shares allotted—Resignation from directorship.]—*Re DUBLIN & RATHCOOLE RY. CO., O'BRIEN'S CASE* (1877), L. R. 11 Eq. 422.—*IR*.

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of procuring an Act of incorporation, subscribed for a large additional number of shares, in the undertaking, & signed a declaration that they held them in trust for the co., but did not pay the deposit on or register them. Subsequently, at a special general meeting of the co., it was resolved that the trust should be annulled, & the shares transferred to the secretary, to be held by him at the disposal of the co., & this resolution was confirmed at a subsequent meeting of the directors. The directors made calls on the registered shares, & proceeded to enforce payment of them:—*Held*: (1) the directors were liable in respect of the deposit, & all calls to be made on such additional shares, & the same must be considered as *bonâ fide* subscriptions; (2) they could not be considered as exonerated from such liability by the proceeding taken to annul the trust, & transfer the shares.—*MANGLES v. GRAND COLLIER DOCK CO.* (1840), 10 Sim. 519; 2 Ry. & Can. Cas. 359; 9 L. J. Ch. 177; 4 Jur. 333; 59 E. R. 716.

8147. Defunct company—Liability account for surplus.]—Suit by a preference shareholder in a railway co., with three classes of shareholders, on behalf of himself & all other shareholders, against the directors, alleging that the undertaking had some years previously been sold to another co., from whom a sum of stock had been received by way of consideration more than sufficient to pay the liabilities of the co., & that the functions of the co. had ceased; & praying an account against the directors, that the surplus might be divided among the shareholders, & the co. wound up:—*Held*: the directors were liable to account for the funds remaining in their hands, & *pltf.* was entitled to a decree, subject to the shareholders whose interests were different from *pltf.*'s being represented before the ct.—*CRAMER v. BIRD* (1868), L. R. 6 Eq. 143; 37 L. J. Ch. 835; 18 L. T. 315; 16 W. R. 781.

In respect of contracts.]—See AGENCY, Vol. I., pp. 647, 663, Nos. 2668, 2671, 2785.

8148. For acts of servants—Superintendent & engineer—Nuisance—Directors personally ignorant of engineer's acts.]—In an indictment against a co. for a nuisance, the question for the jury is, whether the special acts of the particular co. complained of amount to a nuisance. The directors are answerable for an act done by their superintendent & engineer, under a general authority to manage the works, though they are personally ignorant of the particular plan adopted, & though such plan be a departure from the original & understood method, which the directors had no reason to suppose was discontinued.—*R. v. MEDLEY* (1834), 6 C. & P. 292, N. P.

Annotations:—*Refd.* *Tarry v. Ashton* (1876), 1 Q. B. D. 314; *Sherras v. De Rutzen*, [1895] 1 Q. B. 918.

SUB-SECT. 6.—MEETINGS OF DIRECTORS.

8149. What constitutes meeting—"Court of directors."]—*SOUTHAMPTON DOCK CO. v. RICHARDS* No. 7926, *ante*.

8150. — Within 1845 Act, s. 92.]—Directors exercising the powers conferred by 1845 Act, must act together, & as a board. The prescribed quorum of directors in *deft.*'s co. being three, the secretary affixed the seal of the co. to a bond, after having obtained the written authority of two directors at a private interview, & at another private interview the verbal promise of a third to sign the authority. The co. being sued upon this bond:—*Held*: the seal of the co. was affixed without lawful

authority, & the co. were therefore not liable on the bond.—*D'ARCY v. TAMAR, KIT HILL & CALLINGTON RY. CO.* (1867), L. R. 2 Exch. 158; 4 H. & C. 463; 36 L. J. Ex. 37; 14 L. T. 626; 30 J. P. 792; 12 Jur. N. S. 548; 14 W. R. 968.

Annotations:—*Consd.* *Re Bonelli's Telegraph Co.*, *Collie's Claim* (1871), L. R. 12 Eq. 246. *Distd.* *Re Great Northern Salt & Chemical Works*, *Ex p. Kennedy* (1890), 44 Ch. D. 472. *Consd.* *County of Gloucester Bank v. Rudry Merthyr Steam & House Coal Colliery Co.*, [1895] 1 Ch. 629; *Re Haycraft Gold Reduction & Mining Co.*, [1900] 2 Ch. 230. *Refd.* *Cook v. Ward* (1877), 2 O. P. D. 255; *Re Great Northern Salt & Chemical Works*, *Ex p. Fenwick* (1891), 36 Sol. Jo. 42. *Mentd.* *Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869; *Duck v. Tower Galvanizing Co.*, [1901] 2 K. B. 314; *Ruben v. Great Fingall Consolidated*, [1904] 2 K. B. 712.

8151. Attendance at meetings—Exclusion of directors—Validity.]—*GREAT WESTERN RY. CO. v. RUSHOUT*, No. 7847, *ante*.

8152. Business at meetings—Minority bound by majority.]—The majority binds the minority in co. committees, unless evidence of dissent is given.—*BARKER v. GRIFFITHS* (1847), 9 L. T. O. S. 75.

8153. — — —.]—Where, by the constitution of the committee, the acts of the majority of the managing committee of a co. bound the whole:—*Held*: a solr., employed by the committee in a suit instituted against the committee by some of the shareholders for misconduct, was authorised to enter an appearance for any one of the members of the committee.—*GOODMAN v. DE BEAUVOIR* (1848), 12 L. T. O. S. 266; 12 Jur. 989.

Annotation:—*Refd.* *Tomlinson v. Broadsmith*, [1896] 1 Q. B. 386.

8154. — — —.]—**Provided minority heard.]**—*GREAT WESTERN RY. CO. v. RUSHOUT*, No. 7847, *ante*.

8155. Minutes of meetings—Validity of signature—At subsequent meeting.]—*SOUTHAMPTON DOCK CO. v. RICHARDS*, No. 7926, *ante*.

8156. — — —.]—*WEST LONDON RY. CO. v. BERNARD*, No. 7856, *ante*.

8157. — — —.]—**At some subsequent period.]**—(1) By a local act it was required that the trustees under the act should keep a book of their proceedings, " & the chairman of every meeting of the trustees shall subscribe his name at the end of the proceedings of the trustees at such meeting ":—*Held*: a book of proceedings was admissible in evidence, where the proceedings of each meeting were signed by the chairman thereof, although it appeared that, in point of fact, he did not sign at the meeting itself, or at any other meeting.

(2) The act required the shareholders to pay " to the treasurer ":—*Held*: an order of the trustees to pay into a certain bank, " to the account of P. M., treasurer," was sufficient.

(3) The act provided, that " in all cases where it might be necessary for the trustees to give any notice in writing to any person whatever under the provisions of the act," such notice should be signed in a particular manner:—*Held*: in an action against a shareholder for calls, the declaration averring that *deft.* had had " due notice " of such calls, to wit, " by notice in writing signed," etc., in the manner pointed out by the act, it was necessary to prove a notice signed in the manner so pointed out, although the act did not contain any express provision that notice in writing of calls should be given to shareholders.

(4) The Act provided that, where any notice was to be given by the trustees, such notice should be in writing or in print, signed by three or more of the trustees or their clerk or clerks for the time being by their order:—*Held*: a notice signed with the names of the clerks to the trustees, but signed

in fact not by such clerks but by a clerk employed by them was insufficient.

(5) *Semble*: (COLERIDGE, J.) a signature by one of two joint clerks to the trustees in the name of the two was sufficient.—MILES v. BOUGH (1842), 3 Q. B. 845; 3 Ry. & Can. Cas. 668; 3 Gal. & Dav. 119; 12 L. J. Q. B. 74; 7 Jur. 81; 114 E. R. 732.

Annotations:—As to (1) *Folld.* Inglis v. G. N. Ry. (1852), 19 L. T. O. S. 149. *Refd.* West London Ry. v. Bernard (1843), 3 Q. B. 873. As to (4) *Refd.* R. v. Kent JJ. (1873), 42 L. J. M. C. 112. As to (5) *Refd.* Miles v. Coote (1844), 3 L. T. O. S. 281. *Generally, Mentd.* Cundell v. Dawson (1847), 4 C. B. 376.

8158. ——— Meeting adjourned—One signature for both meetings.]—INGLIS v. GREAT NORTHERN RY. CO., No. 7916, *ante*.

8159. ——— Effect of signature—Admissibility of minutes as evidence—Without proof of signature.]

—SHEFFIELD, ASHTON-UNDER-LYNE & MANCHESTER RY. CO. v. WOODCOCK, No. 7989, *ante*.

—See, also, No. 8157, *ante*.

SUB-SECT. 7.—RETIREMENT AND REMOVAL.

8160. Power of shareholders to remove directors—In general meeting.]—ISLE OF WIGHT RY. CO. v. TAIHOURDIN, No. 8179, *post*.

such power in special Act.]—

Where a co. is formed by a special Act incorporating 1845 Act, the shareholders have power to remove directors under 1845 Act, s. 91, even though such power is not contained in the special Act.—WEST SOMERSET MINERAL RY. CO. v. ROBINSON (1917), 34 T. L. R. 132; 62 Sol. Jo. 175.

SECT. 10.—OTHER OFFICERS.

8162. Who are—Consulting engineer.]—A bill was filed by a former officer of a railway co. to obtain distribution of a sum of money which had been set apart for the compensation of the officers of the co., on its amalgamation with another co.

An inquiry was directed at chambers, and the chief clerk found that pltf. was an "officer" of the co., at an average salary of £500 a year, although at the actual time of the amalgamation he only held the appointment of consulting engineer, at an annual retaining fee of £100, & in arriving at this result the chief clerk took into consideration pltf.'s former engagement of traffic manager. The chief clerk submitted to the ct. what shares the persons entitled were to take. The other parties appealed from the decision of the chief clerk, as to the right of pltf. to participate in the fund:—*Held*: pltf. was an officer of the co., & the shares of the parties entitled to share must be determined on the principle of annuities, having regard to their several ages, & the amount of their salaries.—BRUFF v. COBBOLD (1874), 30 L. T. 597.

8163. Authority of—Secretary—To bind company by admission—Letters promising payment for work.]—In an action upon an agreement to do work for a railway co. to the satisfaction of a sub-committee & of the general board of directors, letters written by the secretary promising payment:—*Held*: admissible evidence to prove that the work had been so done.—BUSH v. WEISS (1846), 8 L. T. O. S. 137.

8164. ——— To bind directors.]—Where a director of a railway co. was present when the secretary was proposed & appointed, the letters of such secretary will not be evidence to bind that director, without showing in some way his authority to act; & such secretary having made an entry

in the minute book of the co., there being no names attached to such entry, or even the signature of the chairman to it:—*Held*: such entry was not evidence against the directors.

A secretary has no authority generally to make contracts or to make communications to bind the co. for which he is supposed to be acting (PATTE-SON, J.).—RENNIE v. WYNN (1849), 4 Exch. 691; 19 L. J. Ex. 2; 14 L. T. O. S. 225; 154 E. R. 1392.

8165. ——— To make binding contract.]—A contract made by the secretary of a co. on behalf of the co. is not binding on them unless authorised by the directors or committee; & such contract should be by deed, under the seal of the co., & signed by the directors as required by the Act of Parliament.—WILLIAMS v. CHESTER & HOLYHEAD RY. CO. (1851), 17 L. T. O. S. 269; 15 Jur. 828.

8166. ——— Submission to arbitration.]—COLLINS v. SOUTH STAFFORDSHIRE RY. CO., No. 8357, *post*.

8167. ——— Solicitor—To defend or refer action.]—A writ having issued in an action of debt against an incorporated railway co., defts.' attorney consented to a judge's order referring to arbn. "the claims of pltf. in the action." Pltf. claimed, before the arbitrator, a sum for extra work occasioned by defts.' breach of covenant. The arbitrator entertained this claim, though objected to, & awarded pltf. a sum in respect of it. The ct., having refused to set aside the award:—*Held*: (1) if the matter in dispute were not within the jurisdiction of the arbitrator, defts. should have applied to the ct. to revoke the submission; but not having done so, & pltf. having set up this matter as "a claim in the action," & the arbitrator having so decided in respect of it, his award was binding, however erroneous; (2) the submission was valid, though the attorney had no authority, under seal, to defend or refer the cause.—FAVIELL v. EASTERN COUNTIES RY. CO. (1848), 2 Exch. 344; 6 Dow. & L. 54; 17 L. J. Ex. 297; 154 E. R. 525; *sub nom.* FARRILL v. EASTERN COUNTIES RY. CO., 11 L. T. O. S. 204.

Annotations:—As to (1) *Refd.* Hodgkinson v. Fernie (1857), 3 C. B. N. S. 189; Kirk & Randall v. East & West India Dock Co. (1886), 55 L. T. 245. *Generally, Mentd.* Smith v. Troup (1849), 7 C. B. 757; Chambers v. Mason (1858), 5 C. B. N. S. 59; Neale v. Gordon-Lennox (1902), 71 L. J. K. B. 536; May v. Mills (1914), 30 T. L. R. 287.

8168. Liability of—Treasurer—Submitting to reference to arbitration on promissory note—Company authorised to sue & be sued by treasurer.]—A co. were authorised by statute to sue & be sued by their treasurer, but he was not to be liable in his own person or goods by reason of his being deft. in any such action; & all costs incurred by him in prosecuting or defending any action for the co. were to be defrayed out of the moneys applicable to the purposes of the Act. Two actions between the treasurer & G., in one of which the treasurer was pltf., & in the other deft., were referred to an arbitrator, who awarded against the treasurer in both, with costs. The costs & damages being unpaid, & an attachment being moved for against the treasurer:—*Held*: he had not rendered himself personally liable by submitting to an order of reference; & the ct. refused an attachment, but ordered a *mandamus* to the treasurer & directors to pay the sums awarded.—CORPE v. GLYN (1832), 3 B. & Ad. 801; 1 L. J. K. B. 272; 110 E. R. 294.

Secretary.]—See AGENCY, Vol. I., p. 646, No. 2664.

8169. ——— To produce company's books.]—In obedience to the instructions of his directors, & in disobedience of the order of the district prothonotary of the Common Pleas at Lancaster,

Sect. 10.—Other officers. Sect. 11: Sub-sects. 1, 2, A. & B.; sub-sect. 3.]

& of the order of an arbitrator, the secretary of a co. refused to produce, before the arbitrator, numerous books & papers of the co., which pltf.'s attorney swore to be material to his case:—*Held*: the secretary, being in the position of a servant, was justified in obeying the orders of his masters not to produce the documents, & a rule to attach him for contempt discharged.—*CROWTHER v. APPLEBY* (1873), L. R. 9 C. P. 23; 43 L. J. C. P. 7; 22 W. R. 265; *sub nom. Re SHARPLEY, CROWTHER v. APPLEBY*, 29 L. T. 580; 38 J. P. 24.

Annotations:—*Refd.* *Eccles v. Louisville & Nashville Railroad Co.*, [1912] 1 K. B. 135. *Mentd.* *Forbes v. Samuel*, [1913] 3 K. B. 706.

— — — — —.]—*See, generally*, DISCOVERY, INSPECTION & INTERROGATORIES.

8170. — Solicitor—On contract—Made by him as such.—Where an attorney of a railway co. contracted as such, but managed all the concerns of the co., there being no acting committee:—*Held*: the attorney was not personally liable under such contracts.—*RUSSEL v. REECE* (1847), 2 Car. & Kir. 669.

8171. Remuneration of—Secretary—Right to recover by action—No determination in general meetings.—Under 1845 Act, s. 91, the determination as to the remuneration of the secretary of a co. is to be exercised only at a general meeting. But it is no answer to an action by a secretary for his salary, that no determination as to such salary had ever been exercised at any general meeting of the co.—*BILL v. DARENTH VALLEY RY. CO.* (1856), 1 H. & N. 305; 26 L. J. Ex. 81; 27 L. T. O. S. 204; 2 Jur. N. S. 595; 4 W. R. 684; 156 E. R. 1219.

Annotations:—*Distd.* *Page & Bishop v. Eastern & Midlands Ry.* (1884), Cab. & El. 280. *Refd.* *Roberts v. Smith* (1859), 4 H. & N. 315. *Mentd.* *Prince of Wales Assoc. Soc. v. Athenæum Assoc. Soc.* (1858), 3 C. B. N. S. 756, n.

8172. Right to prove in winding up.—The secretary of a bkpt. railway co., although he was also a shareholder in the same, allowed to prove on the estate of the co. for the amount of his salary, all the other debts of the co. having been paid.—*Re TRING, READING & BASINGSTOKE RY. CO.*, *Ex p.* *GREEN* (1848), 11 L. T. O. S. 248; 12 Jur. 534.

Auditors.—*See* No. 8188,

8173. Security of surety for due performance of duty—Discharge of surety—Amalgamation of companies.—Debt on bond given by deft. & another to the L. & C. Ry. Co. as sureties for the due performance by G. of his duties as clerk. The condition of the bond was, that if G. should render to the L. & C. Ry. Co., or to the committee for managing the London terminus of the L. & C., L. & B., & S. E. Rys. a true account of all the receipts & payments of him as such clerk, & also should pay to the L. & C. Ry. Co., or to the committee, all sums as he should receive on account of the co. or committee, then the obligation to be void. Deft. pleaded, thirdly, the bond was made before the passing of the railway Act to consolidate the L. & B. & L. & C. Ry. Cos., & that the action was commenced afterwards, & that the L. & C. Ry. Co. thereby became dissolved; fourthly, that from the making of the bond up to the time of the passing of the said Act, G. rendered to the L. & C. Ry. Co. an account of all receipts & payments, & paid all sums received by him as such clerk:—*Held*: (1) third plea was bad, & was no defence to the action, inasmuch as the new co. was the same as the two old ones with additional powers, & the amalgamation of the cos. did not affect the

responsibilities of deft. or G.; (2) fourth plea was also bad, for not alleging a payment to the committee of the moneys received by G. on account of the three cos.—*LONDON, BRIGHTON & SOUTH COAST RY. CO. v. GOODWIN* (1849), 3 Exch. 320; 6 Ry. & Can. Cas. 177; 18 L. J. Ex. 174; 12 L. T. O. S. 354; 154 E. R. 866; *subsequent proceedings*, 3 Exch. 736.

Annotations:—*Consd.* *Eastern Union Ry. v. Cochrane* (1853), 9 Exch. 197. *Refd.* *Davis v. Cary* (1850), 15 Q. B. 418.

8174. —.]—Deft., as surety, executed a bond, conditioned for the faithful service of a clerk to a railway co. Whilst the service continued, that co. & another railway co. were dissolved, & united into one co. by a statute; which provided that all bonds, etc., made or entered into with, in favour of, or by the dissolved cos. should "be & remain as good, valid, & effectual in favour of & against & with reference to the new co., & might be proceeded on & enforced in the same manner, to all intents & purposes, as if the last-mentioned co. had been a party to & executed the same, or had been named or referred to therein instead of the persons, co., or party actually named therein respectively":—*Held*: deft. was liable for breaches of the bond committed by the clerk after the union of the two cos.—*EASTERN UNION RY. CO. v. COCHRANE* (1853), 9 Exch. 197; 7 Ry. & Can. Cas. 792; 2 C. L. R. 292; 23 L. J. Ex. 61; 22 L. T. O. S. 104; 17 Jur. 1103; 2 W. R. 43; 156 E. R. 84.

8175. — Change in mode of remuneration.—In Jan. 1851, deft., as surety, executed a bond to a railway co., which, after reciting that the co. had agreed to appoint L. as their clerk or agent, for the purpose of selling coal, at a yearly salary of £100, was conditioned for the due accounting by L. of all moneys received by him for the use of the co. L. performed the duties of such clerk or agent at the above salary, until May, 1851, when it was agreed between L. & the co. to substitute for such salary a commission of 6d. per ton on all coal for which he should obtain orders. From that time L. was paid for his services by such commission, which amounted to a larger sum than the fixed salary. In 1852, L. was indebted to the co. for sums which he did not pay over; & the co. having sued deft. on the bond:—*Held*: (1) the bond was valid, although the co. had no power to deal in coal; (2) the condition of the bond was restrained by the recital, so that deft., as surety, only undertook to be responsible for the faithful conduct of L. whilst he continued clerk at such fixed salary, & consequently deft. was not liable after the change in the mode of remuneration.—*NORTH WESTERN RY. CO. v. WHINRAY* (1854), 10 Exch. 77; 2 C. L. R. 1207; 23 L. J. Ex. 261; 23 L. T. O. S. 163; 156 E. R. 363; *sub nom.* *LONDON & NORTH-WESTERN RY. CO. v. WHINRAY*, 2 W. R. 523.

Annotations:—*Refd.* *Holme v. Brunskill* (1878), 3 Q. B. D. 495. *Mentd.* *Stewart v. M'Kean* (1855), 24 L. J. Ex. 145; *Sanderson v. Aston* (1873), L. R. 8 Exch. 73.

— — — — —.]—*See, generally*, GUARANTEE.

SECT. 11.—REGULATION AND MANAGEMENT.

SUB-SECT. 1.—BYE-LAWS.

See, generally, CORPORATIONS, Vol. XIII., pp. 325–338; PUBLIC HEALTH & LOCAL ADMINISTRATION.

Of particular companies.—*See* specific Titles, *passim*.

SUB-SECT. 2.—MEETINGS OF MEMBERS.

A. Convention of.

See, generally, CORPORATIONS, Vol. XIII., pp. 339–341; & compare Part III., Sect. 30, sub-sect. 3, B., ante.

8176. Necessity for special notice—Remuneration for past services of directors.]—Remuneration for past services of directors cannot be voted at an ordinary general meeting unless special notice be given of the intention to propose such a resolution.—*HUTTON v. WEST CORK RY. CO.* (1883), 23 Ch. D. 654; 52 L. J. Ch. 377; 48 L. T. 626; 31 W. R. 542; *on appeal*, 23 Ch. D. 660, C. A.

Annotations:—Mentd. Re Leicester Club & County Racecourse Co., Ex p. Cannon (1885), 30 Ch. D. 629; *Tomkinson v. S. E. Ry.* (1887), 35 Ch. D. 675; *Henderson v. Bank of Australasia* (1888), 40 Ch. D. 170; *Re Newman*, [1895] 1 Ch. 674; *Kaye v. Croydon Tram. Co.*, [1898] 1 Ch. 358; *Re Newspaper Proprietary Syndicate, Hopkinson v. Newspaper Proprietary Syndicate*, [1900] 2 Ch. 349; *Stroud v. Royal Aquarium & Summer & Winter Garden Soc.* (1903), 89 L. T. 243; *Warren v. Lambeth Waterworks* (1905), 21 T. L. R. 685; *Cyclists' Touring Club v. Hopkinson*, [1910] 1 Ch. 179; *Moriarty v. Regent's Garage Co.*, [1921] 1 K. B. 423.

8177. — Adoption of agreement for sale of undertaking & compensation of officers — Sufficiency of notice.]—*KAYE v. CROYDON TRAMWAYS CO.*, No. 8126, *ante*.

8178. — Resolution to authorise deposit of bill in Parliament.]—*HULL & BARNSELY RAILWAY & DOCK CO., ELLIS v. SMITH* (1889), 5 T. L. R. 347.

8179. Extraordinary meeting — Requisition to directors — Refusal of directors to call meeting — Whether justified.]—(1) Where the prescribed number of shareholders have, under 1845 Act, s. 70, issued a requisition to the directors to call an extraordinary meeting, if the object of the proposed meeting is one which can be carried out in a legal way, the directors cannot, on the ground that resolutions following the precise terms of the requisition would be illegal, refuse to call the meeting, or limit their notice calling the meeting to those objects of the requisition which they consider legal.

(2) Directors may be removed at a general meeting of the company, though no power for that purpose is expressly given by the special Act.

(3) Where directors decline to exercise their power of filling up casual vacancies in their body under sect. 89 of above Act, or where no sufficient quorum of directors remains, a general meeting may appoint new directors.—*ISLE OF WIGHT RY. CO. v. TAHOUDIN* (1883), 25 Ch. D. 320; 53 L. J. Ch. 353; 50 L. T. 132; 32 W. R. 297, C. A.

Annotations:—As to (1) Refd. Fruit & Vegetable Growers' Assocn. v. Kekewich, [1912] 2 Ch. 52. *As to (2) Apld. West Somerset Mineral Ry. v. Robinson* (1917), 62 Sol. Jo. 175. *As to (3) Consd. Barron v. Potter, Potter v. Berry*, [1914] 1 Ch. 895. *Generally, Mentd. Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame*, [1906] 2 Ch. 34; *Salmon v. Quin & Axtens*, [1909] 1 Ch. 311.

B. Proceedings at Meetings.

See, generally, CORPORATIONS, Vol. XIII., pp. 341–348; & compare Part III., Sect. 30, sub-sect. 3, D., ante.

8180. Resolution to be passed by “majority in value of shareholders.”]—The “majority in value of the shareholders, or of the shareholders of a particular class,” which is required by Metropolitan Water Act, 1902 (c. 41), sched. 4, s. 1, to enable a scheme of the directors for the distribution of the compensation payable for the purchase of a metropolitan water undertaking to be submitted to the Ch. Div. of the High Ct., means a majority in value of all the shareholders of the co. or of the particular class, & not merely a majority in value of the shareholders present at the meeting.—

CLAY v. GRAND JUNCTION WATER WORKS CO. (1904), 21 T. L. R. 31.

8181. Voting by proxy—Payment of stamps & postage—Out of company's funds.]—A controversy had been going on for some years between the directors of a ry. co. & a body of shareholders with reference to questions of policy affecting the management of the co.; previously to the half-yearly general meetings the directors sent to each shareholder a circular setting out the facts & the views of the directors & asking the support of the shareholders at the meeting; with this was enclosed a stamped proxy paper containing the names of three of the directors as proxies, with a stamped cover for return. The expenses of printing, posting, & stamping these documents was paid for out of the funds of the co. In an action by the shareholders to restrain the co. & the directors from using the funds of the co. in paying expenses thus incurred:—*Held*: it was the duty of the directors to inform the shareholders of the facts, of their policy, & the reasons why they considered that this policy should be maintained & supported by the shareholders, & they were justified in trying to influence & secure votes for this purpose, & accordingly, expenses which had been *bonâ fide* incurred in the interest of the co. were properly payable out of the funds of the co.—*PEEL v. LONDON & NORTH WESTERN RY. CO.*, [1907] 1 Ch. 5; 76 L. J. Ch. 152; 95 L. T. 897; 23 T. L. R. 85; 14 Mans. 30, C. A.

SUB-SECT. 3.—COMPANY BOOKS AND DOCUMENTS.

See, generally, CORPORATIONS, Vol. XIII., pp. 302–305, 348, 350.

8182. As evidence—Against stranger—Member contracting with company.]—A co. was, by its incorporating Act, required to keep books for the inspection of every member:—*Held*: the books were not evidence for the co. against a stranger, in order to prove, that the provisions of the Act had not been complied with.

The principle upon which partnership books are evidence against all the partners, is, that they are kept by themselves, or by their servants under their authority. Therefore, as the clerk of the co., when once appointed, is under the control of no individual member, a proprietor entering into a contract with the co. is to be deemed a stranger, & cannot be affected by any entry made under the order of the whole body.—*HILL v. MANCHESTER & SALFORD WATERWORKS CO.* (1833), 5 B. & Ad. 866; 2 Nev. & M. K. B. 573; 3 L. J. K. B. 19; 110 E. R. 1011.

Annotations:—Refd. Clarke v. Imperial Gas Light & Coke Co. (1832), 2 L. J. K. B. 30. *Mentd. Lainson v. Tremere* (1834), 1 Ad. & El. 792; *Mestayer v. Biggs* (1834), 4 Tyr. 466; *Doe d. Chandler v. Ford* (1835), 3 Ad. & El. 649; *Horton v. Westminster Improvement Comrs.* (1852), 7 Exch. 780; *Norwich Corpn. v. Norfolk Ry.* (1855), 4 E. & B. 397; *Royal British Bank v. Turquand* (1855), 5 E. & B. 248; *Prince of Wales Assoc. v. Harding* (1858), E. B. & E. 183; *Re Young v. Brompton, etc. Waterworks Co.* (1861), 1 B. & S. 675; *Re Companies Acts, Ex p. Watson* (1888), 21 Q. B. D. 301.

8183. Inspection of—By creditor.]—By a canal Act, it was provided that the directors should keep books & that the proprietors, land-owners, & others interested in the navigation, should be at liberty to inspect the co.'s books:—*Held*: a bond-creditor was entitled to such inspection, to enable him to meet the defence intended to be set up by the co. in an action upon the bond.—*PONTET v. BASINGSTOKE CANAL CO.* (1835), 2 Bing. N. C. 370; 2 Scott, 543; 5 L. J. C. P. 153; 132 E. R. 145.

Sect. 11.—Regulation and management : Sub-sects. 3, 4 & 5, A

8184. .]—A sect. of a railway Act required the co. to keep books containing accounts of the receipts & expenditure of the co. for the inspection of creditors. The co. kept certain journals professedly in compliance with that sect., & containing entries of receipt & expenditure :—*Held* : the co. were not bound to allow inspection by a creditor of any other books than those kept under that sect., & the ct. could not enter into an inquiry, whether those books were properly kept so as to contain all that the legislature intended.—*R. v. GREAT WESTERN RY. CO.* (1849), 13 L. T. O. S. 256.

— **Accounts.**]—See Sub-sect. 4, *post*.

— **Register of mortgages & bonds.**]—See Sect. 14, sub-sect. 5, *post*.

SUB-SECT. 4.—ACCOUNTS AND AUDIT.

8185. Inspection of—Grounds for granting.]—By 1845 Act, s. 115, the directors are ordered to keep full & true accounts of all sums of money expended on behalf of the co. By sect. 119 the directors are required to appoint a book-keeper to enter the accounts in books to be kept for the purpose, & every such book-keeper shall permit any shareholder to inspect such books & take copies & extracts therefrom.

Under above provisions a shareholder is not entitled to inspection of the books of a public co. unless he satisfies the ct. that he requires such an inspection for a *bonâ fide* purpose & not out of mere idle curiosity. Therefore where a shareholder applied for a writ of *mandamus* calling on the directors to permit him to inspect the books without showing that he had any definite object in view beyond looking at the accounts :—*Held* : application must be refused.—*R. v. LONDON & ST. KATHARINE DOCKS CO. (DIRECTORS)* (1874), 44 L. J. Q. B. 4 ; 31 L. T. 588 ; 23 W. R. 136.

Annotations :—*Refd.* *Mutter v. Eastern & Midlands Ry.* (1888), 38 Ch. D. 92 ; *R. v. Bank of England Governor* (1891), 7 T. L. R. 421. *Mentd.* *Davies v. Gas Light & Coke Co.*, [1909] 1 Ch. 248.

8186. Auditors—Certificate of—Effect of—Railway Companies Act, 1867 (c. 127), s. 30.]—*BLOXAM v. METROPOLITAN RY. CO.*, No. 8193, *post*.

8187. — Powers of—To appoint accountant—Without consent of co-auditor.]—An auditor appointed under 1845 Act, is entitled to appoint an accountant under sect. 108 of that Act, without the consent of his co-auditor.—*STEELE v. SUTTON GAS CO.* (1883), 12 Q. B. D. 68 ; 53 L. J. Q. B. 207 ; 49 L. T. 682 ; 32 W. R. 289, D. C.

8188. — Remuneration.]—1845 Act, s. 91, prevents auditors from recovering any other remuneration than that fixed upon at a general meeting of the co.—*PAGE & BISHOP v. EASTERN & MIDLANDS RY. CO.* (1884), 1 Cab. & El. 280.

8189. Balance sheet—"Transaction"—What is—1845 Act, s. 116.]—*CROSS v. IMPERIAL CONTINENTAL GAS ASSOCN.*, No. 8200, *post*.

SUB-SECT. 5.—DIVIDENDS.

A. In General.

8190. Meaning.]—By a railway co.'s Act, after reciting that the co. had issued certain "preference shares," on the terms of the holders thereof being entitled to "fixed preferential dividends

thereon, payable out of the revenues of the co.," at certain rates in the Act mentioned, it was enacted, that the income of the co., from time to time applicable to the payment of interest on moneys borrowed & dividends on shares, should be applied, first, in payment of the interest, from time to time accruing, on mtges. & bonds ; next, in payment of the preferential dividends on the several classes of preference shares, in the order in the Act specified ; & lastly, in payment ratably of dividends on original shares. The contracts upon which the preference shares had been issued & taken up, irregular in themselves but rendered valid by the Act, were to the effect that such preference shares should be entitled, some to a dividend at a certain given rate per cent for a given number of years, & at a lower given rate in perpetuity thereafter ; others to a given rate per cent without restriction as to time ; & others at a given rate per cent for a term certain, & thereafter until such time as they were redeemed by the co. :—*Held* : coupling the enacting part of the Act with the recitals in its preamble, & having regard to the contracts upon which the shares were issued, the holders of such preference shares were entitled, according to their priorities *inter se*, to arrears of former dividends before any dividend could be paid to the holders of ordinary shares ; for the word "dividend" is not, *ex vi termini*, restricted to profits accruing during any given period ; & here, the consequences of so restricting it would be to enable the holders of ordinary shares so to arrange the declaration of their dividends as to prevent the holders of preference shares from deriving any of the advantages for which they had stipulated.—*CRAWFORD v. NORTH EASTERN RY. CO.* (1856), 3 K. & J. 723 ; 3 Jur. N. S. 1093 ; 69 E. R. 1301.

8191. —.]—(1) Preference shares in a railway co. were issued under the provisions of an Act of Parliament authorising the co. to guarantee the payment of dividends thereon at a fixed rate in preference to the payment thereof on the ordinary shares of the co. The resolution for issuing them provided that they should bear "£5 per cent interest or preference dividend in perpetuity." Other preference shares were issued under an Act of Parliament providing that the holders should be entitled to dividends thereon at a given rate "in preference to the payment of dividends on the ordinary shares" :—*Held* : if the profits at any period of distribution were insufficient to pay in full the dividends due to the preference shareholders, the arrears must be paid out of subsequent profits.

(2) A subsequent Act of Parliament directed the profits of a particular half-year to be applied in replacing a loss sustained by the co., & directed the surplus, if any, to be applied, so far as it would extend, in paying the preference shareholders their dividends for that half-year :—*Held* : this Act did not take away their claim against the subsequent profits, & the right given them by the latter direction was cumulative & not substitutionary.

(3) The word "dividend," if we look to its derivation, means obviously the fund to be divided, not the share of any particular partner or person in that fund, & strict language would require us to speak not of the dividend which each shareholder is entitled to receive, but of his *aliquot* portion of the dividend. In construing the clauses in these Acts which give to certain shareholders in preference to others rights to dividends we must construe the word "dividend" in a secondary sense & not according to its strict original meaning.

The word "dividend" carries no spell with it. Applicable to various subjects it is not intelligible without knowing the matter to which it is meant as referring; & of course, where there is a context, it is liable to be affected by that context. But defts.' gloss upon it seems to me arbitrary & fanciful. The word, as used in the places in which we have now to deal with it, means, I apprehend, share of profits. Nor can I discover any necessity, authority, or reason for limiting & restricting the effect of the word "preference" as defts. require it to be. The expression where we have to construe it seems to me correctly used in a large & general sense as between or amongst the stockholders & shareholders in respect of time & profits (LORD CRANWORTH, C.).—HENRY v. GREAT NORTHERN RY. CO. (1857), 1 De G. & J. 606; 4 K. & J. 1; 27 L. J. Ch. 1; 30 L. T. O. S. 141; 3 Jur. N. S. 1133; 6 W. R. 87; 44 E. R. 858, L. C. & L. JJ.

Annotations:—As to (1) *Apld.* Corry v. Londonderry & Enniskillen Ry. (1860), 29 Beav. 263. *Consd.* Re London India Rubber Co. (1868), L. R. 5 Eq. 519. *Apld.* Allen v. Londonderry & Enniskillen Ry. (1877), 25 W. R. 524. *Refd.* Gregory v. Patchett (1864), 33 Beav. 595; Will v. United Lankat Plantations Co., [1912] 2 Ch. 571. As to (2) *Consd.* Re London India Rubber Co. (1868), L. R. 5 Eq. 519. *Distd.* Staples v. Eastman Photographic Materials Co., [1896] 2 Ch. 303. *Apld.* Re Accrington Corp'n. Steam Tram. Co., [1909] 2 Ch. 40. *Refd.* Will v. United Lankat Plantations Co., [1912] 2 Ch. 571; Re Wakley, Wakley v. Vachell, [1920] 2 Ch. 205. As to (3) *Consd.* Matthews v. G. N. Ry. (1859), 28 L. J. Ch. 375. *Refd.* Webb v. Earle (1875), L. R. 20 Eq. 556. *Generally, Mentd.* London City Sewers Comrs. v. Gellatly (1876), 3 Ch. D. 610.

8192. Out of what funds payable—Out of profits—How computed—What deductions permissible.]

—A co. was authorised by some Acts of Parliament to create new shares "having preference in payment of dividends," & by others to create new shares, "& to guarantee dividends or interest" not exceeding a stated rate per annum. The co. created five sorts of preferential shares, some with a "preferential dividend out of working profits," others with "preferential dividends," & others with a "preferential interest or dividend," but giving to one class only a right to their arrears:—*Held*: (1) all the preference shareholders were entitled to have the deficiencies of their dividends or interest in one year made up in the succeeding years, in priority to any payment to the ordinary shareholders, but without interest; (2) in ascertaining the profits of a railway co., for the purpose of making a dividend, all the debts incurred for steam-engines, rails, completing stations, & the like, must be deducted, but not the money raised under the borrowing powers.—CORY v. LONDON-DERRY & ENNISKILLEN RY. CO. (1860), 29 Beav. 263; 30 L. J. Ch. 290; 4 L. T. 131; 7 Jur. N. S. 508; 9 W. R. 301; 54 E. R. 628.

Annotations:—As to (1) *Expld.* Re London India Rubber Co. (1868), L. R. 5 Eq. 519. *Refd.* Allen v. Londonderry & Enniskillen Ry. (1877), 25 W. R. 524.

8193. ——— Whether fund profits or capital.]—A railway co. whose original line was constructed & at work, obtained powers & money for the construction of an extension line, the shareholders in which were not to have more than 6 per cent for the first three years, & afterwards were to have their shares amalgamated with the ordinary stock of the co. The directors had in former half-years charged to capital one-half of the office expenses, & also a sum representing interest on debentures issued for lines in construction; they had also paid interest on the extension share capital out of a sum of money paid by contractors as interest in respect of unfinished lines; & a dividend on the ordinary stock had been declared accordingly:—*Held*: (1)

whether the half of the office expenses was or was not rightly charged to capital, no interlocutory injunction could be granted on that ground, inasmuch as the balance carried over to the next half-year on the revenue account was much larger than the sum so charged; (2) it was doubtful whether interest on debentures issued for lines in construction could be charged to capital; (3) it was doubtful whether it was right to pay interest on the extension capital out of the money received from the contractors; (4) the questions were not concluded by the certificate of the auditors under Railway Companies Act, 1867 (c. 127), s. 30; (5) these were not merely matters of internal management, & the ct. would interfere in such cases if the directors were acting *ultra vires*, & the questions were of such importance & doubt that the injunction must be continued till the hearing.

Pltf. had bought his shares a short time before the bill was filed, & to enable him to file the bill:—

Held: (6) he was not for that reason, or for the reason that these charges had been acquiesced in by the shareholders on former occasions, prevented from obtaining an interlocutory injunction.

—BLOXAM v. METROPOLITAN RY. CO. (1868), 3 Ch. App. 337; 18 L. T. 41; 16 W. R. 490, L. C.

Annotations:—As to (1) *Refd.* Re National Bank of Wales, [1899] 2 Ch. 629. As to (2) *Distd.* Bardwell v. Sheffield Waterworks Co. (1872), L. R. 14 Eq. 517. *Consd.* Hinds v. Buenos Ayres Grand National Tram. Co., [1906] 2 Ch. 654. As to (5) *Refd.* Yool v. G. W. Ry. (1870), 39 L. J. Ch. 562. As to (6) *Apld.* Salisbury v. Met. Ry. (1869), 38 L. J. Ch. 249. *Refd.* Robson v. Dodds (1869), L. R. 8 Eq. 301; Mutter v. Eastern & Midlands Ry. (1888), 38 Ch. D. 92.

8194. ——— ——— ——— ———.]—A railway co. entered into a contract for the construction of an extension of the railway. The contractors were bound to complete the extension by Dec. 31, 1867, & until completion, to pay to the directors of the co. interest on so much of the extension capital as should from time to time be called & paid up; but if any delay in delivering possession of the land to the contractors should render it impracticable to complete the extension by the time appointed, such allowance was to be made to the contractors as should be equivalent to the interest payable by them for the period of the delay so occasioned. The co.'s Acts prohibited the payment of dividends out of capital. A subsequent Act enacted that all moneys paid by the contractors in respect of non-completion should be carried to revenue account & be applicable to the payment of dividends on the extension capital. The extension was not completed by Dec. 31, 1868, & accordingly the contractors paid to the directors £42,600 in respect of the half-year ending on that day; but the directors, admitting that the delay was attributable to the co.'s default in delivering possession of the land, had repaid or were about to repay, this sum to the contractors out of capital:—*Held*: the £42,600 was not really "moneys paid by the contractors in respect of non-completion," & that to apply this sum in payment of dividends would be a violation of the statutory prohibitions against paying dividends out of capital.—SALISBURY v. METROPOLITAN RY. CO. (1869), 38 L. J. Ch. 249; 20 L. T. 72.

Annotation:—*Refd.* Robson v. Dodds (1869), L. R. 8 Eq. 301.

8195. ——— ——— ——— ———.]—JAMES v. EVE, No. 8116, *ante*.

8196. ——— ——— ——— ———.]—Debenture-stockholders, who have no direct or immediate interest in nor immediately enforceable charge upon a particular fund of the co., cannot maintain an action to restrain the co. from applying such

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fund in the payment of dividends on share capital, even though the assets of the co. are insufficient to provide for payment of the loan capital.

Annual payments made during a term of years to a railway co. for the use of or sole control of the whole undertaking of the railway co. are properly applicable by the railway co. in paying dividends.

—**LAWRENCE v. WEST SOMERSET MINERAL RY. Co.**, [1918] 2 Ch. 250; 87 L. J. Ch. 513; 119 L. T. 509; 62 Sol. Jo. 652; [1918–19] B. & C. R. 91. *Annotation*:—**Refd. Cross v. Imperial Continental Gas Assn.**, [1923] 2 Ch. 553.

8197. Conjectural value of surplus lands.—Where the directors of a co. paid dividend out of the capital moneys of the co. they were held to be personally liable for the amount so paid.

A co. were possessed of surplus lands of the alleged value of £1,200,000 which sum, if invested at 5 per cent would procure an annual income of £60,000. The net rental of such lands was about £28,000. The directors paid a dividend, not according to the actual income received from the surplus lands, but according to the conjectural one of £60,000. On a bill filed by a deferred shareholder who had not participated in such dividend:—*Held*: the payment of such dividend was *ultra vires*, & the directors were personally liable to make good the sums so paid, without prejudice to any right they might have to recover the same from the shareholders.—**SALISBURY v. METROPOLITAN RY. Co.** (1870), 22 L. T. 839.

Annotations:—**Distd. Cullerne v. London & Suburban General Permanent Bldg. Soc.** (1890), 25 Q. B. D. 485. **Refd. Re Oxford Benefit Bldg. & Investment Soc.** (1886), 35 Ch. D. 502.

8198. Question of internal management.—After the creation of the original shares in a railway co., a further capital was raised in half-shares, upon which a resolution of the directors guaranteed interest at £6 per cent for ten years. On a motion by a holder of original shares, to restrain the co. from paying any interest or dividends on the half-shares out of the profits of capital subsequently created, in preference to the interest or dividends on the original shares, & from paying any preferential interest or dividends on the half-shares, while any of the floating or unsecured debt of the co. was unpaid, except out of the clear profits of the current half year—the co. entered into an undertaking not to make such payments, unless under the authority of Parliament, until the hearing or further order. By a subsequent Act of Parliament it was enacted, that it should be lawful for the co. to commute the guarantee attached to the half-shares into any other guarantee or privilege, perpetual or terminable, which should be agreed upon by four-fifths of the shareholders of the co. at meetings, after notice, as therein mentioned. The directors thereupon proposed to commute the guarantee into an annual payment for each half-share in perpetuity. Upon a motion to restrain the co. from in any manner acting on or giving effect to the proposed scheme for the commutation of the guarantee, or from declaring or paying any commuted or other dividend on the original or half-shares, while any of the unsecured debt remained due, & except out of the clear profits of the current half-year, & so far as such profits should be sufficient after payment of such debt, & upon a cross-motion, to discharge the undertaking:—*Held*: (1) the Act of Parliament authorising the commutation did not take the case out of the

undertaking; & therefore, the undertaking was binding until the hearing of the cause, or the further order of the ct.; (2) the undertaking was not an agreement which bound defts. to do nothing in the matter, the subject of the injunction, except under the order of the ct., or unless the ct. should be of opinion that what they proposed to do was proper to be done; but was in the nature of an injunction obtained without argument, & which defts. might apply to discharge; (3) upon the construction of the resolution, the holders of half-shares were entitled to the guaranteed £6 per cent out of any funds of the co. which could be lawfully so applied, & therefore out of future profits, before any dividend could be payable upon the whole shares; (4) independently of the construction of the resolution, the Act of Parliament having authorised a commutation of the guarantee, & the commutation having received the consent required by the Act, the co. might lawfully carry it into effect; (5) the principles which apply to partnerships composed of a limited number of persons, apply to such cos.; & the majority of the partners in a partnership of a limited number, constituted with similar provisions as to profits, could overrule the minority, upon the question, whether profits should be divided while debts of the partnership were unprovided for; (6) the manner in which profits were to be ascertained & divided was a question of internal management, & within the power of the co. to direct.—**STEVENS v. SOUTH DEVON RY. Co.** (1851), 9 Hare, 313; 7 Ry. & Can. Cas. 629; 21 L. J. Ch. 816; 68 E. R. 524.

Annotation:—*Generally, Mentd. Salisbury v. Met. Ry.* (1870), 18 W. R. 974.

8199. Dividends on money raised for works—Pending completion.—A co. incorporated by Act of Parliament being already in possession of works constructed by means of capital raised by the issue of shares, obtained by a later Act power to raise more capital for the construction of additional works. These works were of a peculiar kind, & could not be constructed by means of contracts taken in the usual way, but required that the co. should find the plant & employ workmen to act as directed by their engineer. The capital for the works was raised by the exercise of borrowing powers & by preference shares, the holders of which had certain options to convert them into ordinary shares:—*Held*: the co. were entitled to add to the capital required for the construction of the works the amount of the interest or dividends on the loans or shares by means of which it was raised until the completion of the works.—**BARDWELL v. SHEFFIELD WATERWORKS Co.** (1872), L. R. 14 Eq. 517; 41 L. J. Ch. 700; 20 W. R. 939.

Annotation:—**Refd. Hinds v. Buenos Ayres Grand National Tram. Co.**, [1906] 2 Ch. 654.

8200. Capital assets generally—Meaning of “capital stock” in 1845 Act, s. 121.—The compensation payable to debt. assn. for the compulsory acquisition of its gas undertakings in various German towns by the German Govt. during the War resulted in the realisation by the assn. of a very considerable profit upon the book value of those undertakings, some of which profit, after writing down various assets of the assn., the directors proposed to treat as profit available for paying a dividend to the members. Debt. assn. was a co. incorporated & regulated by a series of special Acts which incorporated the Cos. Clauses Consolidation Acts, & had from time to time in exercise of the powers conferred by these Acts

issued debenture-stock. No interest on the debenture stock was in arrear. The proposed distribution involved no reduction of capital, & the paid-up capital of the assocn. was intact. Pltf., who was both a member & a holder of debenture stock of the assocn., sought to restrain the payment of the proposed dividend:—*Held*: (1) the debenture-stock did not constitute a specific charge upon the German property, & no interest being in arrear, there was no debt due to the debenture stockholders, & pltf. as a stockholder had no right to interfere with the ownership, possession or dominion of the assocn. as the statutory owners & managers; (2) pltf. as a member of the assocn. could not impeach the legality of the proposed distribution, because: (a) a co. registered under the Joint Stock Cos. Acts could, in the absence of special provision to the contrary, distribute a realised profit on its capital assets, & for the present purpose, there was no substantial distinction between a co. registered under those Acts & a co. to which the Cos. Clauses Consolidation Acts applied; (b) in the present case the assocn. having power under a special Act to sell any part of its undertaking & having adopted the sale of its German undertaking, that was a "transaction" within 1845 Act, s. 116, which, in the circumstances, conferred upon the assocn. power to distribute the realised profit by way of dividend amongst its members.

In sect. 121 of above Act the prohibition against making any dividend whereby the "capital stock" of the co. will be reduced, refers not to capital assets generally, but to the paid-up capital of the co.—*CROSS v. IMPERIAL CONTINENTAL GAS ASSOCN.*, [1923] 2 Ch. 553; 93 L. J. Ch. 49; 129 L. T. 558; 39 T. L. R. 470.

See, also, No. 1097, *ante*.

8201. At what time payable—Whether before undertaking completed—Provision in special Act.]—An Act of Parliament, which authorised the transfer of a particular portion of a projected railway from one railway co. to another, enacted, that if that portion of the railway was not completed within three years from such transfer, it should not be lawful for the railway co. to pay any dividend until the whole should be completed. That portion was not completed within the three years:—*Held*: (1) the co. were prohibited from paying any dividend on any of their shares, & not merely upon the capital embarked in that particular portion of their undertaking; (2) one shareholder might sue on behalf of himself & other shareholders to restrain the payment of any future dividend; & that, notwithstanding he had received interest on his shares since the expiration of the three years, he being then ignorant of the enactment in question; (3) pltf., being holder of some shares of a particular class which were not entitled at present to participate in any dividend, was not entitled, on a bill so framed, to an injunction to restrain the payment of a dividend already declared, the other shareholders who were interested in those dividends not being parties to the record or represented.

Qu.: whether, in such a case, any adequate remedy exists, without making all the shareholders parties.—*CARLISLE v. SOUTH EASTERN RY. CO.* (1850), 1 Mac. & G. 689; 13 Beav. 295; 6 Ry. & Can. Cas. 670; 2 H. & Tw. 366; 19 L. J. Ch. 477; 15 L. T. O. S. 157; 14 Jur. 535; 47 E. R. 1724, L. C.; *subsequent proceedings* (1851), 16 L. T. O. S. 357.

Annotations:—*As to* (2) *Folld. Fawcett v. Laurie* (1860), 1 Drew. & Sm. 192. *As to* (3) *Expld. & Distd. Marker v. Marker* (1851), 9 Hare, 1. *Folld. Fawcett v. Laurie*

(1860), 1 Drew. & Sm. 192. *Refd. Graham v. Birkenhead, etc. Ry.* (1850), 12 Beav. 460; *Minn v. Stant* (1851), 15 Beav. 49; *Hoole v. G. W. Ry.* (1867), 17 L. T. 193.

8202. —.]—A railway Act in effect enacted that if the W. line was not open for traffic within three years from Aug. 1853, or even if the rest of the P. line should be open within five years from that date, then & from thenceforth it should not be lawful for the co. to declare or pay any dividend on the ordinary or unguaranteed capital until such works had been completed. The time for completing the W. line had expired without its being finished, & no portion of the P. line was yet made. The co. were under terms to apply to Parliament for extended powers, & had applied for them. But they had also applied for power to make a new line, which was not identical with the original W. line. On a motion for an injunction to restrain them from now declaring any dividend on the unguaranteed or ordinary capital, until they had complied with the provisions of their Act:—*Held*: they must be conditionally restrained until the hearing or further order.—*ALLEN v. TALBOT* (1858), 30 L. T. O. S. 316.

8203. ——— **No provision in special Act.]—**The M. Ry. & Canal Co. obtained several Acts of Parliament for improving their existing canal & railways, & for making a new railway, but from want of funds they failed to complete the whole of the works within the time specified by their Acts. Upon a bill filed by a shareholder to restrain the co. from making a dividend out of the income arising from that portion of the property which was worked:—*Held*: the jurisdiction of the ct. had been usefully exercised in cases arising from a combination of illegal acts, breaches of contract with the public or the shareholders, & erroneous acts which shareholders could not rectify; it could not safely be laid down that in no case ought joint-stock cos. to be allowed to divide any profits or receive any tolls until all their works were complete; it was necessary to distinguish between the duty which the governing body had to perform to the public & to the shareholders; the ct. did not attempt to direct the performance of all the duties which a governing body owed to the shareholders, but left shareholders to enforce the duties to themselves arising out of internal arrangement; it was imprudent to treat income as profit while the works & the contract with the public were incomplete; the ct. had not jurisdiction to interfere, on the ground that this was a violation of a duty to the public, & because the misapplication of income was the subject of internal regulations; & the demurrer was allowed, but without costs.—*BROWNE v. MONMOUTHSHIRE RAILWAY & CANAL CO.* (1851), 13 Beav. 32; 7 Ry. & Can. Cas. 682; 20 L. J. Ch. 497; 15 Jur. 475; 51 E. R. 12.

Annotations:—*Appld. Stevens v. South Devon Ry.* (1851), 9 Hare, 313. *Refd. Salisbury v. Met. Ry.* (1870), 22 L. T. 839.

8204. ——— **Before company debts provided for.]—***STEVENS v. SOUTH DEVON RY. CO.*, No. 8198, *ante*.

8205. Effect of declaration.]—Where a co. declares a dividend on its shares, a debt immediately becomes payable to each shareholder in respect of his dividend for which he can sue at law, & Stat. Limitations immediately begins to run. The declaration does not make the co. a trustee of the dividend for the shareholder, & an entry of the liability in the co.'s books—at any rate when no special part of its assets is set aside as representing the dividend & no notice of the entry is given to the shareholder—does not take the case out of the statute.—*Re SEVERN & WYE &*

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SEVERN BRIDGE RY. CO., [1896] 1 Ch. 559; 65 L. J. Ch. 400; 74 L. T. 219; 44 W. R. 347; 12 T. L. R. 262; 40 Sol. Jo. 337; 3 Mans. 90.

Annotation:—Reid. Re Artisans' Land & Mortgage Corpn., [1904] 1 Ch. 796.

—.]—*See, also, No. 8219, post.*

8206. Mode of payment—Issue of preference shares—Validity.]—(1) A ry. co. had power to raise additional capital by the issue of shares, & to allot to them a preferential dividend, it being enacted that dividends should not be paid out of any moneys received for the shares, & that no share should be issued until one-fifth of the amount had been paid. The revenue of the co. during a particular half-year was sufficient to pay a dividend, after providing for all charges properly payable out of revenue, but, owing to the refusal of creditors of the co. to give time, the revenue was absorbed in payment of sums properly chargeable to capital. In these circumstances the co. in general meeting sanctioned a plan for offering to each shareholder, at par, preference shares to an amount equal to the dividend which would have been payable to him if the revenue had not been diverted for capital purposes. These shares were saleable, but only at a considerable discount. A shareholder filed his bill, on behalf of himself & the section of shareholders to which he belonged, to restrain the issue of shares for the above purpose, to have those already issued cancelled & to restrain the payment of dividends on them:—*Held*: the scheme was *ultra vires*, for, assuming that the shares could lawfully be issued at a discount, an issue under this scheme being in reality an issue at a discount, & assuming that owing to the diversion of the revenue to capital purposes they could lawfully be treated as assets for payment of a dividend, each shareholder who was not willing to accept an allotment of them in specie had a right to insist that the proceeds of the whole should be applied ratably in payment of a dividend to all the shareholders.

(2) An individual member of a corpn. may maintain a bill in his own name, without suing on behalf of other persons as well as himself to restrain the corpn. from doing an act which is *ultra vires*:—*Held*: those shareholders who had accepted the shares offered to them according to the above scheme were sufficiently represented for the purpose of these proceedings by one of the directors who had accepted such shares, & had them registered in his name:—*Semble*: the ct. would grant no relief affecting the rights of absent shareholders.—*HOOLE v. GREAT WESTERN RY. CO.* (1867), 3 Ch. App. 262; 17 L. T. 453; 16 W. R. 260, L. J.

Annotations:—As to (1) *Apld. Wood v. Odessa Waterworks Co.* (1889), 42 Ch. D. 636. *As to* (2) *Reid. Bloxam v. Met. Ry.* (1868), 3 Ch. App. 343, n. *Generally, Mentd. Yool v. G. W. Ry.* (1870), 39 L. J. Ch. 562.

8207. Power of directors to decide—How power exercised.]—The certificates of certain stocks of deft. co. contained on the back a clause stating that "dividends are payable by warrants which will be sent by post to the proprietor's registered address." The report of the directors for the half-year ending Dec. 31, 1908, which was sent to the proprietors, also contained a notice that "the dividend warrants will be payable on Feb. 16, 1909, & will be sent by post to the proprietors on the previous day." The half-yearly general meeting of the proprietors was held on

Feb. 12, when the proprietors passed a resolution declaring dividends on the various stocks of the co. In pursuance of this resolution a dividend warrant was sent on Feb. 15, by post to the registered address of pltf., who was the proprietor of three classes of stock in the deft. co., but failed to reach him. Pltf. immediately gave notice to the co., who stopped payment of the warrant. The warrant contained at the foot the following note: "This warrant must be signed by the person to whom it is made payable & presented for payment through a banker. It will not be honoured after three months from date of issue unless specially endorsed for payment by the secretary." The warrant never was presented for payment, & after three months had elapsed pltf. requested deft. co. to issue to him a duplicate warrant. The co. agreed to do so provided he would sign an indemnity, which he refused to do. Pltf. then brought this action to recover the amount of the dividend:—*Held*: (1) the directors had power under 1845 Act, ss. 90 & 91, to decide within reasonable limits in what manner the dividends should be paid, & by the notice on the stock certificate & on the report they had so decided; (2) the proprietors had by their resolution decided in effect that the dividends should be paid in mode prescribed by the directors; (3) the obligation of the co. to pay the dividend was discharged by the sending of the dividend warrant by post to pltf., who must be taken to have requested payment of the dividend in that manner.—*THAIRLWALL v. GREAT NORTHERN RY. CO.*, [1910] 2 K. B. 509; 79 L. J. K. B. 924; 103 L. T. 186; 26 T. L. R. 555; 54 Sol. Jo. 652; 17 Mans. 247, D. C.

8208. — Posting of dividend warrant—At shareholders' request.]—*THAIRLWALL v. GREAT NORTHERN RY. CO.*, No. 8207, *ante*.

8209. Contingent liability to make payment in priority to third party—Whether company bound to inquire if payment required by third party.]—A co. were bound by the Act incorporating them in case the annual income of a board should in any one year fall below £1,000, to pay to them such an annual sum as should make up the deficiency, such annual sum to be paid in preference to the dividends payable by the co. to their own proprietors. No demand was made by the board upon the co. in respect of the deficiency, until 1870, when an application was made, & subsequently an action was brought by the board against the co. for an aggregate sum representing the deficiencies arising in the receipts of the board from 1847 to 1858, during which time dividends had been paid by the co. The co. filed their bill charging wilful default, & praying an account against the board on that footing, & also a declaration that the board were debarred from enforcing their claim for deficiencies previously to 1870:—*Held*: the co. were not bound before declaring their own dividend to inquire of the board whether they had any claim against them in respect of the deficient income, & the board were debarred by their own laches from enforcing any claim prior to 1858, & the ct., being satisfied as to the wilful default, directed an account on that footing from 1858.—*SOUTHAMPTON DOCK CO. v. SOUTHAMPTON HARBOUR & PIER BOARD* (1872), L. R. 14 Eq. 595; 41 L. J. Ch. 832; 26 L. T. 828; 20 W. R. 940.

8210. Capital contributed equally by two companies—Right to contribution towards payment of dividend.]—*METROPOLITAN DISTRICT RY. CO. v. METROPOLITAN RY. CO.* (1889), 5 T. L. R. 394, H. L.

B. Preference Dividends.

8211. When cumulative.]—A railway co. issued certificates of preference stock purporting to carry "interest" at £6 per cent per annum in perpetuity. Afterwards they obtained an Act of Parliament, which, after reciting that preference stock had been created, whereby priority was assigned in the payment of "dividends" to the extent of £6 per cent. per annum, enacted, that the railway co. should pay "dividends" to the holders of such stock at the rate aforesaid, before they should pay any dividend to the holders of any other shares in the co. By a subsequent Act the co. was empowered to issue other shares called "debenture-shares" bearing "interest" at £5 per cent per annum, & was directed to apply the annual profits in payment (1) of interest on mtges.; (2) of interest on the debenture-shares; (3) of the "interest or dividend" on the guaranteed or preference shares & the arrears of such interest or dividends; & (4) as therein mentioned.

A subsequent Act referred to the preference shares as bearing "a preferential interest or dividend":—*Held*: the provision as to payment of "dividends" in the first-mentioned Act must be construed with reference to recital in it & to the subsequent Acts, & did not mean a share of current profits merely, but entitled the holders of the preference shares to resort to a subsequent division of profits to make their dividend up to £6 per cent. *Semble*: the recital alone, having regard to the purport of the certificates, would have been sufficient to give this meaning to the word "dividend."

Qu.: whether it is competent to cos. to create preferential shares under the general powers contained in ordinary railway Acts.

A preferential shareholder is entitled to file a bill to restrain the co. from making a dividend prejudicial to his rights without waiting until there are funds to make a dividend.—*STURGE v. EASTERN UNION RY. CO.* (1855), 7 De G. M. & G. 158; 25 L. T. O. S. 238; 1 Jur. N. S. 713; 44 E. R. 62, L. JJ.

Annotations:—*Consd.* Crawford v. N. E. Ry. (1856), 3 K. & J. 723; Henry v. G. N. Ry. (1857), 1 De G. & J. 606. *Expld.* Re London India Rubber Co. (1868), L. R. 5 Eq. 519. *Refd.* Matthews v. G. N. Ry. (1859), 28 L. J. Ch. 375. *Mentd.* Hoole v. G. W. Ry. (1867), 17 L. T. 193.

8212. —.]—*CRAWFORD v. NORTH EASTERN RY. CO.*, No. 8190, *ante*.

8213. —.]—*HENRY v. GREAT NORTHERN RY. CO.*, No. 8191, *ante*.

8214. — **Waiver of rights in respect of one year—Effect.]**—(1) By an Act of Parliament it was enacted that it should be lawful for any shareholder who should have paid up one-half the amount of any share or shares of the G. N. Ry. Co. to require each share to be converted into two half-shares, whereof the one-half which should be so fully paid up should be denominated deferred half-share, & the other half of such share should be denominated guaranteed half-share; & thenceforth in respect of each whole share so divided, the whole of the interest & dividends which would in each year have accrued should be applied in or towards payment, in the first place, of interest or

dividend after the rate of £6 per cent per annum on the amount paid upon the half-share so denominated "guaranteed" & the remainder, if any, should alone be payable to the half-share so denominated "deferred," provided that the co. should not pay any other or greater amount of interest or dividend upon the two half-shares than was for the time being paid on each undivided share:—*Held*: the holders of guaranteed half-shares were entitled to be paid their £6 per cent in each year not only out of the dividends accruing in that year but out of all subsequent dividends; &, therefore, if in any year the dividends were more than sufficient to pay £6 per cent on the guaranteed half-shares, the surplus must be applied in payment in the first place of all arrears due on those half-shares in respect of past deficiencies before any dividend could be declared on the deferred half-shares.

(2) The holders of the guaranteed half-shares having in a former year acquiesced in the declaration of a dividend on the deferred half-shares whilst there was an arrear of dividend due on the guaranteed half-shares:—*Held*: although they had precluded themselves from making any claim in respect of those particular arrears, they had not thereby renounced their rights in respect of subsequent arrears.—*MATTHEWS v. GREAT NORTHERN RY. CO.* (1859), 28 L. J. Ch. 375; 5 Jur. N. S. 284; 7 W. R. 233; *sub nom.* *MATHEWS v. GREAT NORTHERN RY. CO.*, 32 L. T. O. S. 355.

8215. — **Fixed dividend payable.]**—*CORRY v. LONDONDERRY & ENNISKILLEN RY. CO.*, No. 8192, *ante*.

8216. — —.]—Under an Act of 1845, the dividends on the shares in a water co. were limited to £10 per cent, after payment of which & providing for a contingent fund, the Ct. of Quarter Sessions had power to reduce the water rates. By a second Act in 1854, the capital was extended & a variation made in the shares & rate of interest:—*Held*: shareholders under the first Act were not deprived of their right to payment, out of any surplus, of their arrears of dividends existing at the passing of the second Act.—*COATES v. NOTTINGHAM WATERWORKS CO.* (1861), 30 Beav. 86; 4 L. T. 607; 7 Jur. N. S. 790; 9 W. R. 799; 54 E. R. 821.

8217. — —.]—*CHAMBERLAIN v. NEW WORCESTER GAS LIGHT CO.* (1875), *Times*, June 5.

8218. — —.]—A waterworks co. incorporated in 1809 for many years paid dividends at a less rate than 10 per cent. In 1864, it incorporated the Waterworks Clauses Act, 1847, c. 17, of which sect. 75 enacts that the profits divisible in any year shall not exceed the prescribed yearly rate (10 per cent where no other is fixed) "unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate":—*Held*: sect. 75 did not authorise the co. to pay a larger dividend than 10 per cent, to make up the deficiency of dividends which fell short of that rate prior to 1864.—*KENT WATERWORKS (CO. OF PROPRIETORS) v. LAMPLUGH*, [1904] A. C. 27; 73 L. J. Ch. 96; 89 L. T. 704; 68 J. P. 361; 52 W. R. 401; 20 T. L. R. 107; 48 Sol. Jo. 130; 2 L. G. R. 403, H. L.; *affg.* S. C. *sub nom.*

year:—*Held*: the later act did not relieve the railway co. of the duty of calculating the dividends due to the preferred & deferred stockholders on the basis of the profits of each half year.—*NORTH BRITISH RY. CO. v. WINGATE*, [1913] S. C. 1092; 2 S. L. T. 127.—*SCOT*.

PART IX. SECT. 11, SUB-SECT. 5.—B.

m. How calculated.]—The N. B. Ry. Co. in exercise of powers conferred by a private Act of 1888 created certain preferred & deferred ordinary stocks, the terms of the act providing that a non-cumulative dividend of 3 per cent should be payable out of the available

profits of each half year to the preferred stockholders, & the balance of such profits should go to the deferred stockholders. By Railway Companies (Accounts & Returns) Act, 1911, every railway co. was relieved of any obligation to prepare or submit to their shareholders or auditor's accounts or balance sheets oftener than once a

Sect. 11.—Regulation and management: Sub-sect. 5, B., C. & D. Sect. 12: Sub-sects. 1 & 2, A.

LAMPLOUGH *v.* KENT WATERWORKS (CO. OF PROPRIETORS), [1903] 1 Ch. 575, C. A.

8219. Necessity for declaration—To entitle shareholders to dividends.]—(1) Apart from some special provision in that behalf, preference shares in a parliamentary co. incorporated by a special Act that incorporates the Cos. Clauses Acts have no priority as to capital. Preference shareholders in such a parliamentary co. have no right or claim to their fixed preferential dividends, cumulative or non-cumulative, unless & until declared under 1845 Act, s. 120.

(2) If the assets realised in a winding up are insufficient to return the preference & ordinary capital in full, the preference shareholders cannot claim any arrears of undeclared preferential dividends out of undistributed profits, but the whole assets must be distributed ratably among all the shareholders in proportion to their capital.—*Re ACCRINGTON CORPN. STEAM TRAMWAYS CO.*, [1909] 2 Ch. 40; 78 L. J. Ch. 485; 101 L. T. 99; 16 Mans. 178.

8220. Out of what funds payable—Undistributed profits—Assets insufficient to return capital.]—*Re ACCRINGTON CORPN. STEAM TRAMWAYS CO.*, No. 8219, *ante*.

8221. Extension of dividend—When entitled to.]—By a resolution a co. issued new shares entitled to a preferential dividend of £5 per cent per annum, & declared that whenever the profits admitted of a dividend of the same amount on the whole amount of paid-up capital, such shares should participate in any extension of dividend. In a former suit the preference shareholders had established their right to have arrears of dividend made up out of the profits. It now appearing that the profits of the railway would not, for the first time, suffice for the payment of £5 per cent on the preference & ordinary stock with a surplus:—*Held*: the ordinary shareholders were entitled to arrears of interest out of the surplus, & that it was not till such arrears had been paid that it could be said that a dividend of "the same amount" had been paid on the ordinary capital so as to entitle the preference shareholders to participate in the surplus under the resolution.—*ALLEN v. LONDONDERRY & ENNISKILLEN RY. CO.* (1877), 25 W. R. 524.

8222. Guaranteed dividend—Power of company to commute guarantee—Construction of Act of Parliament.]—*STEVENS v. SOUTH DEVON RY. CO.*, No. 8198, *ante*.

C. Fixed Dividends.

8223. At what rate payable—Prescribed rate—Companies Clauses Act, 1863 (c. 118), s. 13.]—A waterworks co., under the authority of their special Act, which incorporated Part II. of the above Act, raised additional capital by the issue of preference stock at 5 & 4½ per cent. No rate of dividend or interest for the stock was prescribed in the special Act, but by sect. 13 of the above Act, 1863, where a co. issue preference stock or shares under the authority of a special Act incorporating Part II. of the above Act, they may create & issue such stock or shares with any dividend or interest "not exceeding the rate prescribed in the special Act, & if no rate is prescribed then not exceeding the rate of £5 per centum per annum":—*Held*: the 5 & 4½ per cent at which the stock was issued was the "prescribed" rate

within the meaning of Waterworks Clauses Act, 1847 (c. 17), s. 75, which provides, with respect to the amount of profits to be received by the undertakers when the waterworks are carried on for their benefit, that the profits of the undertaking to be divided among the undertakers in any year shall not exceed the prescribed rate, which by sect. 2 means the rate prescribed for that purpose in the special Act.—*CHELSEA WATERWORKS CO. v. METROPOLITAN WATER BOARD*, [1904] 2 K. B. 77; 73 L. J. K. B. 532; 90 L. T. 831; 52 W. R. 449; 20 T. L. R. 433, C. A.

When cumulative.]—*See* Sub-sect. 5, B., *ante*.

8224. How calculated—Payment of dividend free of income tax.]—*A.-G. v. MARGATE PIER & HARBOUR (COMPANY OF PROPRIETORS)*, No. 7818, *ante*.

8225. ———.]—By the special Act of a gas co it was provided that the profits to be divided among the shareholders in any year should not exceed a given rate:—*Held*: in arriving at the rate of dividend the profits ought to be calculated as inclusive & not exclusive of the amount payable for the year in respect of income tax.—*ASHTON GAS CO. v. A.-G.*, [1906] A. C. 10; 75 L. J. Ch. 1; 93 L. T. 676; 70 J. P. 49; 22 T. L. R. 82; 13 Mans. 35, H. L.; *affg.* S. C. *sub nom.* *A.-G. v. ASHTON GAS CO.*, [1904] 2 Ch. 621, C. A.

*Annotations:—***Fold.** *Johnston v. Chestergate Hat Manufacturing Co.*, [1915] 2 Ch. 338. **Distd.** *Collins v. Sedgwick*, [1917] 1 Ch. 179. **Consd.** *Rover v. South African Breweries*, [1918] 2 Ch. 233. **Apld.** *Fellows v. Corker*, [1918] 1 Ch. 9; *Samuel v. I. R. Comrs.*, [1918] 2 K. B. 553; *Re Cains Settlement, Cain v. Cain*, [1919] 2 Ch. 364. **Distd.** *Patent Castings Syndicate v. Etherington*, [1919] 2 Ch. 254. **Refd.** *Usher's Wiltshire Brewery v. Bruce*, [1915] A. C. 433; *Sheldrick v. South African Breweries*, [1923] 1 K. B. 173. **Mentd.** *Brooke v. I. R. Comrs.*, [1918] 1 K. B. 257.

D. Interference by Court.

8226. When court will interfere—Whether matter one of internal management.]—*BROWNE v. MONMOUTHSHIRE RAILWAY & CANAL CO.*, No. 8203, *ante*.

8227. ——— Directors acting ultra vires—Items wrongly debited to capital.]—*BLOXAM v. METROPOLITAN RY. CO.*, No. 8193, *ante*.

8228. ——— Provisions of Act not complied with.]—*CARLISLE v. SOUTH-EASTERN RY. CO.*, No. 8201, *ante*.

8229. ———.]—*ALLEN v. TALBOT*, No. 8202, *ante*.

8230. ——— Payment of dividend by issue of shares.]—*HOOLE v. GREAT WESTERN RY. CO.*, No. 8206, *ante*.

8231. ——— To restrain company making prejudicial dividend—No funds available for making dividend.]—*STURGE v. EASTERN UNION RY. CO.*, No. 8211, *ante*.

8232. At whose instance—Shareholder suing on behalf of class.]—*CARLISLE v. SOUTH-EASTERN RY. CO.*, No. 8201, *ante*.

8233. ———.]—*HOOLE v. GREAT WESTERN RY. CO.*, No. 8206, *ante*.

8234. ——— Holder of shares not entitled to dividend—Joinder of other shareholders of same class.]—*CARLISLE v. SOUTH EASTERN RY. CO.*, No. 8201, *ante*.

8235. ——— Holder's shares acquired for purposes of litigation.]—*BLOXAM v. METROPOLITAN RY. CO.*, No. 8193, *ante*.

8236. ——— Debenture stockholder—Not directly interested.]—*LAWRENCE v. WEST SOMERSET MINERAL RY. CO.*, No. 8196, *ante*.

SECT. 12.—POWERS AND LIABILITIES.

SUB-SECT. 1.—IN GENERAL.

See, generally, CORPORATIONS, Vol. XIII., pp. 349 et seq.

As regards contracts.]—*See* Sub-sect. 4, *post*.

As regards torts.]—*See* CORPORATIONS, Vol. XIII., pp. 398 *et seq.*

As regards criminal & quasi-criminal proceedings.]—*See* CORPORATIONS, Vol. XIII., pp. 408 *et seq.*

Power to acquire land compulsorily.]—*See* COMPULSORY PURCHASE OF LAND & COMPENSATION, Vol. XI., pp. 93 *et seq.*

Power to borrow.]—*See* Sect. 14, sub-sect. 1, *post*.

SUB-SECT. 2.—LIMITATION OF POWERS.

A. Of Public Companies generally.

(a) In General.

Ultra vires generally, *see* CORPORATIONS, Vol. XIII., pp. 354 *et seq.*

8237. General rule—Application of funds limited to purposes authorised by statute—Although unauthorised purposes advantageous to company.]—

(1) The managing body of a railway co. incorporated by Act of Parliament are not entitled to employ the funds of the co. in, or to guarantee the payment of a dividend, or the re-payment of capital to other parties who engage in undertakings which are not part of, or directly connected with, the works which are authorised by the Act of Parliament; & that although they may increase the traffic of the railway, & although a majority of the shareholders in the railway co. may approve of such application of their funds; & although the object may not be against public policy.

Where the directors of a railway co. had proposed to guarantee the parties who should form a joint-stock steam-packet co., to run vessels from a port to which the railway would convey passengers:—*Held*: one of the shareholders in the railway co. was entitled to sue on behalf of himself & all the other shareholders—except the directors who were defts.—although some of these shareholders had taken shares in the steam-packet co.

(2) Although a pltf. who files a bill on behalf of himself & other shareholders in a railway co. may be suing at the instigation of another rival co., that circumstance is not sufficient to prevent him from obtaining a special injunction on the merits of his case, upon a bill so framed.—*COLMAN v. EASTERN COUNTIES RY. CO.* (1846), 10 Beav. 1; 4 Ry. & Can. Cas. 513; 16 L. J. Ch. 73; 8 L. T. O. S. 530; 11 Jur. 74; 50 E. R. 481.

Annotations:—*As to* (1) *Consd.* *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331; *Caledonian & Dumfriesshire Junction Co. v. Helensburgh Harbour Trustees* (1856), 27 L. T. O. S. 241. *Distd.* *South Wales Ry. v. Redmond* (1861), 10 C. B. N. S. 675. *Refd.* *East Anglian Rys. v. Eastern Counties Ry.* (1851), 11 C. B. 775; *Bostock v. North Staffordshire Ry.* (1855), 4 E. & B. 798; *Norwich Corp'n. v. Norfolk Ry.* (1855), 4 E. & B. 397; *Shrewsbury & Birmingham Ry. v. North Western Ry.* (1857), 6 H. L. Cas. 113; *A.-G. v. G. N. Ry.* (1860), 1 Drew. & Sm. 154; *Maunsell v. Mid. G. W. (Ireland) Ry.* (1863), 1 Hem. & M. 130; *Bloxam v. Met. Ry.* (1868), 3 Ch. App. 337, n.; *Riche v. Ashbury Ry. Carriage & Iron Co.* (1874), L. R. 9 Exch. 224; *Norton v. L. & N. W. Ry.* (1878), 9 Ch. D. 623; *A.-G. v. G. E. Ry.* (1879), 11 Ch. D. 449; *A.-G. v. L. C. C.*, [1901] 1 Ch. 781; *A.-G. v. Mersey Ry.*, [1907] 1 Ch. 81; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251. *As to* (2) *Distd.* *Forrest v. M. S. & L. Ry.* (1861), 4 De G. F. & J. 126. *Consd.* *Filder v. L. B. & S. C. Ry.*, *Barchard v. Brighton, Uckfield & Tunbridge Wells Ry.* (1863), 1 Hem. & M. 489. *Refd.* *Seaton v. Grant*

(1867), 36 L. J. Ch. 638. *Generally, Mentd.* *Jackson v. N. E. Ry.* (1877), 37 L. T. 664.

8238. — — — — —.]—Cos. having funds for objects which are distinctly defined by Act of Parliament, cannot be allowed to apply them to any other purpose whatever, however advantageous or profitable that purpose may appear to be to the co., or to the individual members of the co.—*MUNT v. SHREWSBURY & CHESTER RY. CO.* (1850), 13 Beav. 1; 7 Ry. & Can. Cas. 162; 20 L. J. Ch. 169; 16 L. T. O. S. 433; 15 Jur. 26; 51 E. R. 1.

Annotation:—*Refd.* *A.-G. v. G. E. Ry.* (1879), 11 Ch. D. 449.

8239. — — — — —.]—It is not within the powers of an incorporated or joint-stock co. to apply any part of its funds in subscribing to a public institution unconnected with the objects of the co., although such public institution may tend to increase the business of the co.—*TOMKINSON v. SOUTH-EASTERN RY. CO.* (1887), 35 Ch. D. 675; 56 L. J. Ch. 932; 56 L. T. 812; 35 W. R. 758.

Annotations:—*Refd.* *Re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141; *Henderson v. Bank of Australasia* (1888), 58 L. J. Ch. 197; *A.-G. v. N. E. Ry.*, [1915] 1 Ch. 905.

8240. — — — — —.]—*BAGSHAW v. EASTERN UNION RY. CO.*, No. 7845, *ante*.

8241. — — — — —.]—The O. Ry. Co. previously to obtaining their Act, entered into a provisional agreement with the G. W. Ry. Co., under which it was agreed that that co. should assist the O. Co. in obtaining an Act; & that such Act should contain a power to lease their proposed line to the G. W. Ry. Co. The Act passed, containing powers to lease & sell the new line to the G. W. Ry. Co., & under it the railway was to be made in all respects to the satisfaction of the engineer of that co. & to be formed of such gauge as to admit of its being worked continuously with the G. W. line. No agreement was finally concluded between the cos.; but, pending negotiations, some of the directors of the new co. entered into an agreement with the L. & N. W. Ry. Co.—which received the sanction of the majority of the shareholders & was executed under the corporate seals of both cos.—a term in which was as follows:—"The whole concern, without incumbrance, when completed, to be worked by the L. & N. W. & M. C. Ry. Cos., who shall have perfect control & exercise all the rights of the O. Ry. Co." Some of the shareholders of the O. Ry. Co. being dissatisfied with the agreement entered into with the L. & N. W. Ry. Co., filed a bill to restrain that co. by injunction, from acting under that agreement, or using the funds of the co. in applying to Parliament to sanction it:—*Held*: (1) the ct. will interfere by injunction to restrain cos. from applying any portion of their funds in a way not authorised by their Acts; (2) an agreement by one co. to delegate its powers to another co. is illegal; (3) one dissentient shareholder may file a bill to restrain an illegal proceeding by the co., although such proceeding may have been sanctioned by a large majority of the shareholders.

This ct. will not permit parties having the enormous powers which railway cos. obtain, to apply one farthing of their funds in a way which differs in the slightest degree from that in which the legislature has provided that they should be applied (*LORD CRANWORTH, V.-C.*).—*BEMAN v. RUFFORD* (1851), 7 Ry. & Can. Cas. 48; 1 Sim. N. S. 550; 20 L. J. Ch. 537; 15 Jur. 914; 61 E. R. 212.

Annotations:—*As to* (1) *Consd.* *Hare v. L. & N. W. Ry.* (1861), 2 John. & H. 80; *Hattersley v. Shelburne* (1862),

Sect. 12.—Powers and liabilities: Sub-sect. 2, A. (a), (b), (c), (d)

31 L. J. Ch. 873; Gregory v. Patchett (1864), 33 Beav. 595. **Refd.** East Anglian Ry. v. Eastern Counties Ry. (1851), 11 C. B. 775. *As to (2)* **Apld.** Sevenoaks, Maidstone & Tunbridge Ry. v. L. C. & D. Ry. (1879), 11 Ch. D. 625. **Consd.** Re Woking Urban Council (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300. **Refd.** Mid. Ry. v. G. W. Ry. (1873), 8 Ch. App. 844, n.; Russell v. Wakefield Waterworks Co. (1875), L. R. 20 Eq. 474. *As to (3)* **Fold.** Winch v. Birkenhead, Lancashire & Cheshire Junction Ry. (1852), 5 De G. & Sm. 562. **Consd.** Ffooks v. South Western Ry. (1853), 1 Sm. & G. 142. **Refd.** Burt v. British Nation Life Assoc. Assocn. (1859), 33 L. T. O. S. 74. **Generally, Mentd.** G. W. Ry. v. Oxford, Worcester & Wolverhampton Ry. (1853), 3 De G. M. & G. 341.

8242. — Interest on money raised by debentures applicable to same purposes.]—POPE v. MIDLAND & SOUTH WESTERN JUNCTION RY. CO. (1890), 6 T. L. R. 404.

8243. Power to give gratuities to workmen—For work done for company—Under 1845 Act, s. 90.]—The application by directors of a sum of £1,500 out of the undivided profits of a manufacturing co. in paying a gratuity of one week's extra pay to each worker in the factory who had worked there with good character throughout the year:—**Held:** not *ultra vires*, & a reasonable exercise of the powers of management conferred on the directors by 1845 Act, s. 90.—**HAMPSON v. PRICE'S PATENT CANDLE CO. (1876), 45 L. J. Ch. 437; 34 L. T. 711; 24 W. R. 754.**

Annotations:—Distd. Hutton v. West Cork Ry. (1883), 23 Ch. D. 654. **Consd.** Tomkinson v. S. E. Ry. (1887), 35 Ch. D. 675. **Refd.** Henderson v. Bank of Australasia (1888), 40 Ch. D. 170.

Compare No. 8129, *ante*.

(b) Power to Sell Undertaking.

8244. Whether ultra vires—Transfer of all members' shares—Acquiescence.]—With a view to the transfer of the business of the A. insurance co. to the B. insurance co., the greater number of the shareholders in the A. co. agreed to assign their shares to trustees for the B. co. In the case of one of these shareholders, he assigned his shares to a trustee for the B. co., receiving the consideration money out of the assets of the A. co., though there was no evidence that this was known to him. By a private Act of Parliament transfers of shares in the A. co. were to be enrolled in Chancery, but the transfer of these shares was not enrolled until four years after the transfer, when the A. co. ceased to carry on business. Eight years afterwards an order was made for winding up the A. co., which had large liabilities, but no assets except such as could be obtained by calling up the shares, & it was held in the winding up that the claims of the policy-holders in the A. co. continued in force against that co.:—**Held:** (1) the case of this shareholder was to be considered by itself, & without reference to the effect which the decision might have upon the general winding up; (2) there was nothing unlawful, & no breach of trust in the arrangement between the two co.'s so as to make the transfer of the shares invalid; (3) the subsequent enrolment of the transfer was sufficient; (4) this shareholder was not a contributory in the winding up of the A. co.—**Re EUROPEAN ASSURANCE SOCIETY ARBITRATION ACTS, RIVINGTON'S**

CASE (1876), 3 Ch. D. 10; sub nom. Re EUROPEAN ASSURANCE SOCIETY ARBITRATION ACTS & BRITISH COMMERCIAL INSURANCE CO., RIVINGTON'S CASE, 45 L. J. Ch. 804; 34 L. T. 926, C. A.

Annotations:—Refd. Re European Assurance Society Arbitration Acts, Doman's Case (1876), 3 Ch. D. 21; Re European Society Arbitration Acts, *Ex p.* British Nation Life Assoc. Assocn., Liquidators (1878), 8 Ch. D. 679.

8245. — Proposed sale really attempt to turn company into limited company.]—COULTHURST v. WHITSTABLE OYSTER FISHERY CO. (1897), 41 Sol. Jo. 641.

8246. — Canal company.]—In 1777 an Act of Parliament was passed for making a canal. It incorporated a co. by name of the Co. of Proprietors of the B. Canal Navigation, authorised them to construct the canal, & make bye-laws, demand tolls, & acquire land. All persons were to have the right to use the canal on payment of tolls. The co. were to make & maintain bridges. Throughout the Act in conferring rights or imposing obligations on the co. the words "their successors & assigns" were added. The canal was made & navigation carried on till 1866, when a winding-up order was made. In 1874 the liquidator with the sanction of the judge sold the canal to S. The word "undertaking" was not used in the conveyance, but possession was taken, & tolls levied & received:—**Held:** the co. had no power to assign their undertaking & nothing passed to S. by the conveyance of 1874.—**Re WOKING URBAN COUNCIL (BASINGSTOKE CANAL) ACT, 1911, [1914] 1 Ch. 300; 83 L. J. Ch. 201; 110 L. T. 49; 78 J. P. 81; 30 T. L. R. 135; 12 L. G. R. 214, C. A.**

Annotations:—Mentd. A.-G. v. N. E. Ry., [1915] 1 Ch. 905; R. v. Bedfordshire County Council, *Ex p.* Sear, [1920] 2 K. B. 465.

Application to Parliament to sell undertaking—Validity.]—See No. 8266, *post*.

(c) Power to Amalgamate.

8247. What constitutes.]—MIDLAND GREAT WESTERN RY. CO. OF IRELAND v. LEECH, No. 7857, ante.

8248. —.]—LINDSEY (EARL) v. GREAT NORTHERN RY. CO., No. 8318, post.

8249. Agreement for amalgamation—Whether enforceable.]—GREAT WESTERN RY. CO. v. BIRMINGHAM & OXFORD JUNCTION RY. CO., No. 8335, post.

8250. — Validity.]—HATTERSLEY v. SHELBURNE (EARL), No. 7963, ante.

8251. — How effected—Power of provisional directors—Under subscribers' agreement.]—Two cos. proposing to construct railways which would necessarily interfere with each other, their respective subscribers' agreements empowered the respective managing committees or directors "to demise or sell the undertaking, or any part thereof, or to amalgamate the same, or any part thereof, with any other railway or railways," etc. In pursuance of the powers thus conferred upon them, the directors of the two cos. agreed to amalgamate & to form one united co., & this agreement was carried into effect by resolutions made at

PART IX. SECT. 12, SUB-SECT. 2.—A. (b).

n. Whether intra vires—Sale of whole plant.]—A railway co. which had constructed its line under statutory powers, is not entitled to sell the rails, bridges & other materials forming its whole permanent way, although it was financially impossible for it to continue to work the undertaking; & interdict granted at the instance of a holder of

shares & debenture-stock of the co. against such a sale.—**ELLICE v. INVERGARRY & FORT AUGUSTUS RY. CO., [1913] S. C. 849; 1 S. L. T. 361.—SCOT.**

PART IX. SECT. 12, SUB-SECT. 2.—A. (c).

o. Effect—On powers.]—A ry. co. took certain lands of V., & proceedings to ascertain the compensation to be paid were taken & an award made

between V. & the co. in August, 1913. Before that date, & while the arbitration proceedings were pending, an agreement was made by the co. with a co. incorporated under Dom. Acts for the amalgamation of the two cos. into one corp'n.; & on June 2, 1913, an order in council was made, pursuant to Dominion Ry. Act, s. 361 sanctioning the agreement. The amalgamation was not known to V. nor to the judge

board meetings of the respective committees, & by a deed executed by a competent number of the directors of each co.:—*Held*: the power to amalgamate was vested in the two boards, & those powers were well & effectively exercised; & the co. so united or amalgamated might maintain an action for calls against a shareholder of either co. who had executed the parliamentary contract & subscribers' agreement.—*CORK & YOUGHAL RY. CO. v. PATERSON* (1856), 18 C. B. 414; 27 L. T. O. S. 186; 139 E. R. 1430.

Annotation:—*Reid*. *Nixon v. Brownlow*, *Nixon v. Green* (1858), 3 H. & N. 686.

Effect—On liability of shareholder for calls.]—*See Nos. 7857; 7915, ante.*

8252. — Whether liabilities transferred—Transfer of all property of amalgamated company.]—*Bill* by a vendor for specific performance of a contract to sell land to the M. K. Ry. Co. alleged that, since the date of the contract—which had not been completed—the M. K. Ry. Co. had become amalgamated with the S. E. Co., & prayed relief against the two cos., or one of them; demurrer by the S. E. Co. to the bill, on the ground that they had not purchased the liabilities of the M. K. Ry. Co., overruled.—*HACKER v. MID KENT RY. CO. & SOUTH EASTERN RY. CO.* (1865), 12 L. T. 699; 11 Jur. N. S. 634.

8253. — Transfer subject to obligations & liabilities of amalgamated company.]—*JERSEY (EARL) v. GREAT WESTERN RY. CO.*, [1894] 3 Ch. 625, n.; 8 R. 668, n.

Annotation:—*Reid*. *Fortescue v. Lostwithiel & Fowey Ry.*, [1894] 3 Ch. 621.

8254. — On action pending against amalgamated company.]—Where an amalgamation of two cos. was effected by a special Act of Parliament, a suit against one of the two cos. does not thereby abate.—*WEST HARTLEPOOL RY. CO. v. JACKSON* (1866), 15 L. T. 274; 15 W. R. 122.

8255. — .]—Where, pending a suit, a deft. co. is amalgamated with another co., & the amalgamation Act provides for carrying on all suits, etc., against the amalgamated co., on the suggestion of the amalgamation, there must be an order for carrying on such suits, etc.—*BRITISH EQUITABLE ASSURANCE CO. v. VALE OF NEATH RY. CO.* (1866), 15 W. R. 37.

8256. — On powers—Restriction of powers of one company—Whether new company bound.]—Where a number of cos. are amalgamated by statute, a restriction of the powers of one of the cos.—for example, in the importation of energy from outside the city—is not to be held as applying to the amalgamated concern.—*WINNIPEG ELECTRIC RY. CO. v. WINNIPEG CITY*, [1912] A. C. 355; 81 L. J. P. C. 193; 106 L. T. 388, P. C.

Of particular companies.]—*See Specific Titles, passim.*

(d) *Power to Delegate.*

8257. Agreement to delegate powers to another company—Validity.]—*BEMAN v. RUFFORD*, No. 8241, *ante*.

8258. — .]—An agreement between two railway cos., made without the authority of the Legislature, whereby one co. delegates to another all the powers which have been conferred upon it by Parliament, is an unlawful attempt to effect that which Parliament alone can authorise, & is

against public policy; & in such a case, the ct. will not interfere to assist either of the parties in obtaining a collateral benefit, which the agreement would give, or aid them in any manner which would promote the object of the agreement.—*GREAT NORTHERN RY. CO. v. EASTERN COUNTIES RY. CO.* (1851), 9 Hare, 306; 7 Ry. & Can. Cas. 643; 21 L. J. Ch. 837; 68 E. R. 520.

Annotations:—*Folld*. *London, Brighton, etc. Ry. v. L. & S. W. Ry.* (1859), 4 De G. & J. 362; *Richmond Waterworks Co. & Southwark & Vauxhall Waterworks Co. v. Richmond, Surrey Vestry* (1876), 3 Ch. D. 82. *Reid*. *East Anglian Rys. v. Eastern Counties Ry.* (1851), 11 C. B. 775; *Prince of Wales Assee. v. Harding* (1858), E. B. & E. 183; *Re Woking Urban Council (Basingstoke Canal) Act*, 1911, [1914] 1 Ch. 300.

Working agreements between railway companies generally, *see RAILWAYS & CANALS.*

(e) *Power to Apply to Parliament.*

8259. To vary objects of company.]—A ct. of equity will not, at the instance of a shareholder, restrain a joint-stock co., incorporated by Acts of Parliament which prescribe its constitution & objects, from applying in its corporate capacity to Parliament, & from using its corporate seal & resources to obtain the sanction of the Legislature to the remodelling of its constitution, or to a material alteration & extension of its object & powers. The right of making such an application is incident to a joint-stock co. of that description.—*WARE v. GRAND JUNCTION WATER WORKS CO.* (1831), 2 Russ. & M. 470; 9 L. J. O. S. Ch. 169; 39 E. R. 472.

Annotations:—*Appld*. *Simpson v. Denison* (1852), 10 Hare, 51. *Consd*. *Lancaster & Carlisle Ry. v. N. W. Ry.* (1856), 2 K. & J. 293. *Reid*. *Parker v. River Dunn Navigation Co.* (1847), 1 De G. & Sm. 192; *Cooper v. Powis* (1850), 3 De G. & Sm. 688; *Re London, Chatham & Dover Railway Arrangement Act*, *Ex p.* *Hartridge & Allender* (1869), 5 Ch. App. 672, n.

8260. — .]—It is not lawful to apply the funds of a co. in an application to Parliament for powers to extend the business of the co. beyond the objects for which it was constituted, & the ct. will interfere by injunction, at the suit of a shareholder, to restrain any such application.—*SIMPSON v. DENISON* (1852), 10 Hare, 51; 7 Ry. & Can. Cas. 403; 20 L. T. O. S. 46; 16 Jur. 828; 68 E. R. 835.

Annotations:—*Distd*. *South Yorkshire Ry. & River Dun Co. v. G. N. Ry.* (1853), 9 Exch. 55. *Reid*. *Russell v. Wakefield Waterworks Co.* (1875), L. R. 20 Eq. 474. *Mentd*. *Bostock v. North Staffordshire Ry.* (1855), 24 L. J. Q. B. 225; *Norwich Corpn. v. Norfolk Ry.* (1855), 4 E. & B. 397.

8261. — Payment of costs of application out of company's funds—Validity.]—*GREAT WESTERN RY. CO. v. RUSHOUT*, No. 7847, *ante*.

8262. — .]—Although it is competent to the directors of every railway co., on complying with the Wharnccliffe Order, to apply to Parliament for an extended line, or for any other extension of their powers, they will be restrained from defraying the expenses of such application out of the assets of the co., & from issuing new shares, purporting to be shares in the co., except for the purposes & under the powers of existing Acts.—*VANCE v. EAST LANCASHIRE RY. CO.* (1856), 3 K. & J. 50; 69 E. R. 1018.

8263. — .]—*CALEDONIAN RY. CO. v. SOLWAY JUNCTION RY. CO.*, No. 7848, *ante*.

8264. — .]—Although there is no doubt that the Ct. of Ch., by virtue of its jurisdiction in

in chambers; but, on appeal by the owner from the order of the judge, the point was raised that the judge had no jurisdiction to make the order:—*Held*: by the agreement, sanctioned by the order in council, & by the effect

of Dom. Ry. Act, ss. 361 & 362, the amalgamated co. became a new corpn. vested with all the properties, rights, powers, etc., of both of the constituent cos., & liable for their debts & obligations of all kinds; that, after amalga-

mation, the co. ceased to exist as an actual corporate entity.—*Re VAN HORNE & WINNIPEG & NORTHERN RY. CO.* (1914), 29 W. L. R. 37; 6 W. W. R. 1535; 18 D. L. R. 517; 24 Man. L. R. 626.—*CAN.*

Sect. 12.—Powers and liabilities: Sub-sect. 2, A. (e)

personam, has power to restrain an improper application to Parliament for a private Act, yet it is difficult to conceive a case in which it would be right for the ct. to exercise that power.—*Re LONDON, CHATHAM & DOVER RAILWAY ARRANGEMENT ACT, Ex p. HARTRIDGE & ALLENDER* (1869), 5 Ch. App. 671; 17 W. R. 946; *sub nom. Re LONDON, CHATHAM & DOVER RAILWAY ARRANGEMENT ACT, 1867, Ex p. LONDON, CHATHAM & DOVER RY. Co.*, 20 L. T. 718, L. JJ.

8265. To alter rights of shareholders—Payment of costs of application out of company's funds—Validity.]—*STEVENS v. SOUTH DEVON RY. Co.*, No. 7846, *ante*.

8266. To sell undertaking—Payment of costs of application out of company's funds—Validity.]—The majority of shareholders in a co. incorporated by Act of Parliament approved at a meeting of a contract to sell the concern to F. who was one of the committee of management, & passed a resolution that the contract should be confirmed by a special Act of Parliament, & that if the Act should not be passed the expenses of promoting the Bill & of the agreement should be partly borne by the co. At a Wharnccliffe meeting subsequently held, a resolution was passed by a majority of more than thirty to one, authorising the presenting by the co. of a Bill in Parliament to enable them to dispose of the concern. Pltf., one of the dissentients at the Wharnccliffe meeting, moved to restrain the co., from carrying out the agreement, & from presenting the proposed Bill in Parliament, & from applying any part of the funds of the co. towards its promotion. On the co. undertaking not to apply any of their funds towards promoting the Bill the ct. refused the motion.—*MATHIAS v. WILTS & BERKS CANAL NAVIGATION Co.* (1876), 34 L. T. 346.

(f) Interference by Court.

8267. When court will interfere—General rule.]—*BROWNE v. MONMOUTHSHIRE RAILWAY & CANAL Co.*, No. 8203, *ante*.

8268. ———.]—By three Acts of Parliament of the same session, a railway co. was empowered to make three distinct lines, forming a cluster, & not a continuous line. In the next session an Act was passed, declaring the co. to have been & to be only one co., & authorising & requiring them to grant a lease of the lines to another co. They completed only one of the lines, which was worked by the other co. under the provisions of the last Act. Some months after it was obvious that the other two lines could not be completed within the time prescribed by the Acts, a shareholder in the first co. filed a bill, seeking to restrain it from applying its funds otherwise than for the purpose of constructing all three of the lines; but he did not make the co., who were lessees, parties to the suit:—*Held*: more inconvenience would arise from the ct. interfering than from its abstaining to do so; & on that account, as well as on the grounds of acquiescence, & want of parties, an injunction granted by the ct. below must be dissolved.—*HODGSON v. POWIS (EARL)* (1851), 1 De G. M. & G. 6; 7 Ry. & Can. Cas. 956; 21 L. J. Ch. 17; 18 L. T. O. S. 103; 15 Jur. 1022; 42 E. R. 453, L. JJ.; *reversq.* (1850), 12 Beav. 529.

Annotation:—*Refd. Graham v. Birkenhead, etc. Ry.* (1850), 12 Beav. 460.

8269. ——— Whether matter one of internal management.]—A resolution was passed by a co.

that new shares should be created, & the capital so raised to be applied in payment of the then mtge. debt of the co. The co. afterwards leased their line to another co., with the approbation of the shareholders. Liabilities incurred by this arrangement pressing on the co., the directors proposed to apply the calls on the new shares in discharging them. Two holders of the new shares filed a bill on behalf of themselves & the other new shareholders, except seven, who with the co. were made debts. to enforce the application of the calls on the new shares to the purpose originally intended. The co. demurred for want of equity, & the same was allowed.—*YETTS v. NORFOLK RY. Co.* (1849), 3 De G. & Sm. 293; 5 Ry. & Can. Cas. 487; 12 L. T. O. S. 397; 13 Jur. 249; 64 E. R. 484.

8270. ———.]—Certain corpns. were extinguished, & a new corp. formed of the old members & new members, & the debts of the extinguished corpns. were made debts of the new corp. The directors made a call for payment of one of the liabilities of one of the extinguished corpns., & the demurrer for want of equity of the co. to a bill by some of the shareholders against the directors & the co., disputing the right of the directors so to appropriate the call, was allowed.—*COOPER v. SHROPSHIRE UNION RAILWAY & CANAL Co.* (1849), 6 Ry. & Can. Cas. 136, L. C.

8271. ———.]—In an amalgamated railway co. there were three classes of shareholders. A shareholder of one class filed a bill on behalf of himself & all others of the class, stating that an unfair & unnecessary call had been corruptly made on that class, which some had paid, but that pltf. had refused to pay it, & praying that an account might be taken to ascertain the propriety & necessity of the call, & for an injunction:—*Held*: (1) this was an attempt to induce the ct. to interfere in the internal management of the affairs of a continuing co., & a general demurrer to the bill was allowed; (2) the shareholders of the same class as pltf. who had paid the call & the other two classes of shareholders ought to be represented.—*BAILEY v. BIRKENHEAD, LANCASHIRE & CHESHIRE JUNCTION RY. Co.* (1850), 12 Beav. 433; 6 Ry. & Can. Cas. 256; 19 L. J. Ch. 377; 15 L. T. O. S. 293; 14 Jur. 119; 50 E. R. 1127.

Annotation:—*Generally, Mentd. Alexander v. Automatic Telephone Co.* (1899), 68 L. J. Ch. 514.

8272. ———.]—*ORR v. GLASGOW, AIRDRIE & MONKLANDS RY. Co.*, No. 8134, *ante*.

8273. ——— Contract partly ultra vires—Purpose illegal.]—*HATTERSLEY v. SHELBURNE (EARL)*, No. 7963, *ante*.

8274. ———.]—*FRASER v. WHALLEY, GARTSIDE v. WHALLEY*, No. 7964, *ante*.

8275. ——— Company acting ultra vires—But bonâ fide for convenience of public.]—Where a railway co. have diverted a road *ultra vires*, but with a *bonâ fide* view to the convenience of the public, a ct. of equity will not compel them to replace the road so as to make their work *intra vires*, if the result will be to cause greater inconvenience to the public, or the complaining section of the public.—*A.-G. v. ELY, HADDENHAM & SUTTON RY. Co.* (1869), 4 Ch. App. 194; 38 L. J. Ch. 258; 20 L. T. 1; 17 W. R. 356, L. C.

Annotations:—*Consd. Pugh v. Golden Valley Ry.* (1879), 12 Ch. D. 274. *Mentd. Dowling v. Pontypool Caerleon & Newport Ry.* (1874), L. R. 18 Eq. 714; *A.-G. v. Shrewsbury (Kingsland) Bridge Co.* (1882), 21 Ch. D. 752; *L. & N. W. Ry. v. Ogwen District Council* (1899), 80 L. T. 401.

8276. ——— Complaint by rival company.]—A municipal corp. having, under the provisions of an Act of Parliament, bought up a

gas co. which previously supplied gas to the borough, & which had compulsory powers for the purpose within the borough, commenced supplying gas to an adjoining township, in which another gas co. already existed having similar powers within the township. The gas co. of the township having filed a bill against the corpn. to restrain them from supplying gas within the township, & alleging, as a personal injury which entitled them to maintain their suit, that the corpn. had contracted to supply gas to a particular manufactory within the township which otherwise they must have supplied, & that they had thereby been deprived of the profits arising from the supply of gas to the manufactory, & that great loss would be sustained by them:—*Held*: on demurrer, the injury alleged was not such as entitled plffs. to maintain the suit.—**PUDSEY COAL GAS CO. v. BRADFORD CORPN.** (1873), L. R. 15 Eq. 167; 42 L. J. Ch. 293; 28 L. T. 11; 37 J. P. 340; 21 W. R. 286.

Annotation:—**Mentd.** Preston Corpn. v. Fullwood L. B. (1885), 53 L. T. 718.

8277. ————. *WILLING v. METROPOLITAN DISTRICT RY. CO.* (1888), 4 T. L. R. 723.

— *To enforce exercise of powers.*—*See* Subsect. 3, *post*.

8278. *At whose instance—Shareholder proceeding at instigation of rival company.*—**COLMAN v. EASTERN COUNTIES RY. CO.**, No. 8237, *ante*.

8279. ————. *Shareholder member of rival company.*—**FFOOKS v. SOUTH WESTERN RY. CO.**, No. 8310, *post*.

8280. ————. *Where a pltf. filed a bill on behalf of himself & all other shareholders in a railway co., & sought an injunction to restrain the co. from running steam vessels in a manner which he alleged to be ultra vires, but admitted on cross-examination that he was a shareholder in a rival co., & instituted the suit by the direction of the latter co., who indemnified him against costs:—Held: the bill was an imposition on the ct., & was properly dismissed with costs.*—**FORREST v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.** (1861), 4 De G. F. & J. 126; 4 L. T. 666; 25 J. P. 709; 7 Jur. N. S. 887; 9 W. R. 818; 45 E. R. 1131, L. C.

Annotations:—**Consd.** Filder v. L. B. & S. C. Ry., Barchard v. Brighton, Uckfield, & Tunbridge Wells Ry. (1863), 1 Hem. & M. 489. **Distd.** Fraser v. Whalley, Gartside v. Whalley (1864), 11 L. T. 175; Seaton v. Grant (1867), 2 Ch. App. 459. **Consd.** Bloxam v. Met. Ry. (1868), 3 Ch. App. 337. **Distd.** Gray v. Lewis (1869), L. R. 8 Eq. 526; Mutter v. Eastern & Midlands Ry. (1888), 38 Ch. D. 92. **Dbtd.** Dundee Harbour Trustees v. Nicol, [1915] A. C. 550. **Refd.** A.-G. v. G. E. Ry. (1879), 27 W. R. 759; A.-G. v. Mersey Ry., [1907] 1 Ch. 81. **Mentd.** Cooke v. Cooke (1865), 4 De G. J. & Sm. 704; Robson v. Dodds (1869), L. R. 8 Eq. 301; Davies v. Gas Light & Coke Co. (1909), 100 L. T. 553; County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.

8281. ————. *Proprietor of scrip certificate—Suing on behalf of class.*—**BAGSHAW v. EASTERN UNION RY. CO.**, No. 7845, *ante*.

8282. ————. *Shareholder suing on behalf of class.*—*Where an Act of Parliament has been obtained by a co. for constructing a line of railway, & funds have been subscribed for that purpose, the ct. will, on the application of a single shareholder, restrain the co. from applying those funds, or any part thereof, in the construction of a railway on a portion only of the line, or otherwise than for the purpose & with the view of making & completing the entire line.*—**COHEN v. WILKINSON** (1849), 1 Mac. & G. 481; 5 Ry. & Can. Cas. 741; 1 H. & Tw. 554; 14 L. T. O. S. 149; 14 Jur. 491; 47 E. R. 1530, L. C.

Annotations:—**Consd.** Bagshaw v. Eastern Union Ry. (1850), 2 Mac. & G. 389. **Distd.** Graham v. Birkenhead, Lancashire & Cheshire Junction Ry. (1850), 2 Mac. & G. 146; Hodgson v. Powis (1851), 1 De G. M. & G. 6. **Consd.**

Refd. Ffooks v. South Western Ry. (1853), 1 Sm. & G. 142, **Distd.** Sharpley v. Louth & East Coast Ry. (1876), 2 Ch. D. 663. **Refd.** Dunville v. Birkenhead, Lancashire & Cheshire Junction Ry. (1850), 12 Beav. 444; Salomons v. Laing (1850), 12 Beav. 339; Kent v. Jackson (1851), 14 Beav. 367; R. v. York & North Midland Ry. (1852), 1 E. & B. 178; Shrewsbury & Birmingham Ry. v. L. & N. W. Ry. (1853), 4 De G. M. & G. 115; Burt v. British Nation Life Asso. Assocn. (1859), 33 L. T. O. S. 74. **Mentd.** Tamar Manure Navigation Co. v. Wagstaffe (1863), 4 B. & S. 288.

8283. ————. *—A shareholder in an incorporated railway co. filed a bill on behalf of himself & other shareholders to restrain the directors from issuing preference shares, on the ground that they were about to be issued contrary to the co.'s Acts, & for the purpose of constructing the original line instead of the branch, for which alone additional shares were to be created, & were intended to be distributed in a manner contrary to the directions of the Act which authorised the creation of additional shares. The bill, filed on Sept. 22, stated that pltf., on Sept. 17, became aware of resolutions passed on Sept. 12, under which the preference shares were to be offered to the shareholders on Sept. 23; but the bill did not otherwise show that pltf. had not the means of procuring a suit to be instituted in the name of the corpn.:—Held: on the demurrers of the corpn. & of the directors to the bill, these demurrers could not be overruled, consistently with the principles stated in, or to be extracted from, Mozley v. Alston, No. 4436, ante, & Exeter & Crediton Ry. Co. v. Buller, No. 8048, ante, whether the proceedings sought to be restrained were legal or not.*

On the bill being amended, & stating that a majority of the shareholders supported the views of the directors, & refused to authorise pltf., or any other person, to institute a suit in the name of the co.:—*Held*: allowing a demurrer, it was still within the influence of the above authorities.

Semble: there is not sufficient precision in the class purported to be represented by a pltf. who sues on behalf of himself & all other the shareholders in an incorporated co., "except such of the said shareholders as are respectively represented by those shareholders hereinafter named defts."—**EDWARDS v. SHREWSBURY & BIRMINGHAM RY. CO.** (1849), 2 De G. & Sm. 537; 64 E. R. 240.

8284. ————. *—SALOMONS v. LAING*, No. 8285, *post*.

8285. ————. *Action against company improperly paying over funds—& against company receiving such funds.*—*The directors of one incorporated railway co. paid over its funds to another railway co., for purposes wholly unauthorised; & the latter received them with knowledge of the breach of trust:—Held: on demurrer, the second co. were properly made parties to a suit to bring back the fund; & in such a case, an individual shareholder in the first co. might sue the second co. "on behalf," etc., without alleging that the corpn. of which he was a member had refused to sue.*—**SALOMONS v. LAING** (1850), 12 Beav. 377; 6 Ry. & Can. Cas. 303; 19 L. J. Ch. 291; 15 L. T. O. S. 472; 14 Jur. 471; 50 E. R. 1105.

Annotations:—**Refd.** Graham v. Birkenhead, Lancashire & Cheshire Junction Ry. (1850), 7 Ry. & Can. Cas. 938; G. W. Ry. v. Met. Ry. (1863), 1 New Rep. 551; Russell v. Wakefield Waterworks Co. (1875), L. R. 20 Eq. 474.

8286. ————. *Several classes of shareholders.*—*A bill was filed by a shareholder on behalf, etc., to prevent the directors making a part only of the railway, abandoning the rest, & for an indemnity. There were several classes of shareholders:—Held: it was not necessary that the several classes should be severally & separately represented on the record.*—**DUMVILE v. BIRKENHEAD, LAN-**

Sect. 12.—Powers and liabilities: Sub-sect. 2, A.

CASHIRE & CHESHIRE JUNCTION RY. CO. (1850), 12 Beav. 444; 7 Ry. & Can. Cas. 932; 50 E. R. 1130.

*Annotation:—*Reid. *Graham v. Birkenhead, Lancashire & Cheshire Junction Ry.* (1850), 7 Ry. & Can. Cas. 938.

8287. ——— Effect of acquiescence.]—The directors of a railway co., with the concurrence of a majority of the shareholders, on finding the original undertaking impracticable proceeded to construct a small portion only of the works. On an application by an individual shareholder on behalf of himself & the other shareholders for an injunction to restrain this proceeding, the ct. refused to interfere, on the ground of the acquiescence of pltf., & also that the other shareholders had for eighteen months previously to filing the bill known, or had had the means of knowing, the acts complained of.—*GRAHAM v. BIRKENHEAD, LANCASHIRE & CHESHIRE JUNCTION RY. CO.* (1850), 2 Mac. & G. 146; 7 Ry. & Can. Cas. 938; 2 H. & Tw. 450; 20 L. J. Ch. 445; 15 L. T. O. S. 221; 14 Jur. 494; 42 E. R. 57, L. C.

*Annotations:—*Consd. *Kent v. Jackson* (1851), 14 Beav. 367; *Fooks v. South Western Ry.* (1853), 1 Sm. & G. 142; *Hare v. L. & N. W. Ry.* (1861), 2 John. & H. 80. *Reid.* *Winch v. Birkenhead, Lancashire & Cheshire Junction Ry.* (1852), 16 Jur. 1035; *Burt v. British Nation Life Assce. Assocn.* (1859), 33 L. T. O. S. 74. *Mentd.* *R. v. Harrop* (1856), 20 J. P. 627; *Irrigation Co. of France* (1870), 39 L. J. Ch. 663.

8288. ————*HODGSON v. POWIS (EARL)*, No. 8268, *ante*.

8289. ——— Whether action properly framed.]—Heads of a proposed agreement were arranged between the directors of two railway cos., by which one co. was to allow the other co. for ninety-nine years to work the lines, & use the property & plant of the granting co., except certain specified lands & buildings, upon certain terms of allowance for working expenses & charges, & the maintenance of works & ways, the property & plant to be restored on the termination of the agreement, on terms of profitable return to the granting co.; a provision was made for application to Parliament for powers, if needful. On a bill by a shareholder in the granting co., on behalf of himself & all other the shareholders in that co. except the directors, against that co. & the other co.:—*Held*: the suit being by one shareholder, on behalf of himself & the other shareholders in the granting co., against the co. & the other co. proposing to enter into an illegal agreement, without making any directors or other persons parties, seeking an injunction against the granting co. to restrain them from perfecting the agreement, was properly framed.—*WINCH v. BIRKENHEAD, LANCASHIRE & CHESHIRE JUNCTION RY. CO.* (1852), 5 De G. & Sm. 562; 7 Ry. & Can. Cas. 384; 20 L. T. O. S. 108; 16 Jur. 1035; 64 E. R. 1243.

*Annotations:—*Distd. *Hare v. North Western Ry.* (1860), 3 L. T. 289. *Reid.* *Mid. Ry. v. G. W. Ry.* (1873), 8 Ch. App. 844, n.; *Sevenoaks, Maidstone & Tunbridge Ry. v. L. C. & D. Ry.* (1879), 11 Ch. D. 625.

8290. ————*HODGSON v. POWIS (EARL)*, No. 8268, *ante*.

8291. ——— Action to set aside contract between several companies—Whether all parties

to contract necessary parties.]—Where a contract between several public cos. had been acted upon for four years:—*Held*: all the parties to the contract were necessary parties to a suit by a shareholder in one of the cos., to set it aside as *ultra vires*.—*HARE v. LONDON & NORTH WESTERN RY. CO.* (1860), 1 John. & H. 252; 30 L. J. Ch. 280; 3 L. T. 289; 9 W. R. 33; 70 E. R. 741; *subsequent proceedings* (1861), 2 John. & H. 80.

8292. ————*WHITE v. CARMARTHEN, ETC. RY. CO.*, No. 8360, *post*.

8293. ——— Single dissentient shareholder.]—*BEMAN v. RUFFORD*, No. 8241, *ante*.

8294. ————*A single shareholder of a co. may apply for & obtain an injunction to restrain the co. from committing an act beyond their powers.*—*CHARLTON v. NEWCASTLE & CARLISLE & NORTH-EASTERN RY. COS.* (1859), 34 L. T. O. S. 22; 5 Jur. N. S. 1096; 7 W. R. 731.

8295. ——— Shareholder merely puppet in hands of strangers.]—Although it is the undoubted right of every shareholder in a co. to prevent the directors from exceeding their powers, still, where it appears that pltf. is merely a puppet in the hands of others, not shareholders in the co., who indemnify him against the costs of the suit, the ct. will not interfere by interlocutory injunction.—*FILDER v. LONDON, BRIGHTON & SOUTH COAST RY. CO.*, *BARCHARD v. BRIGHTON, UCKFIELD & TUNBRIDGE WELLS RY. CO.* (1863), 1 Hem. & M. 489; 71 E. R. 214.

*Annotations:—*Reid. *Seaton v. Grant* (1867), 36 L. J. Ch. 638; *Bloxam v. Met. Ry.* (1868), 3 Ch. App. 337.

8296. ——— Transferee—Acquiescence by transferor in acts complained of.]—*FHOOKS v. SOUTH WESTERN RY. CO.*, No. 8310, *post*.

8297. ——— Equitable owner of shares—Shares vested in trustees—Action against company & trustees.]—*GREAT WESTERN RY. CO. v. RUSHOUT*, No. 7847, *ante*.

8298. ——— Rival company—No private injury sustained.]—*PUDSEY COAL GAS CO. v. BRADFORD CORPN.*, No. 8276, *ante*.

B. Of Particular Public Companies.

Canal company.]—See RAILWAYS & CANALS.

Dock company.]—See SHIPPING & NAVIGATION.

Electricity company.]—See ELECTRIC LIGHTING & POWER.

Gas company.]—See GAS.

8299. Railway company—General rule.]—*SALOMONS v. LAING*, No. 8303, *post*.

8300. ————(1) It is improper & wrong for railway cos. to embark their funds in other railway undertakings, & they have no right to engage or pledge their funds or entangle their affairs in unauthorised transactions, upon the speculation that they may obtain parliamentary authority for doing acts which are beyond their powers at the time when they are done.

(2) Motion to restrain a co. from declaring a forfeiture of shares, by reason of the non-payment of calls, alleged to be made for illegal purposes, refused; although it appeared that the directors had conducted the proceedings, in many particulars, in a very improper manner; it being sworn that money was wanted to satisfy existing legal obligations of the co. & it being denied that the

PART IX. SECT. 12, SUB-SECT. 2.—B.

8299 i. Railway company—General rule.]—A ry. cannot lease the concern or delegate its powers for a specified term without the sanction of the legislature.—*HINCKLEY v. GILDER-SLEEVE* (1872), 19 Gr. 212.—**CAN.**

p. River driving company—Power to delegate powers.]—Pltfs., an incor-

porated co., with the exclusive right to drive lumber down the M. river, within the co.'s limits, & of collecting tolls fixed by law therefor, contracted with deft., in consideration of a bonus to be paid by him to the co., to allow him to do the driving & receive the tolls:—*Held*: the powers conferred & duties imposed by the legislature on driving

companies could not be delegated or transferred, and no action could be maintained on a contract based on such transfer.—*LYNCH v. RICHARDS (WILLIAM) CO. LTD.* (1907), 3 E. L. R. 383; 38 N. B. R. 160.—**CAN.**

q. Rural telephone company—Power to make promissory notes.]—A co. organised under Rural Telephone Co.

co. sought to enforce the calls for illegal purposes.—*LOGAN v. COURTTOWN (EARL)* (1850), 13 Beav. 22; 20 L. J. Ch. 347; 17 L. T. O. S. 306; 51 E. R. 9.

8301. ———.]—A railway co. incorporated by Act of Parliament, cannot, even with the assent of all its shareholders, legally enter into a contract involving the application of any portion of its funds to purposes foreign from those for which it is incorporated.

Defts. were incorporated by an Act of Parliament, sect. 1 of which enacted that certain persons should be united into a co. for making & maintaining a certain railway & other works by the Act authorised, according to the provisions & regulations thereafter mentioned, & for that purpose should be one body corporate by the name & style of "The E. C. R. Co.," & should have perpetual succession, & a common seal. Sect. 3 empowered the co. to raise a sum of money "for making & maintaining the said railway, & other works authorised by the Act." Sect. 5 directed that the money so raised should be expended in & towards making & maintaining the said railway & other works, & in otherwise carrying the Act into execution. By subsequent sects. it was provided that the profits, after defraying the expenses of making, maintaining, & working the railway, were to be accounted for & divided amongst the proprietors of the undertaking:—*Held*: it was not competent to the directors to enter into a contract with another railway co., to take a lease of their line, & to pay the costs incurred by them in the soliciting & promoting of Bills in Parliament for the extension & improvement of such other line of railway, even though such extension & improvement would benefit their own co.; & such contract, if entered into, was illegal & void, & could not be enforced in a ct. of law.—*EAST ANGLIAN RYS. CO. v. EASTERN COUNTIES RY. CO.* (1851), 11 C. B. 775; 7 Ry. & Can. Cas. 150; 21 L. J. C. P. 23; 18 L. T. O. S. 138; 16 Jur. 249; 138 E. R. 680.

Annotations:—*Appld.* *Macgregor v. Dover & Deal Ry.* (1852), 18 Q. B. 618. *Consd.* *South Yorkshire Ry. & River Dun Co. v. G. N. Ry.* (1853), 9 Exch. 55; *Bostock v. North Staffordshire Ry.* (1855), 4 E. & B. 798; *Norwich Corpn. v. Norfolk Ry.* (1855), 4 E. & B. 397. *Distd.* *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331. *Consd.* *Shrewsbury & Birmingham Ry. v. North Western Ry.* (1857), 6 H. L. Cas. 113; *Bateman v. Ashton-under-Lyne Corpn.* (1858), 3 H. & N. 323. *Appld.* *Taylor v. Chichester & Midhurst Ry.* (1867), L. R. 2 Exch. 356. *Consd.* *A.-G. v. G. E. Ry.* (1879), 11 Ch. D. 449. *Refd.* *Rogers v. Oxford, Worcester & Wolverhampton Ry.* (1858), 2 De G. & J. 662; *London, Brighton, etc. Ry. v. L. & S. W. Ry.* (1859), 4 De G. & J. 362; *Ashbury Ry. Carriage & Iron Co. v. Riche* (1875), L. R. 7 H. L. 653. *Mentd.* *Royal British Bank v. Turquand* (1856), 6 E. & B. 327; *Hammer-smith, etc. Co. v. Brand* (1869), L. R. 4 H. L. 171; *Driver v. Kingston Highway Board* (1871), 24 L. T. 480; *Evershed v. L. & N. W. Ry.* (1877), 3 Q. B. D. 134

8302. ———.]—The S. E. Ry. Co. was incorporated for the purpose of making & maintaining that railway, with power to raise money for the purposes of the Act. The projectors of an intended Dover & Deal, etc., railway had contemplated bringing a bill before Parliament for the establishment of such railway, but were in doubt as to proceeding. M., a person interested, & having influence, in the S. E. Ry. Co., undertook that, if the projectors of the Dover, etc., railway would proceed in endeavouring to obtain their Act, & if successful, would hand over their scheme to the S. E. Ry. Co., that co., if the bill were rejected, would insure them against loss by such rejection, & would pay their parliamentary

expenses. No clause in the co.'s Act empowered them so to apply their funds. The bill was proceeded with, & rejected by Parliament. In an action against M. on the above contract, the declaration alleging that the S. E. Ry. Co. did not insure, etc., & did not pay the Parliamentary expenses:—*Held*: the stipulation by M. was a promise that the co. should do an act which was illegal & contravened public policy & a public statute, & an action did not lie against M. upon such promise.—*MACGREGOR v. DOVER & DEAL RY. CO.* (1852), 18 Q. B. 618; 7 Ry. & Can. Cas. 227; 22 L. J. Q. B. 69; 19 L. T. O. S. 316; 17 Jur. 21; 118 E. R. 233, Ex. Ch.

Annotations:—*Distd.* *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331. *Consd.* *Norwich Corpn. v. Norfolk Ry.* (1855), 4 E. & B. 397. *Appld.* *Taylor v. Chichester & Midhurst Ry.* (1867), L. R. 2 Exch. 356. *Refd.* *Shrewsbury & Birmingham Ry. v. L. & N. W. Ry.* (1853), 4 De G. M. & G. 115; *South Yorkshire Ry. & River Dun Co. v. G. N. Ry.* (1853), 9 Exch. 55; *Bostock v. North Staffordshire Ry.* (1855), 4 E. & B. 798; *Bateman v. Ashton-under-Lyne Corpn.* (1858), 3 H. & N. 323; *Riche v. Ashbury Ry. Carriage & Iron Co.* (1874), 43 L. J. Ex. 177.

8303. ——— **Power to hold shares in another company.**—(1) A railway co. became lawfully possessed of shares in another independent railway co.:—*Held*: having no authority to do so by their Act of Parliament, they could not legally, as against one dissentient shareholder, increase their number of such shares, or apply their funds for the support of the second co.

(2) A railway co. is bound to apply all its moneys & property for the purposes directed & provided for by the Act of Parliament, & not for any other purpose whatever. Any application of or dealing with the capital, funds, or money in any manner not distinctly authorised by the Act is illegal; & where directors, for purposes not authorised by the Act, are proceeding to involve the co. or shareholders in liabilities to which they never consented, relief may & ought to be given in ct. In such a case, one shareholder may sue on behalf, etc.—*SALOMONS v. LAING* (1850), 12 Beav. 339; 6 Ry. & Can. Cas. 289; 19 L. J. Ch. 225; 15 L. T. O. S. 429; 14 Jur. 279; 50 E. R. 1091; *subsequent proceedings*, 12 Beav. 377.

Annotations:—*As to* (1) *Distd.* *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331. *Consd.* *G. W. Ry. v. Met. Ry.* (1863), 1 New Rep. 551. *As to* (2) *Refd.* *East Anglian Ry. v. Eastern Counties Ry.* (1851), 21 L. J. C. P. 23; *Bostock v. North Staffordshire Ry.* (1855), 4 E. & B. 798; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251. *Generally, Mentd.* *Graham v. Birkenhead, Lancashire v. Cheshire Junction Ry.* (1850), 7 Ry. & Can. Cas. 938.

8304. ——— **Company authorised to hold limited number of shares—Whether entitled to allotment of additional shares.**—Although one railway co. cannot hold shares in another without special power for that purpose, yet it does not follow that if one co. is authorised to hold shares to a limited amount in another co. it is not entitled to any incidental benefit which may accrue to the holders of such shares by the allotment of additional shares.—*GREAT WESTERN RY. CO. v. METROPOLITAN RY. CO.* (1863), 2 New Rep. 209; 32 L. J. Ch. 382; 8 L. T. 556; 9 Jur. N. S. 562; 11 W. R. 706, L. JJ.

8305. ——— **Power to purchase shares in another company.**—A provisionally registered railway co. entered into an agreement with two canal cos., established by Acts of Parliament, for the purchase of their shares & property; & in the document it was provided that certain members

Act, merely & exclusively for the purpose of supplying the people living within a certain area with a telephone service, has no power to make pro-

missory notes. There is nothing in said Act enabling such a co. to bind itself thereby, nor is such business one necessitating the making of promissory

notes.—*CANADIAN BANK OF COMMERCE v. CUDWORTH RURAL TELEPHONE CO., LTD.*, [1922] 2 W. W. R. 1211; 67 D. L. R. 723.—CAN.

Sect. 12.—Powers and liabilities : Sub-sect. 2, B.; sub-sects. 3 & 4, A

of the provisional committee of the railway co. should pay down, or procure to be paid down, the sum of £10,000, to be held upon trust, until the railway Act should be obtained, in taking transfers of the bonds or mtges. of the canal cos., & the remaining amount of the purchase-money, within certain stated times, amounting altogether to £50,000; it was also further declared, that the purchase-money should be provided by the thereunder signed six members of the provisional committee out of their own monies, or they should procure the same to be paid as aforesaid, so that the canal cos. should not be affected by any special trusts or liabilities which might attach to the paid-up capital of the railway co. This agreement was executed by the six, on behalf of the railway co., & by persons specially appointed by the canal cos. Three of the six provisional committeemen signed a cheque for the £10,000, & with the concurrence of the other three handed it to a trustee for the canal cos., & the money was paid by the trustees of the railway co., which co. was ordered to be wound up, & the master authorised one of the shareholders to file a bill against the canal cos. for the recovery of the £10,000:—*Held*: the agreement was unauthorised, & one which could not be entered into without the sanction of Parliament; the £10,000 was trust money of the railway co., & not the private monies of the six provisional committeemen; the canal cos., receiving the cheque as they did, & receiving the money for the cheque from the bankers of the railway co., took the £10,000 impressed with a trust, & with notice of its being trust money, & were therefore bound to refund it.—*BRYSON v. WARWICK & BIRMINGHAM CANAL CO.* (1853), 4 De G. M. & G. 711; 2 Eq. Rep. 29; 23 L. J. Ch. 133; 22 L. T. O. S. 200; 18 Jur. 47; 2 W. R. 151; 43 E. R. 686, L. J.

Annotations:—*Refd.* Whitwam v. Watkin (1898), 78 L. T. 188. *Mentd.* *Re* London & Birmingham Extension & Northampton, Daventry, Leamington & Warwick Ry., *Ex p.* Gay (1855), 25 L. T. O. S. 9; *Re* Saxon Life Assoc., *Era* Co.'s Case (1862), 1 De G. J. & Sm. 29; *Macbryde v. Eykyn* (1871), 24 L. T. 461.

8306. Company authorised to subscribe towards undertaking.—In July, 1890, pl'tfs. contracted with the R. Co. for the sale of certain stock in the W. co. The real purchaser, however, was the M. co., & the money was paid by that co. in two sums, the larger on Aug. 5 & the smaller on Oct. 10, 1890. These payments were then *ultra vires*. But by their Act of 1891 they were authorised to subscribe towards the undertaking of the W. Co., & to hold shares therein, & a resolution authorising the M. Co. to subscribe was agreed to the day after the Act passed. The books of the M. Co. did not accurately represent the facts. The writ was issued on Aug. 6, 1896, claiming against three of the directors repayment to the co. of these sums:—*Held*: (1) the purchase was not a subscription within the Act of 1891, & was therefore *ultra vires*; (2) as to the larger sum, the writ not having been issued within six years & no fraud being alleged, Stat. Limitations afforded a good defence; (3) as to the smaller sum, the evidence showed that pl'tfs. had purchased shares to enable them to bring the action, & they were aware of the purchase by the M. Co. before Oct. 1890, & under the circumstances, the action ought to have been brought by the co. & not by pl'tfs.—*WHITWAM v. WATKIN* (1898), 78 L. T. 188; 14 T. L. R. 288.

8307. — Power to draw, accept or indorse bills of exchange.—It is not competent to a co. incor-

porated in the usual way for the formation & working of a railway, to draw, accept, or indorse bills of exchange; & the question is properly raised by a plea denying the acceptance, though the acceptance was given by order of the directors & under the common seal of the co.—*BATEMAN v. MID-WALES RY. CO.* (1866), L. R. 1 C. P. 499; Har. & Ruth. 508; *sub nom.* *BATEMAN v. MID-WALES RY. CO., NATIONAL DISCOUNT CO., LTD. v. MID-WALES RY. CO., OVEREND, GURNEY & CO., LTD. v. MID-WALES RY. CO.*, 35 L. J. C. P. 205; 12 Jur. N. S. 453; 14 W. R. 672.

Annotations:—*Distd.* *Peruvian Rys. v. Thames & Mersey Marine Insee., Re Peruvian Rys.* (1867), 2 Ch. App. 617. *Apld.* *Atkins v. Wardle* (1889), 58 L. J. Q. B. 377. *Mentd.* *R. v. Reed* (1880), 5 Q. B. D. 483.

8308. — Power to prosecute action—Not instituted by company.—A railway co. has no power to expend its funds in the prosecution of a suit not instituted by it, & a ct. of equity will, at the instance of a shareholder, restrain it from doing so, without going into the question whether or not the suit is proper, or for the benefit of the co.—*KERNAGHAN v. WILLIAMS* (1868), L. R. 6 Eq. 228. *Annotations*:—*Apld.* *Pickering v. Scott & Son* (1872), L. R. 14 Eq. 322. *Consd.* *Studdert v. Gilman* (1886), 33 Ch. D. 528.

—*See, also*, Nos. 8237, 8251, 8258, *ante*, No. 8335, *post*; *CARRIERS*, Vol. VIII., pp. 1 *et seq.*; *CORPORATIONS*, Vol. XIII., p. 360, Nos. 950–952; & *generally*, *RAILWAYS & CANALS*.

Tramway company.—*See* *TRAMWAYS & LIGHT RAILWAYS*.

Water company.—*See* *WATER SUPPLY*.

SUB-SECT. 3.—EXERCISE OF POWERS.

8309. Within what time exercisable—No time for completion specified.—A co. were empowered by an Act of Parliament to make a canal within certain limits, without specifying any time within which it was to be completed:—*Held*: no limitation as to time could be assigned to the powers conferred, by an intendment that they were to be exercised within a reasonable time, & consequently the works might be resumed at any period.—*THICKNESSE v. LANCASTER CANAL CO.* (1838), 4 M. & W. 472; 1 Horn & H. 365; 8 L. J. Ex. 49; 3 Jur. 11; 150 E. R. 1515.

Annotations:—*Refd.* *Bostock v. Sidebottom* (1852), 18 Q. B. 813; *Hedges v. Met. Ry.* (1860), 28 Beav. 109. *Mentd.* *Scott v. Ebury* (1867), L. R. 2 C. P. 255.

8310. — Time for completion specified—Completion of works after expiration—Whether ultra vires.—(1) An incorporated railway co., having powers within a fixed time to complete a branch line, commenced, but afterwards, by a vote of the proprietary, suspended for a time, the works. Before their powers expired, the works, on a resolution of the shareholders, were resumed, & actively prosecuted. After the lapse of nearly a year, the powers having then expired, & the branch railway still being unfinished, two shareholders, on behalf of themselves & the other shareholders, filed a bill to restrain the further prosecution of the works. On a motion for an injunction:—*Held*: pl'tfs., having been aware of the intention to construct the line, & not having applied with diligence, the ct. would not grant the injunction.

(2) A shareholder, who had acquiesced in the re-commencement of the works, afterwards sold his shares to a purchaser, who objected to the further prosecution of the works:—*Held*: the purchaser was bound by the acquiescence of his vendor.

(3) *Semble*: where it is established that, on

pretence of serving the interests of one co., a member of a rival co. procures shares in order to oppose the co. into which he has intruded, the ct., at the instance of such shareholder, will not ordinarily interfere.

(4) *Seemle*: the mere expiration of the Parliamentary period for the completion of a railway begun before the powers expired is not enough to stamp with illegality the proceeding to complete such railway.—*FHOOKS v. SOUTH WESTERN RY. CO.* (1853), 1 Sm. & G. 142; 21 L. T. O. S. 55; 17 Jur. 365; 1 W. R. 175; 65 E. R. 62.

Annotations:—*As to* (2) *Refd.* *London Trust Co. v. Mackenzie* (1893), 62 L. J. Ch. 870. *Generally*, *Mentd.* *Burt v. British Nation Life Assce. Asscn.* (1859), 33 L. T. O. S. 74.

8311. — — — — —.]—In an Act of Parliament authorising a co. to construct a railway a sect. which provides that if the railway be not completed within five years from the passing of the Act, then, on the expiration of that period, the powers by the Act given to the co. for making & completing the railway are to cease, only applies to powers which the co. could not exercise except by virtue of the Act. If the co. have, before the expiration of the five years, lawfully acquired the right to use the land, & if they are incorporated for the purpose of making the railway, they can make it under their common law powers notwithstanding the expiration of the five years.—*MIDLAND RY. CO. v. GREAT WESTERN RY. CO.*, [1909] A. C. 445; 78 L. J. Ch. 686; 101 L. T. 142; 53 Sol. Jo. 671, H. L.; *affg.* S. C. *sub nom.* *GREAT WESTERN RY. CO. v. MIDLAND RY. CO.*, [1908] 2 Ch. 644, C. A.

Annotation:—*Refd.* *Met. Ry. v. L. C. C.* (1913), 82 L. J. K. B. 542.

8312. How enforced—Mandamus—On evidence of refusal to perform duty.]—Before a *mandamus* will be issued to an incorporated co., commanding them to perform a duty, either a refusal in direct terms, or circumstances from which a refusal can be conclusively implied, must be shown.—*R. v. BRECKNOCK & ABERGAVENNY CANAL CO.* (1835), 3 Ad. & El. 217; 1 Har. & W. 279; 4 Nev. & M. K. B. 871; 4 L. J. M. C. 105; 111 E. R. 395.

Annotations:—*Apld.* *R. v. Wilts & Berks Canal Co.* (1840), 8 Dowl. 623. *Consd.* *R. v. Bristol & Exeter Ry.* (1843), 4 Q. B. 162.

8313. — — — — — **On evidence of intention not to complete works.**]—On an application by certain shareholders of a railway co., & land owners along the line, it appearing to the ct. on affidavits, that the co. intended to execute only a part of their line, as far as a certain point, & had no *bonâ fide* purpose of completing the work by executing the remainder, a rule was made absolute for a *mandamus*, directing the co. to make & complete their railway according to the provisions of their Act: to set out their line, with the intended deviations within the remaining portion; & to proceed to purchase the land necessary for making & completing the railway within that portion.—*R. v. EASTERN COUNTIES RY. CO.* (1839), 10 Ad. & El. 531; 1 Ry. & Can. Cas. 509; 2 Per. & Dav. 648; 8 L. J. Q. B. 340; 113 E. R. 201; *subsequent proceedings* (1840), 2 Ry. & Can. Cas. 260.

Annotations:—*Distd.* *Exeter & Crediton Ry. v. Buller* (1847), 5 Ry. & Can. Cas. 211. *Consd.* *York & North Midland Ry. v. R.* (1853), 1 E. & B. 858. *Refd.* *R. v. Bristol & Exeter Ry.* (1843), 4 Q. B. 162; *R. v. G. S. & W. Ry.* (1847), 9 L. T. O. S. 375; *Cohen v. Wilkinson* (1849), 12 Beav. 138; *R. v. Rochdale & Halifax Turnpike Road Trustees* (1849), 12 Q. B. 448; *R. v. Ambergate, etc. Ry.* (1851), 17 Q. B. 362; *R. v. L. & N. W. Ry.* (1851), 16 Q. B. 864; *R. v. L. & Y. Ry.* (1852), 22 L. J. Q. B. 57.

8314. — — — — — **Concurrent remedy of indictment for nuisance.**]—A public co. who have obtained an Act of Parliament for executing great public works, are bound to fulfil all the duties thrown upon them, & a writ of *mandamus* will lie to compel the performance of the works; & it makes no difference that the breach of contract causes a public nuisance, which may be prosecuted by indictment.—*R. v. BRISTOL DOCK CO.* (1841), 2 Q. B. 64; 2 Ry. & Can. Cas. 599; 1 Gal. & Dav. 286; 10 L. J. Q. B. 346; 5 J. P. 546; 6 Jur. 216; 114 E. R. 27.

Annotation:—*Refd.* *York & North Midland Ry. v. R.* (1853), 1 C. L. R. 119.

8315. — — — — — **Work completed.**]—Where an Act of Parliament empowers a co. to execute works, & prescribes the manner in which they shall be done, a party wishing to enforce the proper execution by *mandamus* must, after the work is completed, specifically require the co. to perform those things which, according to his view, the Act enjoins. Unless such demand be made after completion of the work, & compliance be refused, in terms or virtually, a *mandamus* will not be granted, though the statute has been palpably disobeyed, & though it assigned a limited time for the performance, which time has elapsed.

Complaint made while the work is proceeding, though a proper precaution, does not excuse the omission of a specific demand after the completion.—*R. v. BRISTOL & EXETER RY. CO.* (1843), 4 Q. B. 162; 3 Ry. & Can. Cas. 433; 3 Gal. & Dav. 384; 12 L. J. Q. B. 106; 7 J. P. 130; 7 Jur. 233; 114 E. R. 859.

Annotation:—*Mentd.* *R. v. Dundalk & Enniskillen Ry.* (1861), 5 L. T. 25.

— — — — —.]—*Sec, further*, CROWN PRACTICE, Vol. XVI., pp. 280, 285–287.

— — — — — **Indictment.**]—*See* No. 8314, *ante*, & CORPORATIONS, Vol. XIII., pp. 409, 410, Nos. 1296–1298.

8316. — — — — — **Action by party aggrieved.**]—Where by an Act extending the powers of resp. co. certain duties & obligations were imposed on it for the benefit of its customers with a view to the reduction of the price of gas contingent on the amount of surplus net profit, but no pecuniary penalty was imposed for default & no right of action given to persons aggrieved, provision, however, being made for its accounts being audited by direction of the mayor of the corpn. with whose assent the co. was originally established:—*Held*: no individual customer had a right of action against the co. for non-compliance with the provisions of the Act: such a right only arises where given by the Act, & especially so where the Act as in this case is in the nature of a private legislative bargain, & not one of public & general policy.—*JOHNSTON & TORONTO TYPE FOUNDRY CO. v. TORONTO CONSUMERS' GAS CO.*, [1898] A. C. 447; 67 L. J. P. C. 33; 78 L. T. 270, P. C.

SUB-SECT. 4.—CONTRACTS.

A. Before Incorporation.

Compare Part III., Sect. 31, sub-sect. 5, *ante*; Part XIV., Sect. 2, sub-sect. 8, B., *post*; & COMPULSORY PURCHASE OF LAND & COMPENSATION, Vol. XI., pp. 166, 228, Nos. 442, 443, 1160.

8317. Whether binding on company—Benefit received.]—An incorporated co. will be bound by the agreement of its individual members, acting

PART IX. SECT. 12, SUB-SECT. 4.—A.

83171. Whether binding on company—Benefit received.]—An engineer's

charges for surveys preliminary to obtaining a Railway Act, are within The Lands Clauses Consolidation Act, 1854, s. 8, & the company are bound

to pay for the surveys, though made in pursuance of a contract entered into with the promoters of the undertaking only.—*LONDONDERRY & ENNISKILLEN*

Sect. 12.—Powers and liabilities: Sub-sect. 4, A. & B. (a).]

before incorporation on its behalf, if the co. has received the full benefit of the consideration for which the agreement stipulated on its behalf.—

EDWARDS v. GRAND JUNCTION RY. CO. (1836), 1 My. & Cr. 650; 1 Ry. & Can. Cas. 173; 7 Sim. 337; 6 L. J. Ch. 47; 40 E. R. 525, L. C.

*Annotations:—*Distd. Howden v. Simpson (1839), 10 Ad. & El. 793; Gooday v. Colchester, etc. Ry. (1852), 17 Beav. 132. *Consd.* Lindsey v. G. N. Ry. (1853), 10 Hare, 664. *Apprvd.* Eastern Counties Ry. v. Hawkes (1855), 5 H. L. Cas. 331. *N.F.* Caledonian & Dumbartonshire Junction Co. v. Helensburgh Harbour Trustees (1856), 27 L. T. O. S. 241. *Dbtd.* Preston v. Liverpool, Manchester, etc. Ry. Proprietors (1856), 5 H. L. Cas. 605. *Distd.* Williams v. St. George's Harbour Co. (1857), 24 Beav. 339. *N.F.* Shrewsbury v. North Staffordshire Ry. (1865), L. R. 1 Eq. 593. *Appld.* Cutbill v. Shropshire Rys. (1891), 7 T. L. R. 381. *Refd.* Simpson v. Howden (1837), 1 Jur. 703; Greenhalgh v. Manchester & Birmingham Ry. (1838), 3 My. & Cr. 784; Hargreaves v. Lancaster & Preston Junction Ry. (1838), 1 Ry. & Can. Cas. 416; Aldred v. North Midland Ry. (1839), 1 Ry. & Can. Cas. 404; G. W. Ry. v. Birmingham & Oxford Junction Ry. (1848), 2 Ph. 597; Stuart v. L. & N. W. Ry. (1852), 1 De G. M. & G. 721; Leominster Canal Navigation Co. v. Shrewsbury & Hereford Ry. (1857), 3 K. & J. 654; Bedford & Cambridge Ry. v. Stanley (1862), 2 John. & H. 746. *Mentd.* Norwich Corpn. v. Norfolk Ry. (1855), 4 E. & B. 397.

landowner, being a peer of Parliament, entered into an agreement with the projectors of a railway, stipulating, among other things, that they should take certain portions of his land, & pay him certain specified sums for the same, & by way of compensation for permanent injury to his mansion & estate; that they should execute certain works of utility & ornament on his property & make & maintain a station adjoining or near to a particular road, at which all trains passing along the railway should stop for the accommodation of passengers, & for the receiving & unloading of goods, luggage, carriages & horses; with a provision that the landowner should withdraw his opposition to the bill of the projectors, & co-operate with them & use his best endeavours to prevent the bill of a rival co. from passing into a law; but that, if the bill of the rival co. should pass, then the first-mentioned co. should pay pltf. certain sums for the land the rival co. might take, & recover from the latter & pay to the first-mentioned co. the largest amount of price & compensation which could be obtained; & a provision that either of the parties might determine the agreement by notice to the other if the bill of the first-mentioned co. should not pass within six months; & a further provision, that, if the two projected cos. should be amalgamated, the amalgamated co. should pay certain sums to pltf. as purchase-money & compensation; & that the covenants & agreements concerning the purchase & taking of land, not making deviations without pltf.'s consent, & the making & maintaining such station, & all other the covenants & agreements therein-before contained on the part of the first-mentioned co., so far as the same should be applicable, should be performed by the amalgamated cos. By an Act, passed within six months, the subscribers to the two projected cos. were incorporated in one body, & authorised to make certain of the projected lines of railway; & it was enacted, that the shareholders of each co. should be entitled in certain rates or proportions to the shares of the united co.:—*Held*: notwithstanding the bill of the first-mentioned co. did not pass, the agreement could not be determined by

a notice given by the projectors who were parties to the agreement, or by the amalgamated body.

(2) The amalgamated co. having then taken the land referred to in the agreement, & paid for it the price thereby stipulated, & having in a suit in equity brought against them by the landowner, claimed the benefit of the agreement, he filed his bill for a specific performance of his contract with the projectors of the first-mentioned co., & moved for an injunction to restrain the incorporated co. from permitting any of their trains to pass a certain station near the road mentioned in the agreement without stopping thereat for the accommodation of passengers, etc.:—*Held*: the union & incorporation of the shareholders of the two cos. in one body, & the consolidation of their several shares under the Act of Parliament, constituted an amalgamation within the meaning of the agreement.

(3) The decision in the case of *Edwards v. Grand Junction Ry. Co.*, No. 8317, *ante*, did not proceed on the principle that the incorporated co. was bound by the contract of a party acting as an agent for them prior to their corporate existence, but on the principle that the ct. would not allow them to exercise powers acquired by means of such contract without carrying it into full effect; & in the absence of any adoption of the contract of such a party by the incorporated co., or of any attempt to exercise the powers thereby acquired or of any part performance, the ct. might refuse to enforce specific performance of such a contract against the incorporated co.; but if they adopt or avail themselves of the contract, or exercise the powers acquired by its means, the ct. will, in that case, not only negatively but positively, interpose & compel the performance by them of every portion of the contract.—LINDSEY (EARL) v. GREAT NORTHERN RY. CO. (1853), 10 Hare, 664; 22 L. J. Ch. 995; 17 Jur. 522; 1 W. R. 257; 68 E. R. 1094.

8319. —.]—The provisional directors of a railway co., for the purposes of the co., took a lease of offices for a term of 21 years, determinable at the end of seven or fourteen years: & the trustees of the co. executed such lease by their direction. A subscribers' agreement was executed, but the co. was afterwards dissolved. The co. being ordered to be wound up, one of the trustees claimed to be repaid the sums he had paid on account of rent since the dissolution of the co.:—*Held*: the co. at large were not liable.

Not only do I think that a contract of this description was in its nature improper—not using that word offensively—towards the co. at large, the directors being aware of the uncertain & provisional position in which they stood, but it seems to me to have been absolutely prohibited by the subscribers' agreement or the Act of Parliament, or both (KNIGHT BRUCE, V.-C.).—*Re* NORTH LONDON JUNCTION RY. CO., *Ex p.* JAMES (1851), 17 L. T. O. S. 88; 15 Jur. 893.

8320. —.]—Where the projectors of a railway co., in order to induce a landowner to withdraw his opposition to their bill, enter into a contract with him, in which the stipulation is that the contract is to be performed by the co. after the co. shall have obtained an Act of Incorporation from Parliament, such contract to be valid ought to be one which might be lawfully made by the co. after incorporation.

RY. CO. v. MACNEILL (1847), 9 L. T. O. S. 436.—IR.

r. — Contract with provisional directors — Before flotation.] — Seven

persons, deft. being one, were incorporated as the A. & T. Ry. Co., with power to obtain a certain amount of stock. As soon as it was obtained, a meeting of the stockholders was to be

called to organise the co. These seven, acting as provisional directors, passed a resolution authorising R. to retain counsel to prosecute a suit in chancery on their behalf, & on the same day

It is *ultra vires* of a corp'n. established for the purpose of making a railway, to enter into a covenant to pay a large sum of money to a man for not opposing the passing of the co.'s bill in Parliament. P. was a landowner, a railway co. was projected, & for the intended railway some of his land would be required. He threatened to oppose the Bill. The projectors entered into an agreement with him, that "in case the co. shall obtain an Act of incorporation, the co. shall pay to P. £1,000 for all lands required by the co. for the due making of the railway, & £4,000 for residential injury to the estate & hall of P.," that a tunnel should be constructed in a particular manner through a part of his property, & that a passenger station should be made, etc.; P. withdrew his opposition, & the bill passed: the railway was not made nor were the lands required:—*Held*: this was not a contract which on the mere passing of the bill entitled P. to claim from the co. payment of the money.—*PRESTON v. LIVERPOOL, MANCHESTER, ETC. RY. CO. (PROPRIETORS) (1856)*, 5 H. L. Cas. 605; 25 L. J. Ch. 421; 27 L. T. O. S. 2; 2 Jur. N. S. 241; 4 W. R. 383; 10 E. R. 1037, H. L.; *affg.* (1853), 17 Beav. 114.

Annotations:—*Consd.* Taylor v. Chichester & Midhurst Ry. (1867), L. R. 2 Exch. 356. *Refd.* Caledonian & Dumbartonshire Junction Co. v. Helensburgh Harbour Trustees (1856), 27 L. T. O. S. 241; Scottish North-Eastern Ry. v. Stewart (1859), 33 L. T. O. S. 307; Shrewsbury v. North Staffordshire Ry. (1865), L. R. 1 Eq. 593; Mann v. Edinburgh Northern Tram. Co., [1893] A. C. 69.

8321. — Contract not embodied in company's Act.]—The magistrates of H. agreed with the provisional committee of the projected C. railway co., to allow the co. to lay their line of rails along the streets of H., to allow the co. to take certain ground of the burgh without payment, & themselves to apply for an Act of Parliament, to extend their harbour, & to charge on the harbour dues £3,000 to be lent to them by the co. On the other hand, the committee bound the co. to pay all the past & future expenses of enlarging the harbour, & of applying for the Harbour Act, & that £3,000 only of such moneys should form a charge on the harbour & dues. The magistrates of H. duly obtained their Harbour Act. The committee also obtained their Railway Act, but the said agreement was not incorporated in or noticed by the latter Act. The co. never made the branch line to the harbour of H. for which they obtained powers, & declined to carry out the agreement:—*Held*: the magistrates were not entitled to specific performance, for it would be *ultra vires* of the co. to make a harbour, there being no power given to them for that purpose by their Act: the doctrine developed in *Edwards v. Grand Junction Railway Co.*, No. 8317, *ante*, & afterwards followed in many subsequent cases is contrary to sound principle & is not supported by authority; the true rule is, that the co. are not bound by the contracts of the projectors, unless such contracts are embodied in the Act of Parliament.—*CALEDONIAN & DUMBARTONSHIRE JUNCTION CO. v. HELENSBURGH HARBOUR (TRUSTEES) (1856)*, 27 L. T. O. S. 241; 2 Jur. N. S. 695; 4 W. R. 671, H. L.

Annotations:—*Folld.* Leominster Canal Navigation Co. v. Shrewsbury & Hereford Ry. (1857), 3 K. & J. 654. *Consd.* Shrewsbury v. North Staffordshire Ry. (1865), L. R. 1 Eq. 593. *Apld.* Mann v. Edinburgh Northern Tram. Co., [1893] A. C. 69. *Refd.* Shrewsbury & Birmingham Ry. v. L. & N. W. Ry., Shropshire Union Ry. & Canal Co. & Glyn & Cowan (1857), 3 Jur. N. S. 775; Bedford & Cambridge Ry. v. Stanley (1862), 32 L. J. Ch. 60.

directors, previously chosen by the stockholders, passed a resolution to the same effect. Pltfs. were thereupon retained:—*Held*: the resolution being an illegal act, & the responsibility

arising therefrom not being removed by the resolution of the general board of direction, deft. as well as the others who authorised retaining pltfs., was liable personally.—*MACBETH v. Mc-*

8322. Execution of contract ultra vires.]

SHREWSBURY (EARL) v. NORTH STAFFORDSHIRE RY. CO., No. 7835, *ante*.

8323. Whether enforceable by company.]

Where directors of a co. granted a lease, with a power of re-entry, & afterwards the co. was incorporated by an Act of Parliament, which—amongst other things—enacted "that all contracts, etc., theretofore entered into with the directors of the co. shall be as valid & effectual, to all intents & purposes, as if the co. had been incorporated when the same contracts, etc., were entered into, & as if the same had been entered into with the said incorporated co.":—*Held*: the incorporated co. might support ejectment on the clause of re-entry.—*DOE d. LONDON DOCK CO. v. KNEBELL (1837)*, 2 Mood. & R. 66.

8324. —.]—A landowner agreed with the promoters of a railway co., that in the event of their obtaining an Act of Parliament, he would sell them such land as they required at a fixed rate:—*Held*: such an agreement would be enforced in this ct. against the landowner, at the suit of the co., although the latter had no existence at the time of the contract.—*BEDFORD & CAMBRIDGE RY. CO. v. STANLEY (1862)*, 2 John. & H. 746; 1 New Rep. 162; 32 L. J. Ch. 60; 7 L. T. 477; 9 Jur. N. S. 152; 11 W. R. 139; 70 E. R. 1260.

Annotation:—*Distd.* Kemp v. S. E. Ry. (1872), 7 Ch. App. 364.

8325. Whether promoters personally liable—Ratification by company.]

J., acting as the solr. & secretary of a projected railway co., by the authority of the promoters, & by means of a cheque signed by two of them, obtained from pltf. an advance of £500, to be applied in payment of parliamentary fees, upon an agreement expressing that it was "to be repaid out of the calls on shares." An Act authorising the construction of the railway passed, the promoters being named therein as the first directors; & at a meeting subsequently held the directors passed a resolution that the acts of J. should be adopted & confirmed. No shares were allotted or calls made, & the undertaking was not proceeded with:—*Held*: the advance was made upon the personal responsibility of those who signed the cheque, & the subsequent adoption of their acts by the directors did not alter their position.—*SCOTT v. EBURY (LORD) (1867)*, L. R. 2 C. P. 255; 36 L. J. C. P. 161; 15 L. T. 506; 15 W. R. 517.

Annotations:—*Distd.* Coultts v. Irish Exhibition, London (1890), 63 L. T. 489. *Mentd.* Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth, [1891] 1 Ch. 337.

8326. —.]—Parliamentary agents, who had given an order to a newspaper for an insertion of an advertisement of an intended application to Parliament for the incorporation of a co. to construct a railway:—*Held*: personally liable on the ground that they had contracted on behalf of a co. not in existence.—*WILSON & CO. v. BAKER, LEES & CO. (1901)*, 17 T. L. R. 473.

B. After Incorporation.

(a) In General.

Compare Part XIV., Sect. 2, sub-sect. 8, B., post.
Power to contract.]—*See CORPORATIONS*, Vol. XIII., pp. 378–380.

Necessity for seal.]—*See CORPORATIONS*, Vol. XIII., pp. 380–398.

8327. Validity of contract—Contract partly ultra

DONALD (1861), 11 C. P. 224.—*CAN.*

PART IX. SECT. 12, SUB-SECT. 4.—B. (a).

s. Validity of contract.]—The respec-

Sect. 12.—Powers and liabilities: Sub-sect. 4, B. (a).]

vires—Purpose illegal.]—HATTERSLEY v. SHELBURNE (EARL), No. 7963, ante.

8328. Containing stipulation on nature of penalty.]—A co. incorporated by Act of Parliament for making a dock agreed with a landowner to purchase a piece of land for £4,000, of which £2,000 was to be paid at once, & the remaining £2,000 on a future day named in the agreement, with a provision that if the whole of the £2,000 & interest was not paid off by that day, in which respect time was to be of the essence of the contract, the vendors might repossess the land as of their former estate, without any obligation to repay any part of the purchase-money:—**Held:** this stipulation was in the nature of a penalty, from which the co. was entitled to be relieved on payment of the balance of the purchase-money, with interest.

Semble: if, on the true construction of the agreement, this stipulation had not been merely in the nature of a penalty, it would have been void as *ultra vires*.—**Re DAGENHAM (THAMES) Dock Co., Ex p. HULSE (1873), 8 Ch. App. 1022; 43 L. J. Ch. 261; 38 J. P. 180; 21 W. R. 898, L. JJ.**

Annotations:—**Apld.** Kilmer v. British Columbia Orchard Lands, [1913] A. C. 319. **Mentd.** Cornwall v. Henson, [1900] 2 Ch. 298; **Re** Dixon, Heynes v. Dixon, [1900] 2 Ch. 561.

8329. Effect of 1845 Act, s. 97—General rule.]—(1) The above sect., which points out in what manner the powers of directors to contract may be lawfully exercised, while enacting that all contracts made according to its provisions shall be binding, does not enact that contracts otherwise entered into shall not be binding; the Act being affirmative, it takes away none of the existing rights & remedies, & does not deprive the ct. of any equity or jurisdiction which it previously possessed.

(2) Where directors of a co. have power to make a contract, they must necessarily have the power also of ratifying a contract to the like effect made on their behalf; &, having ratified it, they can the less repudiate it where they have given possession under the contract.

Pltf. having by letters entered into a contract with the manager of a co. for the purchase of lands, a branch line of railway in accordance with the terms laid down by the co.'s servants, plant & machinery were removed to the purchased lands by the co., & pltf. was let into possession:—**Held:** although the manager had at the outset no authority to make the contract at all, these subsequent acts of the directors had made it binding upon them.—**WILSON v. WEST HARTLEPOOL RY. Co. (1865), 2 De G. J. & Sm. 475; 5 New Rep. 289; 34 L. J. Ch. 241; 11 L. T. 692; 11 Jur. N. S. 124; 13 W. R. 361; 46 E. R. 459, L. JJ.**

Annotations:—**As to (1) Refd.** Bateman v. Mid-Wales Ry. (1866), L. R. 1 C. P. 499. **As to (2) Refd.** **Re** Patent Ivory Manufacturing Co., Howard v. Patent Ivory Manufacturing Co. (1888), 38 Ch. D. 156. **Generally, Refd.** Hunt v. Wimbledon L. B. (1878), 4 C. P. D. 48; Teebay v. Manchester & Sheffield Ry. (1883), 52 L. J. Ch. 613. **Mentd.** Prince v. Prince (1866), 14 L. T. 43; **Re** National Savings Bank Assn., Brady's Case (1867), 15 W. R. 753; **A.-G. v. Biphosphated Guano Co. (1879), 11 Ch. D. 327; Melbourne Banking Corpn. v. Brougham (1879), 48 L. J. P. C. 12; Hart v. Hart (1881), 18 Ch. D. 670; Re Northumberland Avenue Hotel Co., Sully's Case (1885), 54 L. T. 76; Davis v. Leicester Corpn., [1894] 2 Ch. 208; Hoare v. Kingsbury U. C., [1912] 2 Ch. 452.**

8330. — Parol contract—When inferred—

tive legislatures of N. Y., U. S. A. & Canada incorporated persons for constructing a suspension bridge across the river, with power to take lands, charge tolls,

etc., & the two companies joined in conveying to one ry. co. the exclusive use of the ry. portion of their structure, with power to make arrangements with other ry. companies:—**Held:**

Use & occupation of premises.]—Where any corp'n. has actually used & occupied land, for a corporate purpose, by permission of the owner, it is liable in *assumpsit* for use & occupation, though there be no contract under seal for such occupation. Where the corp'n. so occupying is a railway co., within the provision of above sect., such parol contract may be presumed against the co. in an action for use & occupation, in the absence of direct evidence to the contrary, upon proof of actual occupation by the corp'n. or its agent.—**LOWE v. NORTH WESTERN RY. Co. (1852), 18 Q. B. 632; 7 Ry. & Can. Cas. 524; 21 L. J. Q. B. 361; 19 L. T. O. S. 200; 17 Jur. 375; 118 E. R. 239.**

Annotations:—**Apld.** Pauling v. L. & N. W. Ry. (1853), 8 Exch. 867. **Refd.** Giles v. Taff Vale Ry. (1853), 2 C. L. R. 132; **Markham v. Stanford (1863), 14 C. B. N. S. 376.**

8331. — — — Work done for company.]—A public co. incorporated by Act of Parliament entered into a contract under seal with pltf. for the execution of certain works, according to the terms of a specification, which also contained provisions for work. He entered upon the work under the superintendence of the co.'s engineer, & with his approbation: executed certain works not coming within the provisions of the contract under seal. The work being finished pltf. made a claim upon the co. to a large amount, & subsequently the directors paid him a sum, but not an account. By above sect. the directors are empowered to make parol contracts, without the same being reduced into writing, where such contracts would, if entered into between private persons, be valid; &, by sect. 98, the directors are bound to enter minutes of such contracts in a book, & by one of the clauses of the special Act of the co., three directors constitute a quorum:—**Held:** in an action for the extra work, the mere fact of the work being done was not sufficient, in the absence of any order of directors, or anything from which a parol contract could be inferred, such as would bind the co.; & there was no evidence for the jury of liability on the part of defts.—**HOMERSHAM v. WOLVERHAMPTON WATERWORKS Co. (1851), 6 Exch. 137; 6 Ry. & Can. Cas. 790; 20 L. J. Ex. 193; 155 E. R. 486.**

Annotations:—**Distd.** Pauling v. L. & N. W. Ry. (1853), 8 Exch. 867. **Refd.** **Low v. L. & N. W. Ry. (1852), 21 L. J. Q. B. 361; Henderson v. Australian Steam Navigation Co. (1855), 25 L. T. O. S. 234. Mentd.** Clarke v. Cuckfield Union (1852), Bail Ct. Cas. 81; **Smith v. Hull Glass Co. (1852), 11 C. B. 897; Re Sea, Fire & Life Assce., Ex p. Greenwood (1854), 2 W. R. 322; Re County Palatine Loan & Discount Co., Cartmell's Case (1874), 31 L. T. 52.**

8332. — — — Acceptance & user of goods.]—A clerk to an engineer of defts., a railway co. agreed with pltf. for the purchase from him of some railway sleepers on certain special terms. The sleepers were afterwards delivered to & used by the co.:—**Held:** there was evidence from which a jury might infer a parol contract by the directors, on behalf of the co.—which would be valid under above sect.—on the terms agreed to by the clerk.—**PAULING v. LONDON & NORTH WESTERN RY. Co. (1853), 8 Exch. 867; 7 Ry. & Can. Cas. 816; 1 C. L. R. 997; 23 L. J. Ex. 105; 21 L. T. O. S. 157; 155 E. R. 1605.**

8333. Contract for sale of land—Not under seal—Nor signed by two directors.]—Bill by a canal co. for specific performance by a railway co. of an agreement to purchase the canal for £12,000 entered into by the projectors of the railway, with

such conveyance was *ultra vires* & void.—**A.-G. v. NIAGARA FALLS INTERNATIONAL BRIDGE Co. (1873), 20 Gr. 34.—CAN.**

a view of obviating *bonâ fide* opposition on the part of pltfs. to defts.' Act. Dismissed on the ground that there was no agreement under seal, or signed by two of the directors of the railway co. as required by above sect., notwithstanding pltfs. had, upon the faith of the agreement, withdrawn their opposition, & had further performed their part of the agreement, by obtaining an Act authorising the sale & purchase of the canal, & notwithstanding other circumstances tending to show part-performance, & a *bonâ fide* intention by both parties to complete.

By the Act authorising the sale & purchase of the canal, defts. were "authorised & required," with consent of three-fifths of the proprietors present at a special meeting, "to purchase the canal upon such terms & conditions as shall be or may have been agreed upon between the said cos." The proprietors present at a special meeting, duly held & called in every respect as required by the Act, passed an unanimous resolution—afterwards communicated to pltfs.—authorising the directors to purchase the canal for £12,000, upon such terms & conditions as to them should seem meet:—*Held*: the Act not referring to the previous imperfect agreement, did not give validity thereto; notwithstanding the meeting had been held, & the requisite consent of the proprietors obtained, the co. were not bound by the words "authorised & required to purchase," inasmuch as the purchase was to be subject to such terms & conditions as should be agreed upon "between the said cos."; the proprietors having referred it to their directors to settle such terms & conditions, the latter could only do so in the mode prescribed by above sect., viz. by an agreement signed by two at least of their number.—*LEOMINSTER CANAL NAVIGATION CO. v. SHREWSBURY & HEREFORD RY. CO.* (1857), 3 K. & J. 654; 26 L. J. Ch. 764; 29 L. T. O. S. 342; 3 Jur. N. S. 930; 5 W. R. 868; 69 E. R. 1272.

Annotation:—*Refd.* *Bateman v. Mid-Wales Ry., National Discount Co. v. Same, Overend, Gurney v. Same* (1866), 14 W. R. 672.

8334. Evidence of contract—Proof that work done to satisfaction of company—Letters by secretary promising payment.—*BUSH v. WEISS*, No. 8163, *ante*.

8335. Rescission of contract—Made by majority of shareholders—By persons afterwards becoming shareholders & constituting majority.—The G. W. Ry. Co. entered into an agreement with two other cos., A. & B.—which agreement was sanctioned by three-fifths of the then shareholders of the A. & B. cos.—to purchase their lines, under a power of sale contained in their Acts; & it was a term of that agreement that the A. & B. cos. should apply to Parliament for powers to amalgamate their lines, & that the directors of the G. W. Ry. should have certain powers as to the manner of making the lines & controlling the expenditure. In consequence of the transfer of shares to persons not favourable to this agreement, resolutions were afterwards passed, by which it appeared that it was the desire of the majority of the then shareholders of the A. & B. cos. to repudiate the agreement with the G. W. Co., & they refused to make the application to Parliament, & to oppose it if made by the directors pursuant to the agreement. The G. W. Ry. Co. then filed a bill for the specific performance of the agreement, & at the same time applied for an injunction to restrain the dissentient shareholders of the A. & B. cos. from entering into any agreement with any other co., or doing any act in violation of their original agreement:—*Held*: (1)

there was a sufficient case shown by the bill to support it against a demurrer for want of equity; (2) an agreement to apply to Parliament for powers to do something, not included in a particular Act, is such an agreement as the ct. will recognise to the extent of compelling the parties to keep matters *in statu quo* until the application to Parliament be made; (3) an agreement, not in itself invalid, made by the majority of the shareholders, cannot be rescinded by resolutions passed by persons afterwards becoming shareholders, although they may then constitute the majority.—*GREAT WESTERN RY. CO. v. BIRMINGHAM & OXFORD JUNCTION RY. CO.* (1848), 2 Ph. 597; 5 Ry. & Can. Cas. 241; 17 L. J. Ch. 243; 10 L. T. O. S. 497; 12 Jur. 106; 41 E. R. 1074, L. C.

Annotations:—*As to* (1) *Consd.* *Shrewsbury & Chester v. Shrewsbury & Birmingham Ry.* (1851), 1 Sim. N. S. 410. *As to* (2) *Refd.* *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331. *Generally, Refd.* *West Cornwall Ry. v. Mowatt* (1848), 12 Jur. 407; *Bourgoin v. Compagnie du Chemin de Fer de Montréal Ottawa, et Occidental* (1880), 5 App. Cas. 381.

Whether directors personally liable.—*See AGENCY*, Vol. I., pp. 647, 663, Nos. 2668, 2671, 2785.

8336. Cheque drawn by directors—In fraud of company—Not purporting to be drawn on behalf of company.—A., B., & C., three directors of a railway co., in fraud of the co., drew a cheque upon the co.'s bankers in favour of one of their body. This cheque, though bearing the stamp usually impressed upon documents issued by the co., & countersigned by the secretary, did not upon the face of it purport to be drawn on behalf of the co., nor did the drawers describe themselves therein as directors:—*Held*: the co. were not liable for the amount of a *bonâ fide* holder for value.—*SERRELL v. DERBYSHIRE, ETC., RY. CO.* (1850), 9 C. B. 811; 19 L. J. C. P. 371; 137 E. R. 1110; *sub nom.* *SORRELL v. DERBYSHIRE, STAFFORDSHIRE & WORCESTERSHIRE JUNCTION RY. CO.*, 15 L. T. O. S. 254.

Annotation:—*Mentd.* *London & County Banking Co. v. Groome* (1881), 8 Q. B. D. 288.

8337. Presentment delayed at request of chairman.—A railway co. had entered into an agreement with a landowner for the purchase of land A. They found that they did not at the time require this land, but required immediately land B., belonging to the same landowner. He consented to sell them B. if they would at the same time pay for A. The finance committee of the co. drew a cheque for the price of A. & another for the price of B., & left the chairman to make the best arrangement he could with the landowner. The agent of the landowner received both cheques, upon an agreement that the cheque for B. should not be presented for a week, to give time for the completion of a more formal agreement as to the purchase of A. than that which had been executed. The preparation of the agreement having been delayed beyond the week, communications took place between the chairman of the finance committee—who was one of the drawers of the cheque—and the landowner's solr., in which the former desired that the cheque might continue to be retained, as the agreement was not completed. It appeared that the fact of the cheque being outstanding had been the subject of discussion in the finance committee, & had been considered by them unsatisfactory. Before the execution of the agreement, & before the presentation of the cheque, the bank failed on which it was drawn, & in which the chairman was a partner:—*Held*: whether the chairman, in desiring the presentation

Sect. 12.—Powers and liabilities: Sub-sect. 4, B. (a) (b); sub-sects. 5 & 6. Sect. 13: Sub-sects. 2.]

of the cheque to be delayed, was acting *ultra vires* or not, his act was sanctioned by the committee & bound the co., & the co., & not the landowner, must bear the loss.

Semble: the chairman was not acting *ultra vires*, being one of the drawers of the cheque.—WARD (LORD) v. OXFORD RY. CO. (1852), 2 De G. M. & G. 750; 22 L. J. Ch. 905; 22 L. T. O. S. 13; 1 W. R. 9; 42 E. R. 1065, L. J.J.

8338. Contract made with provisional directors Before flotation—Failure of flotation.]—A railway co. being incorporated by Act of Parliament to construct a railway, the original directors entered into a contract with a promoter to float the co. The promoter appointed a provisional board, by whom a contract was entered into, in the name of the co., with a contractor for the construction of the railway. The promoter did not float the co., & the agreement with him fell through, the capital being raised from another source:—*Held*: the contract for the construction of the railway was entered into by persons wholly unauthorised to act as directors of the co., & judgment must be given for debts.—SHARPE v. BRIGHTON & DYKE RY. CO. (1884), 1 T. L. R. 28.

Contracts made by secretary.]—See Sect. 10, *ante*.

Contracts made by servants—Of railway company—For surgical attendance on injured passengers.]—See AGENCY, Vol. I., p. 354, Nos. 623–625.

(b) *Contracts with Directors.*

8339. Validity—In equity.]—A director of a railway co., who was also a member of a mercantile firm, entered into a contract *qua* director with such firm for the supply of certain iron chairs at a fixed price:—*Held*: such a contract although it might be enforced at law, was illegal in equity, upon general equitable principles, & would be set aside; & no question could be raised as to the fairness or unfairness of a contract so entered into.—ABERDEEN RY. CO. v. BLAICKIE BROTHERS (1854), 2 Eq. Rep. 1281; 23 L. T. O. S. 315, H. L.

Annotations:—**Apld.** Flanagan v. G. W. Ry. (1868), L. R. 7 Eq. 116. **Consd.** Costa Rica Ry. v. Forwood, [1901] 1 Ch. 746; Transvaal Lands Co. v. New Belgium (Transvaal) Land & Development Co., [1914] 2 Ch. 488. **Refd.** Stears v. South Essex Gas-Light & Coke Co. (1860), 7 Jur. N. S. 447; Imperial Mercantile Credit Assn. v. Coleman (1871), 6 Ch. App. 558; Murray v. Epsom L. B., [1897] 1 Ch. 35. **Mentd.** Armstrong v. Jackson, [1917] 2 K. B. 222.

8340. — — — Contract for director's own benefit.]—A director of a co. cannot enter into a contract with such co. for his own advantage. Where, therefore, S., a director of a co., had entered into an agreement to occupy certain refreshment rooms at a railway station at a certain rent:—*Held*: (1) he was incompetent to maintain a suit for specific performance, against the co.; (2) any sub-lease made by him of such rooms could not be sustained.—FLANAGAN v. GREAT WESTERN RY. CO. (1868), L. R. 7 Eq. 116; 38 L. J. Ch. 117; 19 L. T. 345.

Annotation:—*Generally*, **Mentd.** County Hotel & Wine Co. v. L. & N. W. Ry., [1919] 2 K. B. 29.

8341. — — — 1845 Act, ss. 85, 86.]—FOSTER v. OXFORD, ETC. RY. CO., No. 8125, *ante*.

8342. — — —.]—KAYE v. CROYDON TRAMWAYS CO., No. 8126, *ante*.

SUB-SECT. 5.—NOTICE.

Compare Part III., Sect. 31, sub-sect. 6, *ante*.

8343. To company — Service — On recognised

attorney.]—An Act of Parliament required that notices of a particular description should be served upon corpns. at their place of business:—*Held*: service upon a person whom the corpns. recognised as attorney, & whose acts in respect of such service it adopted, was valid to support subsequent proceedings taken upon such service.—R. v. MARYPORT & CARLISLE RY. CO. (1850), 15 L. T. O. S. 134.

— — — **Service of process generally.]**—See PRACTICE.

— — — **Acquisition of land compulsorily.]**—See COMPULSORY PURCHASE OF LAND & COMPENSATION, Vol. XI., pp. 172–177, 182–184.

8344. By company—Proof—Notice sent by post —To all names & addresses on list of allottees.]—CARMARTHEN RY. CO. v. WRIGHT, No. 7860, *ante*.

Notice of calls.]—See Sect. 8, sub-sect. 5, C., *ante*.

Notice of forfeiture of shares.]—See Sect. 8, sub-sect. 9, *ante*.

SUB-SECT. 6.—

Compare Part III., Sect. 31, sub-sect. 7, *ante*.

8345. Conversion — By agent — Acting under managing committee.]—*Semble*: an incorporated co. may be guilty of a conversion by the act of their agent, acting under the direction of a committee for managing the affairs of the co.—DUNCAN v. SURREY CANAL (PROPRIETORS) (1821), 3 Stark. 50, N. P.

SECT. 13.—LEGAL PROCEEDINGS BY AND AGAINST PUBLIC COMPANIES.

SUB-SECT. 1.—IN GENERAL.

In general.]—*Compare* Part III., Sect. 33, *ante*; & *see, generally*, CORPORATIONS, Vol. XIII., pp. 413 *et seq.*

8346. By company—Irish company—Security for costs.]—Where an Irish joint-stock co., incorporated by statute, but having no tangible property in this country, sued a deft. in this ct., the proceedings were ordered to be stayed until they gave security for costs.—LIMERICK & WATERFORD RY. CO. v. FRASER (1827), 4 Bing. 394; 1 Moo. & P. 23; 6 L. J. O. S. C. P. 9; 130 E. R. 819.

Annotation:—**Refd.** Kilkenny & G. S. & W. Ry. v. Feilden (1851), 6 Exch. 81.

8347. Against company—Company authorised to sue & be sued in name of treasurer—Enforcement of judgment against treasurer—Mandamus.]—CORPE v. GLYN, No. 8168, *ante*.

Compare No. 8602, *post*.

8348. — — — Parties—Action by shareholders.]—PRESTON v. GRAND COLLIER DOCK CO., No. 7975, *ante*.

— — — — —.]—*See, also*, Nos. 8201, 8271, 8282, 8283, *ante*; & *generally*, Part III., Sect. 33, *ante*.

8349. — — — Action by contractor.]—(1) A bill filed against a co., & two shareholders, as representatives of 62 other shareholders, in which relief was prayed against the co., the two shareholders, & all others the holders of the shares:—*Held*: not demurrable for want of parties.

(2) Where a contractor, in pursuance of a contract with a railway co., for certain consideration advanced money, purchased lands, & completed a portion of the works of the co., & subsequently filed a bill seeking—*inter alia*—to enforce the contract, & obtain a lien on the lands:—*Held*:

notwithstanding its appearing doubtful whether the contract was not *ultra vires* the powers of the co. under their Act of Parliament, the bill was not demurrable for want of equity.—**PICKERING v. ILFRACOMBE RY. CO.** (1866), 15 L. T. 461; 15 W. R. 218.

8350. ——— Action for specific performance of contract—Amalgamation of company.]—In a suit for the specific performance of a contract against a co., who stated in their answer that since the filing of the bill they had become amalgamated with another co. under a different title, the ct. refused to decree specific performance until the amalgamated co. had been made a party to the suit by amendment.—**POWYS v. SHREWSBURY & POTTERIES JUNCTION RY. CO.** (1867), 15 L. T. 602.

8351. ——— Action by unpaid vendor—Receiver obtained by debenture-holders.]—In a suit by an unpaid vendor against a railway co., debenture-holders of the co. who in another suit have obtained a receiver, are properly made co-defts.—**DRAX v. SOMERSET & DORSET RY. CO.** (1869), 38 L. J. Ch. 232; 19 L. T. 626.

Annotation:—Apld. Marling v. Stonehouse & Nailsworth Ry. & Mid. Ry. (1869), 17 W. R. 484.

8352. ——— Line worked by another company.]—A railway co., working the line of another co. under a traffic arrangement, is properly made a party to a suit for enforcing a lien upon, or otherwise with reference to, any portion of the line so worked.—**MARLING v. STONEHOUSE & NAILSWORTH RY. CO.** (1869), 38 L. J. Ch. 306; 17 W. R. 484.

Annotation:—Folld. Goodford v. Stonehouse & Nailsworth Ry. (1869), 38 L. J. Ch. 307.

8353. ——— ——— ———.]—A railway co. working the line of another co., under parliamentary powers, is a proper & necessary party to a bill for specific performance filed by an unpaid vendor against that other co., & must bear its own costs of the suit.—**GOODFORD v. STONEHOUSE & NAILSWORTH RY. CO.** (1869), 38 L. J. Ch. 307; 20 L. T. 137; 17 W. R. 515.

8354. Against directors—Parties—Whether company or shareholder.]—A bill was filed by a shareholder in a waterworks co., incorporated by Act of Parliament, on behalf of himself & the other shareholders, except defts., against the co., the directors, & the promoters of a rival bill in Parliament, withdrawn in the session of 1874, alleging that the withdrawal of such bill was the result of a corrupt agreement between the directors & the promoters; that the directors had paid to the promoters, out of the funds of the co., the sum of £5,500 in pursuance of the agreement; that the promoters well knew that that sum was paid out of the funds of the co., & the directors had no authority to pay it; & that no resolution was ever passed at any meeting of the shareholders authorising or confirming such payments; & charging that the sum of £5,500 was illegally paid out of the funds of the co. to the promoters, with notice that the same was so paid to them illegally & by a breach of trust, & that they concurred therein; & praying a declaration that the agreement & the payment of the £5,500 was not binding on the co.; that an account might be taken of the moneys so paid, & that the directors & promoters might repay the same, with interest:—*Held*: on demurrer, the bill could not be sustained, for the co. were the proper pltf. in a suit to bring back the fund, & it was not alleged that they refused to institute a suit, or that there was anything to prevent their doing so.

Leave to amend was given.—**RUSSELL v. WAKEFIELD WATERWORKS CO.** (1875), L. R. 20 Eq.

474; 44 L. J. Ch. 496; 32 L. T. 685; 23 W. R. 887.

Annotations:—Refd. Whitwam v. Watkin (1898), 78 L. T. 188. *Mentd. Duckett v. Gover* (1877), 25 W. R. 554; *Moxham v. Grant*, [1900] 1 Q. B. 88; *Towers v. African Tug Co.*, [1904] 1 Ch. 558; *Russell v. Amalgamated Soc. of Carpenters & Joiners*, [1912] A. C. 421.

8355. ——— By company—Leave to serve third party notices—On all shareholders.]—An application by deft. in an action for leave to serve a notice on a third party under R. S. C., 1875, Ord. 16, r. 18, ought to be made on notice to pltf. & not *ex p.*

In an action by a co. against its directors & others, seeking to make defts. personally liable in respect of certain dividends alleged to have been improperly paid out of capital, defts. applied under Order XVI., rule 18, for leave to serve third party notices on all the shareholders of the co., 450 in number, on the ground that if they, defts., were held liable, they would have a right over against the shareholders to recover from them the sums received by them by way of dividend:—*Held*: this was a case in which the granting of the leave asked would or might materially embarrass pltf. in the conduct of their action, & therefore, the ct., in the exercise of its discretion, ought to refuse the application.—**WYE VALLEY RY. CO. v. HAWES** (1880), 16 Ch. D. 489; 50 L. J. Ch. 225; 43 L. T. 715; 29 W. R. 177, C. A.

Annotations:—Expld. Furness, Withy & Co. v. Pickering, [1908] 2 Ch. 224. *Mentd. Corrie v. Allen* (1883), 48 L. T. 464.

Compare No. 3368, ante.

8356. ——— By shareholder—Costs.]—In a bill by one shareholder, on behalf of himself & all others except defts., to restrain the directors from improper dealings with the co.'s funds; such funds do not belong to pltf. as *cestuis que trust* thereof, so as to entitle him, in the event of success, to his costs thereof as between solr. & client.—**MORGAN v. GREAT EASTERN RY. CO.** (No. 2) (1863), 1 Hem. & M. 560; 71 E. R. 246.

Bankruptcy proceedings by company.]—*See* BANKRUPTCY & INSOLVENCY, Vol. IV., pp. 110, 111, 126, 134, 136.

Personal liability of company's officers.]—*See* Nos. 8168, 8169, *ante*.

Execution against rolling-stock, *see* RAILWAYS & CANALS.

SUB-SECT. 2.—ARBITRATION.

See, generally, ARBITRATION, Vol. II., pp. 305 *et seq.*; & *COMPULSORY PURCHASE OF LAND & COMPENSATION*, Vol. XI., pp. 189 *et seq.*

8357. Requisites of valid submission—Agreement by secretary in writing not under seal—1845 Act, s. 97.]—Where land is required for the purposes of a railway co., under the Lands Clauses Act, 1845 (c. 18), & the parties agree to refer the amount of compensation to arbn., it is unnecessary to go through the form of giving notice of a desire to treat for the land, & to have the matter so settled; & in every such case the submission by writing under the hand of the secretary or clerk of the co. is sufficient, by sect. 25 of that Act.

But such a submission is not rendered valid by 1845 Act, s. 97.—**COLLINS v. SOUTH STAFFORDSHIRE RY. CO.** (1851), 7 Exch. 5; 21 L. J. Ex. 247; 18 L. T. O. S. 96; 16 Jur. 843; 155 E. R. 831.

Annotations:—Mentd. R. v. Manchester, etc. Ry. (1854), 4 E. & B. 88; *Martin v. Leicester Waterworks Co.* (1858), 3 H. & N. 463.

8358. Effect of agreement to refer—Ouster of jurisdiction of court.]—An Act of Parliament

Sect. 13.—Legal proceedings by and against public companies: Sub-sect. 2. Sect. 14: Sub-sect. 1.]

amalgamating the C. & G. Ry. Cos. provided that, with a view to the proper division of profits in manner therein mentioned between the shareholders of the two cos., the auditors of the G. Co. should determine what portion of the general charges, arising in respect of the C. line, was to be charged against the revenues of each co., provided that in estimating the revenue of the C. Co. the fares charged by the G. Co. in respect of traffic passing partly over the C. line & partly over any other line belonging to the G. Co., should be apportioned according to the mileage traversed. The Act further provided that in case of differences between the shareholders of the C. Co. & the G. Co., affecting the interests of the shareholders of the C. Co., they might require a general meeting to be held, & upon the attendance of a certain proportion of shareholders might elect, or require to be appointed, two arbitrators, & that all questions in difference should be referred to such arbitrators or their umpire, whose decision should be final. A dispute having arisen between some of the C. shareholders & the G. Co. regarding the amount of deductions to be made from the revenue of the C. Co. in respect of the B. line, the running powers over which were vested jointly in the G. & the L. Co.'s, but which, the C. shareholders contended, must for the purpose of the accounts be treated as belonging to the G. Co., two of the C. Co.'s shareholders filed a bill for the purpose of determining the principle upon which the accounts were to be taken:—*Held*: the question being merely one of account as being two classes of shareholders, for the determination of which the Act of Parliament had provided sufficient machinery by means of arbitration, the ct. would not interfere, & the bill was dismissed with costs.—*YOOL v. GREAT WESTERN RY. CO.* (1870), 39 L. J. Ch. 562; 22 L. T. 781; 18 W. R. 825.

8359. Appointment of umpire by court—Failure of arbitrators to appoint—Common Law Procedure Act, 1854 (c. 125), s. 12.]—By 1862 Act, ss. 161, 162, on any co. being voluntarily wound up, it is lawful by special resolution to transfer the business, etc., to a new co., provided that any dissentient shareholder may require the liquidators either to abstain from carrying the resolution into effect, or to take his shares at a price, if not agreed upon, to be determined by arbitration under the provisions of 1845 Act.

A dispute as to the price to be paid for his shares having arisen between a shareholder & a co. not a railway co., & the arbitrators having neglected to appoint an umpire:—*Held*: the case was within Common Law Procedure Act, 1854 (c. 125), s. 12, & a judge could therefore, appoint an umpire under that sect.—*Re ANGLO ITALIAN BANK & DE ROSAZ* (1867), L. R. 2 Q. B. 452; 16 L. T. 412; *subsequent proceedings, sub nom. DE ROSAZ v. ANGLO-ITALIAN BANK* (1869), L. R. 4 Q. B. 462.

Personal liability of company's officers.]—*See* Nos. 8168, 8169, *ante*.

SECT. 14.—BORROWING.

SUB-SECT. 1.—POWER TO BORROW.

8360. Borrowing powers exhausted—Validity of further borrowing—Issue of Lloyd's bonds.]—

PART IX. SECT. 14, SUB-SECT. 1.

t. Mortgage.]—The statutory power to borrow money & secure loans

cannot be considered as implying that the co.'s powers to mtge. are to be limited to that object; therefore, a mtge. by the co. of a portion of their

(1) A railway co., after exhausting their Parliamentary borrowing powers, issued bonds in the form known as Lloyd's bonds—viz., an acknowledgment of debt & a covenant to pay with interest on a future day—partly to a contractor & partly to persons who supplied a Parliamentary deposit. At the time of the issue the co. was promoting or contemplating a bill, which was ultimately passed, to enable them to raise further share & loan capital:—*Held*: these facts would not justify the ct. in declaring the bonds illegal.

Semble: a co. intending to issue such bonds to raise a Parliamentary deposit would be restrained before the money was raised; though, after the money had been raised & applied, the ct. would not interfere.

Qu.: whether such bonds would be valid if issued for the purpose of evading the limitations of a co.'s borrowing powers.

(2) A suit by a shareholder to restrain an illegal act must be in form on behalf of all the shareholders, though it may be sustained notwithstanding their opposition.—*WHITE v. CARMARTHEN, ETC. RY. CO.* (1863), 1 Hem. & M. 786; 3 New Rep. 64; 33 L. J. Ch. 93; 9 L. T. 450; 12 W. R. 68; 71 E. R. 344.

Annotations:—*As to* (1) *Refd. Chambers v. Manchester & Milford Ry.* (1864), 5 B. & S. 588; *Re Cork & Youghal Ry.* (1869), 4 Ch. App. 748.

8361. — Issue of debentures.]—A railway co., which had exercised to the full their statutory powers of borrowing, whilst their whole debt was outstanding, executed a debenture for £500 to W. Subsequently, two other debenture-holders recovered judgments against the co., & having issued execution, satisfied their debts to the amount of several thousand pounds. Afterwards, the directors of the co., without the sanction of a general meeting, as required by 1845 Act, s. 39, re-issued debentures to such an amount as, with the existing debentures, did not exceed the statutory powers of the co.:—*Held*: (1) the debenture issued to W. was void *ab initio*; (2) the judgment creditors, since they had been actually paid, could not be treated as trustees for all the debenture-holders; & sect. 39 of the Act is merely discretionary & for the protection of the co., & not of creditors; (3) the debentures issued by the directors subsequently to the payment of the judgment creditors not having been in excess of the co.'s borrowing powers, were valid so far as they were issued for good consideration.—*FOUNTAIN v. CARMARTHEN RY. CO.* (1868), L. R. 5 Eq. 316; 37 L. J. Ch. 429; 16 W. R. 476.

Annotations:—*As to* (1) *Consd. Re Companies Acts, Ex p. Watson* (1888), 21 Q. B. D. 301. *Refd. Re Mersey Ry.* (1895), 64 L. J. Ch. 625. *As to* (2) *Refd. Landowners West of England & South Wales Land Drainage & Inclosure Co. v. Ashford* (1880), 16 Ch. D. 411; *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim* (1883), 24 Ch. D. 85. *Generally, Mentd. Williams v. Carmarthen & Cardigan Ry.* (1868), 19 L. T. 762; *Re Land Credit Co. of Ireland, Ex p. Overend, Gurney* (1869), 4 Ch. App. 460; *Weeks v. Propert* (1873), L. R. 8 C. P. 427; *Colonial Bank of Australasia v. Willan* (1874), L. R. 5 P. C. 417; *Atkins v. Wardle* (1889), 58 L. J. Q. B. 377; *Premier Industrial Bank v. Carlton Manufacturing Co. & Crabtree*, [1909] 1 K. B. 106; *Dey v. Pullinger Engineering Co.*, [1921] 1 K. B. 77.

8362. — Representation that further borrowing valid—Personal liability of directors.]—Defts., directors of a dock co., having fully exercised their power of issuing debentures under their Act, & with knowledge of this fact, authorised the issue of a debenture-bond to plffs., & having received £2,250 in payment for it, applied such moneys in

road being given within the scope of the powers conferred upon the co. to "alienate, sell, or dispose of" lands for the purpose of constructing & work-

extinction of a guarantee on which they had become personally liable for an advance made to their co. Pltfs. finding that the debenture-bond was worthless, brought an action against defts. to recover the amount paid by them for it:—*Held*: defts. were liable for the whole amount paid for the debenture, on the ground that the document itself contained representations that they had had power to issue a bond which would be valid & binding on the co.—*ARNOLD v. ARMISTAGE* (1885), 1 T. L. R. 670.

8363. ———.]—A docks co. were empowered by their special Acts to issue debenture-stock to a fixed amount. Between Apr. 1881 & 1883 various transactions took place between the secretary of the docks co. & the London agents of pltfs. in respect of advances by pltfs. to the co., the usual arrangement being that pltfs. should take a bill of exchange drawn upon the co. by the contractors of the co., & also certificates of debenture-stock, accompanied by a letter from the secretary to the effect that the certificates were a collateral security. The advances were renewed from time to time, & finally consolidated by an agreement of Oct. 20, 1882 made in consideration of a further advance. Some of these certificates were indorsed by G., one of the directors of the docks co., to the effect that the stock represented thereby was within the statutory limit. In Jan. 1883, it came to the knowledge of the docks co. that there had been an over-issue of debenture-stock since Jan. 1881, & that the co. was insolvent. A special Act was obtained under which an arbitrator was appointed to settle the claims arising out of the condition of the co. Under that Act certain classes of debenture-stock were authorised to be issued. Stock under one of these classes was awarded & issued to pltfs. in respect of their loan & interest. The stock was admitted to be worthless, & pltfs. brought an action for damages against the directors & the secretary:—*Held*: pltfs. advanced their money on the faith of the warranty contained in the indorsements on the certificates by G., & were, therefore, entitled to damages against him. The measure of such damages was the difference between the values of the certificates as delivered, & those which ought to have been delivered, which in this case was the whole amount advanced by pltfs. The issue of debenture-stock by way of collateral security was not *ultra vires* Cos. Clauses Act, 1863 (c. 118), s. 22.—*WHITEHAVEN JOINT STOCK BANKING CO. v. REED* (1886), 54 L. T. 360; 2 T. L. R. 353, C. A.

——— **Rights of lender.**]—*See* No. 8408, *post*.

8364. On what securities—Company empowered to issue bonds & debentures.]—(1) The G. railway co. had by their original statute of incorporation no power given to borrow money, but a subsequent statute gave power to borrow money from time to time for maintaining & working their railroad, to pledge the lands, tolls, & revenues for due payment thereof, & to make bonds or debentures for securing the repayment of any sums so borrowed in certain terms:—*Held*: the securities on which the co. had power to borrow were not restricted to bonds or debentures; a statute having passed to legalise a loan of money already illegally made by the G. co. to another co., it became as lawful to apply the funds of the G. co. for that other co. as for maintaining the G. co.'s own railway.

(2) A statute legalised a loan already made of

£250,000 by the G. co. to another co., & also authorised the G. co. to use its funds by loan or otherwise to facilitate access to other railways, provided no such expenditure should be incurred unless sanctioned by a vote of two-thirds of the G. shareholders:—*Held*: a bank, in advancing money to the directors of the G. co., was bound to ascertain for itself, at its own risk, whether the loan was authorised by the G. shareholders, & had no right to assume that the G. directors must have authority to borrow.—*COMMERCIAL BANK OF CANADA v. GREAT WESTERN RY. CO. OF CANADA* (1865), 3 Moo. P. C. C. N. S. 295; 13 L. T. 105; 16 E. R. 112, P. C.

8365. By issue of Lloyd's bonds—Right of holder to sue on bond.]—A railway co. were empowered by their special Act to raise a capital of £555,000, & to raise by mtge. any further sum not exceeding £185,000; but no part of such further sum was to be raised until the whole of the capital had been subscribed for & one-half paid up. Part only of the capital was subscribed for; but the co., being in want of money, determined to borrow £10,000 to enable them to pay debts due to the contractor, engineer, solrs., & for land, & also to meet a claim made by C. for travelling expenses & loss of time. The directors applied to their bankers, & obtained the sum required on the security of the joint & several promissory note of C., the then chairman of the co., & of B., one of the directors. B. having been compelled to pay the money, brought an action against C. for contribution. The board of directors resolved that, "in order to discharge the liability of the chairman in the action of B. against him, the secretary be authorised to seal Lloyd's bonds to the extent of," etc. Bonds were accordingly sealed with the common seal of the co., by each of which the co. "acknowledge that they stand indebted to C. in the sum of £1,000 for money due & owing from the said co. to the said C.; & the said co., for themselves, their successors & assigns, hereby covenant with the said C., his exors., & administrators, to pay to him, his exors., administrators or assigns, the said sum of £1,000," etc. These bonds were delivered to C. & he assigned them to one D. to secure money advanced by him, & with which money the action brought by B. against C. was settled. Subsequently, the directors resolved that the bonds should be redeemed, & that the expenses incurred by the chairman should be paid by the co. out of the first moneys in their hands. In an action brought by C. upon one of these bonds:—*Held*: taking into consideration Railway Regulation Act, 1844 (c. 85), 1845 Act, & the special Act, the bond was illegal, & he could not recover.

As to the point whether the prohibition against borrowing extends to the overdrawing by the co. of the account at their bankers to a small extent for the immediate necessities of the co.; I think the right answer is, that if a co. were permitted to overdraw to a small amount there is no reason why they should not do so to any extent to which their credit would reach (*CROMPTON, J.*).—*CHAMBERS v. MANCHESTER & MILFORD RY. CO.* (1864), 5 B. & S. 588; 4 New Rep. 425; 33 L. J. Q. B. 268; 10 L. T. 715; 10 Jur. N. S. 700; 12 W. R. 980; 122 E. R. 951.

Annotations:—*Folld. Fountaine v. Carmarthen Ry.* (1868), L. R. 5 Eq. 316. *Distd. Re Cork & Youghal Ry.* (1869), 4 Ch. App. 748. *Consd. Landowners West of England & South Wales Land Drainage & Inclosure Co. v. Ashford* (1880), 16 Ch. D. 411; *Yorkshire Ry. Wagon Co. v.*

ing a ry., is not ultra vires.—*BICKFORD v. GRAND JUNCTION RY. CO.* (1877), 1 S. C. R. 696.—*CAN.*

a. ——— *Of future*
KIRKPATRICK v. CORNWALL STREET RY. CO., BANK OF MONTREAL

v. KIRKPATRICK (1901), 2 O. L. R. 113; 21 C. L. T. 368.—*CAN.*

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Maclure (1881), 19 Ch. D. 478. *Reid*. Taylor v. Chichester & Midhurst Ry. (1867), L. R. 2 Exch. 356; Wenlock v. River Dee Co. (1885), 10 App. Cas. 354; *Re* Manchester, Middleton & District Tram. Co., [1893] 2 Ch. 638; *Re* Wrexham Mold & Connah's Quay Ry., [1899] 1 Ch. 440; Payne v. Cork Co., [1900] 1 Ch. 308. *Mentd.* Rashdall v. Ford (1866), L. R. 2 Eq. 750; Webb v. Herne Bay Comrs. (1870), L. R. 5 Q. B. 642; R. v. Reed (1880), 5 Q. B. D. 483; Wauthier v. Wilson (1911), 27 T. L. R. 582.

8366. ———.]—The holders of instruments under the seal of a railway co. given with the knowledge of the shareholders, & acknowledging sums of money to be due from the co.—called Lloyd's bonds—have, notwithstanding Railway Regulation Act, 1844 (c. (85), s. 19, which imposes penalties on a co. for giving loan notes or securities, a valid claim against the assets of the co. for those sums of money, so far as the co. had the benefit of the sums of money in respect of which the instruments were given.—*Re* CORK & YOUGHAL RY. CO. (1869), 4 Ch. App. 748; *sub nom.* *Re* CORK & YOUGHAL RY. CO., *Ex p.* OVEREND, GURNEY & CO., LTD., & LONDON, HAMBURGH & CONTINENTAL EXCHANGE BANK, 39 L. J. Ch. 277; 21 L. T. 735; 18 W. R. 26, L. C. & L. J.

*Annotations:—*Consd. Yorkshire Ry. Wagon Co. v. Maclure (1881), 19 Ch. D. 478. *Apld.* *Re* East & West India Dock Co. (1891), 7 T. L. R. 623. *Consd.* *Re* Wrexham Mold & Connah's Quay Ry., [1899] 1 Ch. 440; *Reversion Fund & Insee. v. Maison Cosway*, [1913] 1 K. B. 364. *Reid.* *Re* National Permanent Benefit Bldg. Soc., *Ex p.* Williamson (1869), 5 Ch. App. 309; *Victoria Permanent Benefit Bldg. Investment & Freehold Land Soc., Hill's Case*, *Jones' Case* (1870), L. R. 9 Eq. 605; *Re* Durham County Permanent Investment Land & Bldg. Soc., *Davis' Case*, *Wilson's Case* (1871), L. R. 12 Eq. 516; *Blackburn Bldg. Soc. v. Cunliffe Brooks* (1882), 22 Ch. D. 61; *Portsea Island Bldg. Soc. v. Barclay*, [1895] 2 Ch. 298; *Re* Johnston Foreign Patents Co., *Re* Johnston Die Press Co., *Re* Johnston Engraving Co., *J. P. Trust v. Above Cos.*, [1904] 2 Ch. 234; *Bannatyne v. MacIver*, [1906] 1 K. B. 103; *Re* Birkbeck Permanent Benefit Bldg. Soc., [1912] 2 Ch. 183. *Mentd.* *Patten v. Bond* (1889), 60 L. T. 583.

8367. ——— **Right of assignee for value without notice to sue on bond—Secret arrangement between company & assignor—Excluding company's liability.]**—To a declaration on a bond made by a railway co. the co. pleaded on equitable grounds that, before the giving of the bond it was agreed by deed between pltf. & the co. that the co. should pay pltf. certain sums in Lloyd's bonds, & that pltf. should pay these bonds as they became due, & all interest on them in the meantime, & should indemnify the co. against the bonds & against all losses, charges, damages, & expenses in respect of them. To this pltf. replied that after the making of the bond sued on he assigned it for valuable consideration to certain persons who had no notice of the arrangement between pltf. & the co. mentioned in the deed, & that pltf. sued as trustee for the assignees of the deed, & for their sole use & benefit:—*Held*: as the railway co. had given these bonds to pltf. for the purpose of raising money upon them, the co. could not, after the bonds had been assigned for valuable consideration, set up as a defence a secret arrangement between themselves & pltf., whereby they should be free from liability.—*DICKSON v. SWANSEA VALE RY. CO.* (1868), L. R. 4 Q. B. 44; 38 L. J. Q. B. 17; 19 L. T. 346; 17 W. R. 51.

*Annotations:—**Reid.* *Higgs v. Assam Tea Co.* (1869), L. R. 4 Exch. 387; *Re* Romford Canal Co., *Pocock's Claim*, *Trickett's Claim*, *Carew's Claim* (1883), 24 Ch. D. 85.

———.]—*See, also*, No. 8360, *ante*.

8368. **By deposit of title deeds—In name of trustees—Whether trustees liable to execution.]**—By agreement a railway co. were to allot paid-up shares to A. & B. as trustees for a banking co., as security for overdrawing their account. The certificate stated that the shares were registered

as paid up, but in the register there was no such entry, whilst in the call book they were stated to have been deposited as security for an overdrawn account. A judgment creditor of the railway co. applied for a *scire facias* against A. & B.:—*Held*: A. & B. were not liable; but the *scire facias* was allowed to issue so that the question might be taken to a ct. of error.—*GUEST v. WORCESTER, ETC. RY. CO.* (1868), L. R. 4 C. P. 9; 38 L. J. C. P. 23.

8369. ——— **Position of mortgagee.]**—(1) A lender to a co. is not bound to see that the loan had been duly authorised by a meeting.

(2) The deposit of deeds of a co. in respect of a past debt is a mtgee. to the extent of the co.'s power to borrow on mtge. then unexhausted, but only entitled to be paid *pari passu* with the mtgees. of the co.'s whole assets, to the extent of the particular assets.

(3) 1845 Act, ss. 41 & 42, requiring mtges. to be duly stamped & the consideration to be duly stated, do not make void an instrument the consideration for which is apparent, though it is not in terms stated.

(4) A provision in a co.'s special Act provided that moneys were to be borrowed by order of a general meeting:—*Held*: to be directory only, & not to postpone money borrowed without such order to other mtges. of the co., ranking in other respects *pari passu*.—*LANDOWNERS WEST OF ENGLAND & SOUTH WALES LAND DRAINAGE & INCLOSURE CO. v. ASHFORD* (1880), 16 Ch. D. 411; 50 L. J. Ch. 276; 44 L. T. 20.

*Annotations:—*As to (1) *Reid.* *Re* Romford Canal Co., *Pocock's Claim*, *Trickett's Claim*, *Carew's Claim* (1883), 24 Ch. D. 85; *Re* Mersey Ry. (1895), 64 L. J. Ch. 625. As to (4) *Reid.* *Re* Patent Ivory Manufacturing Co., *Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156.

8370. **By issue of debentures & debenture-stock—Issue before half capital paid up—Contrary to special Act.]**—By a railway Act, power was given to the directors to borrow money upon debentures, when all the shares should be allotted & half the capital paid up. The co. having a great number of shares unallotted, contracted to sell them to debt. at a discount of £5 per share, & upon payment by debt. of the whole sum agreed upon, the co. were to deliver debentures to the amount of £5 per share to debt., payable three years after date, provided they were in a position legally to do so. At the time of the contract, much less than half the capital had been paid up:—*Held*: the contract could not be enforced.—*WEST CORNWALL RY. CO. v. MOWATT* (1848), 17 L. J. Ch. 366; 12 Jur. 407.

*Annotation:—**Reid.* *Re* Inns of Court Hotel Co. (1868), L. R. 6 Eq. 82.

8371. ——— **Issue by way of collateral security—Validity.]**—*WHITEHAVEN JOINT STOCK BANKING CO. v. REED*, No. 8363, *ante*.

8372. ——— **Issue at discount—Validity.]**—*WEBB v. SHROPSHIRE RYS. CO.*, No. 7969, *ante*.

——— **Nature of debentures—Whether interest in land—Within Mortmain Acts.]**—*See* CHARITIES, Vol. VIII., pp. 272, 273, Nos. 384–390.

——— **Whether bill of sale.]**—*See* BILLS OF SALE, Vol. VII., pp. 28–31.

——— **Stamp duties on issue.]**—*See* Sub-sect. 6, *post*.

8373. **By deposit of securities—To secure repayment of money borrowed in excess of borrowing powers.]**—The deposit of securities, made to secure repayment of money borrowed by a dock co. in excess of its borrowing powers, is good & valid in so far as the money was applied in payment of the dock co.'s debts & liabilities.—*Re*

EAST & WEST INDIA DOCK CO. (1891), 7 T. L. R. 623.

What property may be charged.]—See Subsect. 2, *post*.

SUB-SECT. 2.—SUBJECT-MATTER OF INSTRUMENT OF CHARGE.

8374. "Undertaking"—Meaning.]—(1) The A. ry. co., incorporated by a local Act, being also a land co., transferred by agreement, together with the undertaking, all its property, lands, rights, & appurtenances to the B. ry. co., also incorporated—such agreement being confirmed by a private Act of the Imperial Parliament. The B. ry. co. having borrowed money, issued debentures to secure the same; these were termed mtge. debentures, the principal & interest thereon being secured on the undertaking, & all moneys to arise from the sale of the lands of the co., all future calls on shareholders, & all tolls & sums of money which should become due with the plant & rolling-stock, & with power of entry & possession of the same, on failure by the co. of payment of principal & interest as therein specified, with a proviso that nothing therein contained should be held to limit the power of sale or appropriation by the co. of any of the lands of the co., nor constitute a charge on the same. These bonds were not registered:—*Held*: (1) such debentures did not constitute a charge in the nature of an equitable mtge. on the lands of the co., so as to give the holders of such debentures a right to restrain the sale of the lands by judgment creditors of the co., or any title to the proceeds of the lands when sold; (2) as judgment creditors under an execution take the precise interest, & no more, which the debtor possesses in the property seized, the sale being a sale by the law, & not by the co., such judgment creditors took the lands subject to any incumbrances, legal or equitable, that they were subject to in the hands of the co.

(2) A transfer of the "undertaking" of a railway does not *prima facie* include the lands of the co.—*WICKHAM v. NEW BRUNSWICK & CANADA RY. CO.* (1865), L. R. 1 P. C. 64; 3 Moo. P. C. C. N. S. 416; 35 L. J. P. C. 6; 14 L. T. 311; 12 Jur. N. S. 34; 14 W. R. 251; 16 E. R. 158, P. C.

Annotation:—As to (1) & (2) *Refd.* *Re Panama, New Zealand & Australian Royal Mail Co.* (1869), 39 L. J. Ch. 162.

8375. —.].—(1) A mtge. debenture made by a railway co. in the form given in 1845 Act, Sched. C., does not give the debenture-holder a specific charge upon the surplus lands of the co., or the proceeds of the sale of them, so as to entitle him to an order for a receiver of the sale moneys or interim rents. The "undertaking" of a railway co. which is pledged in such a mtge., is the going concern created by the Act, which cannot be broken up or interfered with by the mtgee.: the "sums of money" are moneys *ejusdem generis* as the tolls, & are the earnings of the undertaking, which may be made available to satisfy the mtge. A railway co. may give a specific charge on the moneys to arise from the sale of its surplus lands for a debt due to the contractors who have constructed the works.

(2) The ct. will not appoint a manager of a railway.—*GARDNER v. LONDON, CHATHAM & DOVER RY. CO.* (No. 1), *DRAWBRIDGE v. SAME*, *GARDNER v. SAME* (No. 2), *IMPERIAL MERCANTILE CREDIT ASSOCN. v. SAME* (1867), 2 Ch. App. 201;

36 L. J. Ch. 323; 15 L. T. 552; 31 J. P. 87; 15 W. R. 325, L. JJ.

Annotations:—As to (1) *Distd.* *Re Panama, New Zealand & Australian Royal Mail Co.* (1870), 5 Ch. App. 318. *Consd.* *Chandler v. Howell* (1876), 4 Ch. D. 651. *Expld. & Apld.* *Re Mitchell's Estate, Mitchell v. Moberly* (1877), 6 Ch. D. 655. *Consd.* *Attree v. Hawe* (1878), 9 Ch. D. 337; *Re Cornwall Minerals Ry.* (1882), 48 L. T. 41; *Re Hull, Barnsley & West Riding Junction Ry.* (1888), 40 Ch. D. 119. *Expld.* *Redfield v. Wickham Corp.* (1888), 13 App. Cas. 467. *Apld.* *Blaker v. Herts & Essex Waterworks Co.* (1889), 41 Ch. D. 399. *Consd.* *Re David, Buckley v. Royal National Lifeboat Institution* (1889), 41 Ch. D. 168. *Apld.* *Re Yerbury's Estate, Ker v. Dent* (1889), 62 L. T. 55. *Consd.* *Re Parker, Wignall v. Park*, [1891] 1 Ch. 682; *Whadcoat v. Shropshire Rys.* (1893), 9 T. L. R. 589; *Marshall v. South Staffordshire Tram. Co.*, [1895] 2 Ch. 36; *Pegge v. Neath District Tram. Co.*, [1895] 2 Ch. 508; *Re Crossley, Birrell v. Greenhough*, [1897] 1 Ch. 928. *Refd.* *Bowen v. Brecon Ry., Ex p. Howell* (1867), L. R. 3 Eq. 541; *Re Cambrian Rys. Scheme* (1867), 3 Ch. App. 280, n.; *Imperial Mercantile Credit Asscn. v. Newry & Armagh Ry. & Joint Stock Discount Co.* (1868), 16 W. R. 1070; *Re New Clydach Sheet & Bar Iron Co.* (1868), L. R. 6 Eq. 514; *Re Exmouth Docks Co.* (1873), L. R. 17 Eq. 181; *Holdsworth v. Davenport* (1876), 3 Ch. D. 185; *Re Herne Bay Waterworks Co.* (1878), 10 Ch. D. 42; *Brocklehurst v. Railway Printing & Publishing Co.*, [1884] W. N. 70; *Re Christmas, Martin v. Lacon* (1885), 30 Ch. D. 544; *Re Watts, Cornford v. Elliott* (1885), 33 W. R. 885; *Re Hatton, Robson v. Gibbs* (1888), 4 T. L. R. 311; *Re Barton-upon-Humber & District Water Co.* (1889), 42 Ch. D. 585; *Re David, Buckley v. Royal National Lifeboat Institution* (1889), 43 Ch. D. 27; *Re Hallett, Howarth v. Massey* (1889), 5 T. L. R. 285; *Re Eastern & Midlands Ry.* (1890), 45 Ch. D. 367; *Re East & West India Dock Co.* (1891), 7 T. L. R. 623; *Re Portsmouth Borough (Kingston, Fratton & Southsea) Tram. Co.*, [1892] 2 Ch. 362; *Driver v. Broad*, [1893] 1 Q. B. 744; *Re Pickard, Elmsley v. Mitchell*, [1894] 3 Ch. 704; *Re Mersey Ry., Gibbs v. Mersey Ry.* (1895), 11 T. L. R. 390; *Re Knott End Railway Act, 1898*, [1901] 2 Ch. 8; *Stagg v. Medway (Upper) Navigation Co.*, [1903] 1 Ch. 169; *Central Ontario Ry. v. Trusts & Guarantee Co.*, [1905] A. C. 576; *Boehm v. Goodall*, [1911] 1 Ch. 155. *Re Woking Urban Council (Basingstoke Canal) Act, 1911*, [1914] 1 Ch. 300. As to (2) *Consd.* *Re Manchester & Milford Ry., Ex p. Cambrian Ry.* (1880), 14 Ch. D. 645; *Reid v. Explosives Co.* (1886), 56 L. J. Q. B. 68. *Apld.* *Blaker v. Herts & Essex Waterworks Co.* (1889), 41 Ch. D. 399. *Distd.* *Bartlett v. West Metropolitan Tram. Co.*, [1893] 3 Ch. 437. *Refd.* *Griffin v. Bishop's Castle Ry.* (1867), 15 W. R. 1058; *Re Cornwall Minerals Ry.* (1882), 48 L. T. 41; *De Grelle, Houdret v. Bull* (1894), 1 Mans. 118; *Boehm v. Goodall*, [1911] 1 Ch. 155. *Generally, Mentd.* *Bourgoin v. Compagnie du Chemin de Fer de Montreal, Ottawa et Occidental* (1880), 5 App. Cas. 381; *Makins v. Ibbotson* (1890), 60 L. J. Ch. 164; *Re Thompson, Bedford v. Teal* (1890), 45 Ch. D. 161; *Sadler v. Worley*, [1894] 2 Ch. 170; *Re Crystal Palace Co., Fox v. Crystal Palace Co.* (1911), 104 L. T. 898.

8376. —. —.].—The "undertaking" of a railway co., which is pledged in a mtge., is the going concern of the co., & does not give the right to any specific charge on the surplus lands, or the proceeds thereof if sold.—*Re YERBURY'S ESTATE, KER v. DENT* (1889), 62 L. T. 55.

Annotations:—*Refd.* *Re Parker, Wignall v. Park*, [1891] 1 Ch. 682; *Re Pickard, Elmsley v. Mitchell*, [1894] 3 Ch. 704.

8377. Land—Whether title acquired by mortgage.]—A railway Act empowered the co. to purchase land for the purposes of the Act, to levy tolls for carriage on the railway, & to regulate such carriage. No other person was empowered to take tolls. The Act likewise authorised them to borrow money, & to assign & charge "the property of the said undertaking, & the rates, tolls, & other sums arising or to arise by virtue of this Act," as security. It gave a form of mtge., by which the co. were to assign "the said undertaking, & all & singular the rates, tools, & other sums arising," etc. Mtgees. were to be entitled, one with the other, to their proportions of the said rates, tolls, & sums & premises, according to the sums advanced, without preference by reason of priority in date of mtge., etc. Parties holding mtges. were not on that account to be deemed shareholders:—*Held*: by such mtge. the mtgee. did not acquire title to the land, & he could not bring

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ejectment as on a demise of "the said undertaking, & all & singular the rates, tolls," etc., arising by virtue of the Act.—*DOE d. MYATT v. ST. HELEN'S & RUNCORN GAP RY. CO.* (1841), 2 Q. B. 364; 2 Ry. & Can. Cas. 756; 1 Gal. & Dav. 663; 11 L. J. Q. B. 6; 6 Jur. 640; 114 E. R. 144.

Annotations:—*Consd.* Walker v. Milne (1849), 18 L. J. Ch. 288. *Distd.* Ashton v. Langdale (1851), 4 De G. & Sm. 402. *Expld.* Wickham v. New Brunswick & Canada Ry. (1865), L. R. 1 P. C. 64. *Consd.* Re Mitchell's Estate, Mitchell v. Moberly (1877), 6 Ch. D. 655. *Refd.* Hart v. Eastern Union Ry. (1852), 7 Exch. 246; Fripp v. Chard Ry., Fripp v. Bridgewater & Taunton Canal, etc. Co. (1853), 11 Haro, 241; Attree v. Hawe (1878), 9 Ch. D. 337; Re Woking Urban Council (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300. *Mentd.* Re Panama, New Zealand & Australian Royal Mail Co. (1869), 39 L. J. Ch. 162; Re Parker, Wignall v. Park, [1891] 1 Ch. 682.

8378. & proceeds.]—FURNESS v. CATERHAM RY. CO., No. 8448, post.

8379. —.]—A mtge. or bond for securing money borrowed by a railway co., according to the form in 1845 Act, Sched. C., comprises the lands as well as the rails & chattels of the co., & is entitled to priority over a writ of *elegit* sued out against the co. by a judgment creditor thereof.

Where, therefore, a railway co. borrowed money from various persons on mtge., according to the form in the above schedule, the ct., at the instance of a mtgee., who sued on behalf of himself & all other the mtgees. of the co., restrained the sheriff from delivering legal possession of the co.'s lands & rails to a creditor of the co., who was the contractor who had constructed the railway, & had obtained judgment against the co., & had sued out a writ of *elegit* thereon.—*LEGG v. MATHIESON* (1860), 2 Giff. 71; 29 L. J. Ch. 385; 2 L. T. 112; 6 Jur. N. S. 1010; 66 E. R. 31.

Annotations:—*Refd.* Wildy v. Mid-Hants Ry. (1868), 18 L. T. 73; Edwards v. Standard Rolling Stock Syndicate, [1893] 1 Ch. 574; Re London Pressed Hinge Co., Campbell v. London Pressed Hinge Co., [1905] 1 Ch. 576.

8380. —.]—WICKHAM v. NEW BRUNSWICK & CANADA RY. CO., No. 8374, ante.

8381. — Superfluous lands & proceeds.]—*GARDNER v. LONDON CHATHAM & DOVER RY. CO.* (No. 1), *DRAWBRIDGE v. SAME*, *GARDNER v. SAME* (No. 2), *IMPERIAL MERCANTILE CREDIT ASSOCN. v. SAME*, No. 8375, ante.

8382. —.]—*Re YERBURY'S ESTATE, KER v. DENT*, No. 8376, ante.

—.]—*See, generally*, COMPULSORY PURCHASE OF LAND & COMPENSATION, Vol. XI., p. 289, Nos. 2178, 2179.

Rolling-stock—Rights of debenture-holders.]—*See* Nos. 8389, 8407, post.

8383. Call made but not payable.]—Defts. signed judgment against a railway co. on Feb. 9, 1866, & on July 31, obtained a garnishee order *nisi* under the Common Law Procedure Act, 1854 (c. 125), whereby it was ordered that all debts due & owing or accruing due from P., a shareholder in the co., should be attached to answer the judgment. On May 12, pltfs.—the contractors for the line—received from the co.'s engineer a certificate in the form agreed on by the co., that £96,200 was due to them for work done & materials supplied under the arts. of agreement, one of the clauses of which authorised the engineer from time to time to "ascertain the extent & value of the works then executed & the materials then provided for the works by the contractors." Of this a sum of £11,000 represented materials provided for, but not actually affixed to, the line. On June 4, 1866, the co. issued to pltfs. paid-up shares to the amount of £52,200 in part-satisfaction of the sum so certified to be due. On June 11, they made a

call of £5 per share, payable on July 14; & on July 13, they, by a deed reciting that they were indebted to pltfs. in £40,000, assigned the call to them by way of security, with a power of sale at any time after Oct. 13. Before the garnishee order was made absolute, pltfs. claimed from P. £1,000, being the amount of the call due upon 200 shares held by him; & the judge directed an issue, to try the validity of the assignment. P. had no actual notice of the assignment, but he was present as a director at the board meetings at which it was resolved that the assignment should be made:—*Held*: it was competent to the co.'s engineer to certify for "materials"; the co. might properly assign the call as security for a *bona fide* debt, though the time for payment of the call had not yet arrived; the assignment was not rendered invalid by the power of sale, inasmuch as the exercise of that power might be restrained by injunction, or that part of the deed rejected; &, if notice were necessary in such a case—which the ct. inclined to think it was not—P. had such knowledge of the assignment as amounted to notice.—*PICKERING v. ILFRACOMBE RY. CO.* (1868), L. R. 3 C. P. 235; 37 L. J. C. P. 118; 17 L. T. 650; 16 W. R. 458.

Annotations:—*Consd.* Vacuum Oil Co. v. Ellis, [1914] 1 K. B. 693. *Refd.* Stagg v. Medway (Upper) Navigation Co., [1903] 1 Ch. 169. *Mentd.* Robinson v. Nesbitt (1868), L. R. 3 C. P. 264; Mosse v. Killick (1881), 44 L. T. 149; Punchard v. Tomkins (1882), 31 W. R. 286; Baker v. Hedgecock (1888), 39 Ch. D. 520; Re Burdett, *Ex p.* Byrne (1888), 20 Q. B. D. 310; Re Leavesley, [1891] 2 Ch. 1; Brunton v. Dixon (1892), 36 Sol. Jo. 556; Farmers & Cleveland Dairies Co. v. Riley (1893), 9 T. L. R. 260; Cole v. Eley, [1894] 2 Q. B. 180; Royal Exchange Assco. Corpn. v. Sjörforsakrings Akt. Vega, [1901] 2 K. B. 567; Wild v. Simpson, [1919] 2 K. B. 544.

8384. Gross traffic receipts.]—Pltf. on behalf of himself & all other the debenture-stock holders of deft. co. claimed a declaration that they were entitled to a first charge on the gross traffic receipts arising under an agreement made between deft. co. & the G. W. Ry. Co. scheduled to the Wye Valley Railway Act, 1866 (c. cclvii.), & confirmed & made binding upon the cos. parties thereto by sect. 53 of that statute. Clause 11 of the agreement provided that the interest on the bonds & debentures of deft. co. not exceeding £76,600 should be a first charge on the gross receipts, & should be paid thereout by the G. W. Ry. Co., & should be repaid to that co. by deft. co. out of its proportion of the divisible receipts from time to time; & that in case of any deficiency of such proportion in any half-year the amount of such deficiency should be a charge on any moneys payable by the G. W. Ry. Co. to deft. co. in any subsequent half-year. Deft. co. sought to apply out of gross traffic receipts moneys required for the purpose of discharging certain outgoings which were absolutely necessary in connection with the branches or subsidiary works of deft. co.'s undertaking:—*Held*: pltf.'s charge had absolute priority over the claim made by deft. co.—*PROFFITT v. WYE VALLEY RY. CO.* (1891), 64 L. T. 669, C. A.

8385. Chattels—Navigation company empowered to mortgage undertaking.]—A co. which was formed under a private Act for the maintenance of the navigation of a river, had power to borrow money on a mtge. of its undertaking. The co. was empowered to levy tolls & own barges for carrying goods:—*Held*: the co. had power to mtge. their barges.—*REEVE v. MEDWAY (UPPER) NAVIGATION CO.* (1905), 21 T. L. R. 400.

See, also, No. 8404, post.

8386. Property abroad.]—*CROSS v. IMPERIAL CONTINENTAL GAS ASSOCN.*, No. 8200, ante.

SUB-SECT. 3.—EXERCISE OF POWERS.

A. What constitutes Borrowing.

8387. Overdraft.]—CHAMBERS v. MANCHESTER & MILFORD RY. CO., No. 8365, *ante*.

8388. —.]—A banking co. permitted their customers, a railway co., to draw cheques against a sum entered in the books of the bank under the title "Loan Account." The co. being insolvent, the claim of the bank was disputed as being an unauthorised loan:—*Held*: though the transactions between the banking co. & the railway co. were recorded in the bank books under the title of "Loan Account," yet they were not the less mere overdrawn in the regular course of a banking business, & there was no borrowing or loan, in the proper sense of the word, which could be questioned as *ultra vires*.—WATERLOW v. SHARP, GARDNER v. SHARP (1869), L. R. 8 Eq. 501; 20 L. T. 902; *subsequent proceedings*, 20 L. T. 903.

Annotations:—*Consd.* Looker v. Wrigley, Leigh v. Wrigley (1882), 9 Q. B. D. 397. *Refd.* Colonial Bank of Australasia v. Willan (1874), L. R. 5 P. C. 417; Brooks v. Blackburn Benefit Soc. (1884), 9 App. Cas. 857.

8389. Sale of rolling-stock—& hire of rolling-stock from purchaser—At annual rent sufficient to repay purchase-money & interest—Option of re-purchase at end of term.]—(1) A railway co. being in want of money, & being advised that they had no power to borrow, sold part of their rolling-stock to a wagon co. for £30,000, at the same time making a contract with the wagon co. for the hire of the same rolling-stock at a rent which would repay the £30,000 with interest in five years, & then for its re-purchase at a nominal price. At the same time three of the directors guaranteed to the wagon co. the payment of the rent. The wagon co. brought an action against the railway co. & the sureties for non-payment of rent due:—*Held*: the transaction was not a borrowing of money, but a *bona fide* sale & hiring of the rolling-stock, & was valid both against the railway co. & the sureties.

(2) Observations on the rights of debenture-holders over the rolling-stock of a railway co.—YORKSHIRE RAILWAY WAGON CO. v. MACLURE (1882), 21 Ch. D. 309; 51 L. J. Ch. 857; 47 L. T. 290; 30 W. R. 761, C. A.

Annotations:—*As to* (1) *Consd.* *Re* Yarrow, Collins v. Weymouth (1889), 59 L. J. Q. B. 18; Madell v. Thomas (1890), 60 L. J. Q. B. 227; *Re* Watson, *Ex p.* Official Receiver in Bankruptcy (1890), 25 Q. B. D. 27; Beckett v. Tower Assets Co., [1891] 1 Q. B. 1. *Expld.* *Re* Eastern & Midland Ry. (1891), 65 L. T. 668. *Refd.* *Re* Liskeard & Caradon Ry., [1903] 2 Ch. 681; Wauthier v. Wilson (1912), 28 T. L. R. 239; British Ry. Traffic & Electric Co. v. Kahn, [1921] W. N. 52. *As to* (2) *Consd.* *Re* Cornwall Minerals Ry. (1882), 48 L. T. 41; *Re* Liskeard & Caradon Ry., [1903] 2 Ch. 681. *Generally*, *Mentd.* Phillips v. London School Board, Cockerton v. London School Board (1897), 77 L. T. 397.

8390. —.]—The B. co., being in want of money & being in possession of certain wagons in which they had an interest, applied to resps., who agreed to buy the wagons for £1,000, & advanced that sum, £257 thereof being paid to the owners of the wagons & the rest, £743, to the B. co. Resps. received from the B. co. an invoice for the wagons & a receipt for the £743, & from the owner of the wagons a receipt for the £257. At the same time resps. leased the wagons to the B. co. for three years, at a yearly rent payable quarterly & calculated to replace the

£1,000 with seven per cent interest, upon the terms that if all the payments were duly made the B. co. should have the option of purchasing the wagons at the end of the lease for a nominal sum, & that if the rent was not duly paid after demand resps. should be entitled to re-possess & enjoy the wagons as in their former estate, & that the agreement should thereupon cease & determine. The B. co. having made default in payment of the rent, resps. claimed the wagons from a railway co. into whose possession they had come, but were resisted on the ground that the transaction was void under Bills of Sale Acts, 1878 (c. 31), & 1882 (c. 43), the documents not being in the form prescribed by those Acts for bills of sale:—*Held*: the transaction was in fact a purchase by resps., & was not a mtge. by the B. co. or a security for the payment of money.—MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. v. NORTH CENTRAL WAGON CO (1888), 13 App. Cas. 554; 58 L. J. Ch. 219; 59 L. T. 730; 37 W. R. 305; 4 T. L. R. 728, H. L.; *affg.* S. C. *sub nom.* NORTH CENTRAL WAGON CO. v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. (1887), 35 Ch. D. 191, C. A.

Annotations:—*Consd.* French v. Bombardier (1888), 60 L. T. 48; Haydon v. Brown (1888), 59 L. T. 810; *Re* Yarrow, Collins v. Weymouth (1889), 59 L. J. Q. B. 18; Beckett v. Tower Assets Co., [1891] 1 Q. B. 1. *Expld.* & *Distd.* *Re* Whiteley, *Ex p.* Smith (1892), 66 L. T. 291. *Refd.* Redhead v. Westwood (1888), 59 L. T. 293; *Re* Watson, *Ex p.* Official Receiver in Bankruptcy (1890), 25 Q. B. D. 27; Secretary of State in Council of India v. British Empire Mutual Life Assce. (1892), 67 L. T. 434; Clapham v. Ives (1904), 91 L. T. 69; National Provincial & Union Bank of England v. Lindsell (1921), 91 L. J. K. B. 196. *Mentd.* Newlove v. Shrewsbury (1888), 21 Q. B. D. 41; *Re* Yates, Batchelor v. Yates (1888), 38 Ch. D. 112; Jones v. Tower Furnishing Co. (1889), 61 L. T. 84; Grigg v. National Guardian Assce., [1891] 3 Ch. 206; *Re* Hood, *Ex p.* Burgess (1893), 9 T. L. R. 541; Ramsay v. Margrett, [1894] 2 Q. B. 18.

8391. —.]—*Re* EASTERN & MIDLANDS RY. CO., No. 8407, *post*.

"Issue of loan capital"—Within Revenue Act, 1899 (c. 9), s. 8.]—*See* Sub-sect. 6, *post*.

B. Compliance with Formalities.

8392. Mortgage not in statutory form—Not registered—Mortgaged property not within special Act—Mortgage valid.]—By 7 & 8 Vict. c. lxxix., certain persons were incorporated as commissioners, for the purpose of "constructing tidal basins, a dock, & other works at Birkenhead"; & by 11 & 12 Vict. c. cliv., certain trustees were substituted for these commissioners; & the property which was vested in the commissioners by virtue of the former Act, was, by the subsequent Act, vested in the trustees. By sect. 39 of the former Act, the commissioners were empowered to borrow at interest on the credit of the several rates & tolls by that Act granted, & of any property which might be vested in the commissioners by virtue of that Act, any sums of money, so that the amount owing by them did not at any one time exceed a certain specified sum; & for securing the repayment of the monies so borrowed, the commissioners might assign over the said rates, tolls, & property to the person who should advance or lend such money, as a security for the money so borrowed. By sect. 40, such mtge. was to be by deed duly stamped, etc., & might be according to the form given in the schedule to the Act. By sect. 41, such mtgees. were to be creditors on the

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b. Resolution passed by wrongly constituted board.]—A co. were empowered to borrow money for purposes specified, & through their president to make notes, etc. The president, acting upon a resolution of the directors,

signed the note in question, but it appeared that the directors had not been appointed as required by the Act:—*Held*: the resolution sufficiently complied with the Act; and as the statute empowered the directors to authorise the president to sign notes,

& pltf. had accepted such notes in good faith, & the proceeds had been applied for the benefit of the co., it might be presumed that the proper authority had been given.—CURRIER v. OTTAWA GAS CO. (1868), 18 C. P. 202.—CAN.

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rates or tolls & property equally. By sect. 43, a register of such mtges. was to be kept, & to be open to inspection. By sect. 57, the commissioners were empowered to purchase certain lands, & to agree with the parties interested in such lands for the purchase for a consideration in money, etc. After a portion of the works had been completed, the trustees, who were indebted to their contractor for the execution of a part of the works, by two several indentures assigned to him by way of mtge. all the plant, goods, machinery, & working materials in use in & about the docks. These deeds were not in the form given by the Act, nor were they registered:—*Held*: as the property assigned by these deeds was not such property as that contemplated by sect. 39 of the first Act, but was property to which the trustees were entitled independently of the Act, therefore the trustees had an absolute control over it; & the mtges. in question were valid.—*McCORMICK v. PARRY* (1852), 7 Exch. 355; 21 L. J. Ex. 143; 18 L. T. O. S. 291; 155 E. R. 984.

8393. No indorsement of registration on mortgage—Mortgage binding on company.]—By the Act incorporating a co., the co. was empowered to raise a certain amount of money upon mtge. of the harbour, & of the tolls, rates, & duties to arise under the Act; & it was provided that such mtges. should be entered in the books of the co. by the clerks thereof, who were to indorse on such mtges. a memorandum of such entry; & it was thereby declared, that until such entries were made of such mtges., & such indorsements made thereon, the same should not be valid or effectual:—*Held*: certain mtges. made under the powers of the Act were valid & binding upon the co., & those claiming under them, with notice, notwithstanding such mtges. had not been indorsed pursuant to the requisitions of the Act.—*JORTIN v. SOUTH EASTERN RY. CO.* (1855), 6 De G. M. & G. 270; 3 Eq. Rep. 281; 24 L. J. Ch. 343; 25 L. T. O. S. 16; 1 Jur. N. S. 433; 3 W. R. 190; 43 E. R. 1237, L. JJ.; *reversd.* on other grounds, *sub nom.* *SOUTH EASTERN RY. CO. v. JORTIN* (1857), 6 H. L. Cas. 425, H. L. *Annotations*:—*Mentd. Re Burdett, Ex p. Byrne* (1888), 20 Q. B. D. 310; *Davis v. Petrie* (1905), 93 L. T. 511.

8394. Seal irregularly affixed—Bond invalid.]—*D'ARCY v. TAMAR, KIT HILL & CALLINGTON RY. CO.*, No. 8150, *ante*.

8395. Money borrowed without order of general meeting—Not postponed to other mortgages.]—*LANDOWNERS WEST OF ENGLAND & SOUTH WALES LAND DRAINAGE & INCLOSURE CO. v. ASHFORD*, No. 8369, *ante*.

8396. Consideration not duly stated—But apparent—Instrument valid.]—*LANDOWNERS WEST OF ENGLAND & SOUTH WALES LAND DRAINAGE & INCLOSURE CO. v. ASHFORD*, No. 8369, *ante*.

8397. Resolution for issue passed at insufficiently attended meeting.]—Where a co. has power to issue legally transferable securities an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia rite acta*. If such securities be legally transferable such an irregularity & *a fortiori* any equity against the original holder, cannot be asserted by the co. against a *bonâ fide* transferee for value without notice. Nor can such an equity be set up against an equitable transferee, whether the securities were transferable at law or not, if by the original conduct of the co. in issuing the securities or by their subsequent dealing with the transferee he has a superior equity. If the original conduct of the co. in issuing debentures

was such that the public were justified in treating it as a representation that they were legally transferable, there would be an equity on the part of any person who had agreed for value to take a transfer of these debentures to restrain the co. from pleading their invalidity, although that might be a defence at law to an action by the transferor.

A co. having, subject to the conditions in 1845 Act, the power of borrowing, issued, after resolutions passed at a meeting at which an insufficient number of shareholders were present, debentures to the contractor, P., who was present at the meeting & knew of the irregularities of the co. P. transferred some of the debentures to Y., a sub-contractor, for a nominal consideration, & some to C. for value. Y. had a bill against P., & R. discounted it & took as security a deposit of some of the debentures which had been registered in the name of P. These debentures were not transferred to R. & the transfer to Y. was not registered.

T. took a transfer of other debentures from Y. for a nominal consideration which had not been registered in the name of P., but the transfer to Y. had been registered, & T. alleged that he gave value to Y. Registration of the transfer to T. was refused. He brought an action against the co. for payment & for registration, but it was stopped by the winding up. C. had a transfer for full value & registered:—*Held*: (1) C. had a valid claim to be paid his debentures, & the co. were estopped from setting up the irregularity in the issue of them; (2) R. & T. must be treated as equitable transferees only, but without reason to suspect any irregularity in the issue, & they could be allowed to recover only such a sum as each of them might be able to prove he *bonâ fide* advanced upon the securities which he received.—*Re ROMFORD CANAL CO., POCOCK'S CLAIM, TRICKETT'S CLAIM, CAREW'S CLAIM* (1883), 24 Ch. D. 85; 52 L. J. Ch. 729; 49 L. T. 118.

8398. Re-issue of debentures without sanction of general meeting—Valid.]—*FOUNTAIN v. CARMARTHEN RY. CO.*, No. 8361, *ante*.

8399. Estoppel of company from setting up irregularity in issue—As against original holder.]—*Re ROMFORD CANAL CO., POCOCK'S CLAIM, TRICKETT'S CLAIM, CAREW'S CLAIM*, No. 8397, *ante*.

8400. — As against bonâ fide transferee for value.]—*Re ROMFORD CANAL CO., POCOCK'S CLAIM, TRICKETT'S CLAIM, CAREW'S CLAIM*, No. 8397, *ante*.

Estoppel of company from setting up illegality of issue—As against bonâ fide transferee for value.]—*See* No. 8401, *post*.

C. Effect of Illegal Exercise of Powers.

8401. Estoppel of company from setting up illegality of issue—As against bonâ fide transferee for value.]—A body corporate, having issued debentures, which are assignable, & purport to have been executed pursuant to powers conferred by statute, is estopped from alleging against an innocent assignee for value that the debentures have been issued illegally & in contravention of the statutory powers; & the assignee may by action of *mandamus* compel the body corporate to apply its funds to liquidate the interest due on the debentures, as required by their Act of incorporation.

Commissioners were incorporated by statute for the purpose of improving the town of H., & were empowered to levy rates, & to borrow money. For securing the payment of the loans

made to them, they were authorised to issue in a prescribed form debentures, bearing interest & capable of assignment. A person being a commissioner was forbidden under a penalty to accept any contract for carrying out the objects of the statute. The commissioners bought bricks for the purposes of the Act from H., a commissioner; & in order to provide for payment of the bricks they executed & delivered to him debentures in the prescribed form, which were duly registered as required by the Act. H. assigned them to pl'tfs. for value without notice of the circumstances under which they were issued. The commissioners having made default in payment of the interest due upon the debentures:—*Held*: assuming the transaction to have been illegal, as the commissioners had issued the debentures, knowing that they might be assigned, they were estopped from alleging that the debentures had been illegally issued; & pl'tfs. were entitled to maintain an action of *mandamus* to compel the commissioners to apply their funds in payment of the interest.—*WEBB v. HERNE BAY COMRS.* (1870), L. R. 5 Q. B. 642; 39 L. J. Q. B. 221; 22 L. T. 745; 34 J. P. 629; 19 W. R. 241.

Annotations:—*Consd.* *Re Hercules Insee*, Brunton's Claim (1874), L. R. 19 Eq. 302; *Re Romford Canal Co.*, Pocock's Claim, Trickett's Claim, Carew's Claim (1883), 24 Ch. D. 85. *Refd.* *R. v. Charnwood Forest Ry.* (1884), Cab. & Kl. 419; *Re Jubilee Cotton Mills*, [1922] 1 Ch. 100. *Mentd.* *Smith v. Chorley District Council* (1897), 66 L. J. Q. B. 427.

Estoppel of company from setting up irregularity in issue—As against holder & bona fide transferee for value.—*See* No. 8397, *ante*.

SUB-SECT. 4.—RIGHTS AND LIABILITIES OF LENDER.

A. In General.

8402. Duty—To inquire whether loan duly authorised.—*COMMERCIAL BANK OF CANADA v. GREAT WESTERN RY. CO. OF CANADA*, No. 8364, *ante*.

8403. — — —.]—*LANDOWNERS WEST OF ENGLAND & SOUTH WALES LAND DRAINAGE & INCLOSURE CO. v. ASHFORD*, No. 8369, *ante*.

8404. Rights—Over property of company—No specific lien on goods & chattels of company.—(1) A railway co. being indebted to a large amount upon bond & mtge., & also upon simple contract, a bond creditor of the co. filed a bill, on behalf of himself & other bond creditors, against the remaining bond creditors & mtgees., & the co., charging that, under 1845 Act, ss. 42 & 44, & the special Act, the bond creditors & mtgees. had a statutable lien upon all the property & effects of the co., & praying a receiver & manager. On motion, by consent, a receiver was appointed. While the receiver was in possession, a simple contract creditor of the co. sued out execution & levied upon the goods of the co., & refused to withdraw after notice of the order for a receiver. Upon motion to commit the sheriff for contempt:—*Held*: it was no answer to the motion to show that the order for a receiver ought not to have been granted; & the sheriff was ordered to withdraw & pay the costs, but without prejudice to any application by the execution creditor to be heard *pro interesse suo*, or otherwise.

On petition by execution creditor, the ct., on the ground that pl'tf. had no equity for a receiver,

ordered that the receiver should keep sufficient goods within the bailiwick for one month, & that the execution creditor should be at liberty to levy after that time, unless in the mean time security was given for the debt, etc., to await the order of the ct.

(2) 1845 Act, ss. 42 & 44, do not give to the mtgees. & bond creditors of a railway co. a specific lien upon the goods & chattels of the co.

(3) *Qu.*: whether the Ct. of Ch. has jurisdiction to appoint a receiver & manager of a railway.—*RUSSELL v. EAST ANGLIAN RY. CO.* (1850), 3 Mac. & G. 104, 125; 6 Ry. & Can. Cas. 501, 532; 20 L. J. Ch. 257; 16 L. T. O. S. 317; 17 L. T. O. S. 298; 14 Jur. 1033; 42 E. R. 201, 208; *sub nom.* *RUSSELL v. EAST ANGLIAN RY. CO.*, *Ex p.* BOWES, 15 Jur. 935, L. C.

Annotations:—*As to* (1) *Consd.* *Ames v. Birkenhead Docks Trustees* (1855), 20 Beav. 332. *Refd.* *De Winton v. Brecon Corp'n.* (No. 2) (1860), 28 Beav. 200; *Bowen v. Brecon Ry.*, *Ex p.* Howell (1867), L. R. 3 Eq. 541; *Imperial Mercantile Credit Assocn. v. Newry & Armagh Ry. & Joint Stock Discount Co.* (1868), 16 W. R. 1070; *Re Mayhew*, *Ex p.* Till (1873), L. R. 16 Eq. 97; *Edwards v. Edwards* (1875), 1 Ch. D. 454; *Re London Dry Docks Corp'n.* (1888), 39 Ch. D. 306. *As to* (2) *Refd.* *Gardner v. L. C. & D. Ry.* (No. 1), *Drawbridge v. Same*, *Gardner v. Same* (No. 2), *Imperial Mercantile Credit Assocn. v. Same* (1867), 2 Ch. App. 201; *Re Burry Port & Gwendreath Valley Ry.* (1885), 54 L. J. Ch. 710; *Re Hull, Barnsley & West Riding Junction Ry.* (1888), 40 Ch. D. 119. *As to* (3) *Consd.* *Fripp v. Chard Ry.*, *Fripp v. Bridgewater & Taunton Canal & Ry.* (1853), 1 Eq. Rep. 503. *Refd.* *Potts v. Warwick & Birmingham Canal Navigation Co.* (1853), Kay. 142. *Generally*, *Mentd.* *G. S. & W. Ry. v. Corry*, *Turquand*, etc. (1867), 15 W. R. 650; *Re Mead*, *Ex p.* *Cochrane* (1875), L. R. 20 Eq. 282; *Jarmain v. Chatterton* (1882), 20 Ch. D. 493.

Subject-matter of instrument of charge, *see* Sub-sect. 2, *ante*.

8405. — — — **Rolling-stock.**]—*YORKSHIRE RAILWAY WAGON CO. v. MACLURE*, No. 8389, *ante*.

8406. — — —.]—*Re EASTERN & MIDLANDS RY. CO.*, No. 8407, *post*.

— — —.]—*See*, generally, **RAILWAYS & CANALS.**

— **Power of sale.**]—*See* Sub-sect. 4, C. (d), *post*.

— **Right to appointment of receiver & manager.**]—*See* Sub-sect. 4, C. (b) & (c), *post*.

8407. — **To attend proceedings concerning claim against assets—& contest legality of claim.**]—In Apr. 1889, a railway co. entered into a hire-&-purchase agreement for rolling stock with a firm of bankers & rolling stock contractors, under which the co. agreed to pay a rent of £30,000, for one year in certain instalments, & to pay interest at 15 per cent *per annum* on any instalment not paid within seven days of its becoming payable. The rolling stock was at the end of that period, the payments having been duly made, to become the property of the co. The co. gave to the contractors collateral security for the payment of these instalments. Immediately before the date of this agreement the co. had sold the same rolling-stock which was comprised therein to the contractors, & had received from them £25,000. Subsequently a receiver & manager of the co.'s undertaking was appointed on the petition of a judgment creditor, & the rolling stock contractors brought in a claim for the balance of the rent due to them under the agreement of Apr. 1889. It was contended, on behalf of the debenture-stock holders that the agreement was not a *bona fide* hire-&-purchase agreement, but was in fact a borrowing by the co.:—*Held*: (1) a debenture-stock holder, attending the proceedings, was entitled to be heard on

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c. *Rights—To vote at annual meet-*
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— The right of bondholders of a ry. co. to vote exists, under 36 Vict. c. 73, s. 15, & it may be exercised

at any time when interest is in arrear.—*WEDDELL v. RITCHIE* (1905), 5 O. W. R. 733; 10 O. L. R. 5.—CAN

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the question of the legality of a claim against the assets of the co. on which he depended for payment of his interest; (2) notwithstanding the general intention of both parties that the railway co. should obtain money, of which they were in need, by a sale of their rolling-stock, while retaining the possession & use thereof, yet there was a complete sale of the rolling-stock; &, therefore, the hire-&-purchase agreement, since it was within the competence of the directors, was valid. — *Re EASTERN & MIDLANDS RY. CO.* (1891), 65 L. T. 668; 8 T. L. R. 34; *subsequent proceedings*, 66 L. T. 153.

8408. — Money lent after company's borrowing powers exhausted—Subrogation to rights of repaid creditors.]—Where a co. borrows money *ultra vires*, the lender, so far as the money is applied in the discharge of legal debts & liabilities of the co., is entitled to have the loan treated as valid, but he is not subrogated to any securities or priorities of the creditors who are paid by means of his money.—*Re WREXHAM, MOLD & CONNAH'S QUAY RY. CO.*, [1899] 1 Ch. 440; 68 L. J. Ch. 270; 80 L. T. 130; 47 W. R. 464; 43 Sol. Jo. 277; 6 Mans. 218; *sub nom. Re WREXHAM, MOLD & CONNAH'S QUAY RY. CO., Ex p. NORTH & SOUTH WALES BANK*, 15 T. L. R. 209, C. A.

Annotations:—Consd. Re Birkbeck Permanent Benefit Bldg. Soc., [1912] 2 Ch. 183; *Reversion Fund & Insce. v. Maison Cosway*, [1913] 1 K. B. 364. *Refd. Re Johnston Foreign Patents Co., Re Johnston Die Press Co., Re Johnstons Engraving Co., Re J. P. Trust v. above Cos.* (1904), 73 L. J. Ch. 617; *Bannatyne v. MacIver*, [1906] 1 K. B. 103; *Re Harris Calculating Machine Co., Sumner v. The Co.*, [1914] 1 Ch. 920; *Sinclair v. Brougham*, [1914] A. C. 398.

—Compare No. 8633, *post*.

B. Priorities.

8409. As between lenders inter se.] — FRIPP v. BRIDGWATER & TAUNTON CANAL & STOLFORD RAILWAY & HARBOUR CO., No. 8436, *post*.

8410. —.]—In an Act of Parliament granting fresh borrowing powers to a railway co., a reservation of the rights & priorities of “existing mtges.” will not, in the absence of express words to that effect, be construed so as to include mtges. created in renewal of, or substitution for, mtges. existing at the date of the Act.—*ROBINSON v. CAMBRIAN RYS. CO.*, *JONES v. CAMBRIAN RYS. CO.* (1869), 17 W. R. 441.

8411. — Different issues of debenture-stock.]—By the Cornwall Minerals Railway Act, 1873 (c. clxii.), a railway co. was empowered to borrow on mtge. to the extent of £250,000, & to issue debenture-stock subject to the provisions of the Companies Clauses Act, 1863 (c. 118), Part III., but notwithstanding anything therein contained, the interest of all debenture-stock, at any time created by the co., was to rank *pari passu* with the interest of all mtges. “at any time granted by the co.” & should have priority over all principal money secured by such mtges. By a later Act of 1875, the co. were empowered to raise additional capital; & after providing that the principal secured by all mtges. granted by the co. before the passing of the Act, should have priority over the principal secured by all mtges. granted by virtue of that Act, the co. was empowered to issue debenture-stock subject to the provisions of the Companies Clauses Act, 1863 (c. 118), but the interest of all debenture-stock created & issued at any time after the passing of that Act was to rank *pari passu* with the interest of all mtges. granted after the passing of that Act & should have priority over all principal moneys secured by such mtges.

By another Act of 1877 power to raise a further sum by the issue of debenture-stock under provisions similar to those in the Act of 1875 was given to the co.

The co. granted mtges. & issued debenture-stock under the powers of the Act of 1873 before the passing of the Act of 1875. They also issued further debenture-stock under the powers of the Act of 1873 after the passing of the Act of 1875, but before the passing of the Act of 1877. They also issued further debenture-stock under the powers of the Act of 1873 after the passing of the Act of 1877; & also issued debenture-stock under the powers of the Acts of 1875 & 1877 after the passing of the Act of 1877.

The co. being unable to pay the interest on all these mtges. & debenture-stock in full, a receiver of the undertaking was appointed by the ct., & a special case settled for ascertaining the priorities:—*Held*: (1) notwithstanding the words “at any time” in the Act of 1873 the enactment therein contained applied only to the mtge. debt & debenture-stock for which provision was made by that Act; (2) upon the true construction of the several Acts of 1873, 1875 & 1877, the order of priority of the interest on the mtges. & debenture-stocks was as follows: (a) the interest on the mtges. & debenture-stocks granted & issued under the powers of the Act of 1873 previously to the passing of the Act of 1875; (b) the interest on the debenture-stock issued under the Act of 1873 after the passing of the Act of 1875, but before the Act of 1877; (c) the interest on the debenture-stock created under any of the Acts, after the passing of the Act of 1877; (3) the principal of mtges. for the time being due had priority of payment next after the interest of the debenture-stock issued before the passing of the Act of 1875.—*FENTON v. HARRISON* (1883), 8 App. Cas. 780; 49 L. T. 372, II L.; *affg. S. C. sub nom. HARRISON v. CORNWALL MINERALS RY. CO.* (1881), 18 Ch. D. 334; 51 L. J. Ch. 98; 45 L. T. 498, C. A.

Annotations:—As to (2) Refd. Re Mersey Ry., [1895] 2 Ch. 287. *Generally, Mentd. Johnstone v. Cox* (1881), 30 W. R. 114.

8412. —.]—Companies Clauses Act, 1863 (c. 118), s. 24, which enacts that the holders of debenture-stock shall not as among themselves be entitled to any priority, applies only to debentures issued under the same special Act, & not to all debentures issued by the same co.—*Re MERSEY Ry. Co.*, [1895] 2 Ch. 287; 64 L. J. Ch. 625; 72 L. T. 735; 11 T. L. R. 385; 39 Sol. Jo. 467; 12 R. 345, C. A.

8413. — Alternative issues of debenture-stock & bonds.]—A railway co., having unexhausted powers of borrowing, obtained a special Act giving them further powers to borrow on mtge., & “in lieu thereof” to create & issue debenture-stock; & provided for the priority of existing mtges. or bonds. The co. exercised such borrowing powers by the creation of debenture-stock. Subsequently to such creation the co. alternately issued debenture-stock & bonds. The income was insufficient to pay the interest on the debenture-stock & bonds:—*Held*: the special Act in effect substituted the time of the passing of that Act for the time of creation of the debenture-stock—the time specified in Companies Clauses Act, 1863 (c. 118), s. 24—as the period for determining in what order the stock was to rank, & also the interest on all mtges. or bonds subsisting at the time of the passing of the special Act had priority over the interest on debenture-stock granted by virtue of that Act, & the interest on bonds granted after the passing of that Act ranked *pari passu*

with the interest on the debenture-stock.—*Re BURRY PORT & GWENDREATH VALLEY RY. CO.* (1885), 54 L. J. Ch. 710; 52 L. T. 842; 33 W. R. 741.

8414. As between lenders & judgment creditors.]—A canal co. was incorporated by a special Act of Parliament, which authorised them to purchase lands for the purposes of the Act, & for no other purpose, & empowered them to levy rates, tolls & dues, & to borrow money on mtge. thereof; & contained a provision that all persons whatsoever might navigate upon the canal, upon payment of the rates & dues thereby authorised to be taken. The co. made several mtges. of the rates, tolls, & dues under the Act; one of the mtgees., on behalf of himself & all others, obtained the appointment of a receiver of the co.'s rates, tolls, & dues, who was ordered to pay thereout the expenses of carrying on the co.'s business, & then the interest on the said mtges., & to pay the balance into ct. in the cause. A judgment creditor of the co. presented a petition in the cause before the hearing, praying that he might be at liberty to sue out & execute a *fi. fa* & *elegit* against the goods & lands respectively of the co.:—*Held*: he might execute a *fi. fa.*, but all he could take under the *elegit* would be such right in the lands as the co. had, namely, subject to the mtges. & to the right of user of the canal by the public, & subject also to the powers of management of the co.—*POTTS v. WARWICK & BIRMINGHAM CANAL NAVIGATION CO.* (1853), Kay, 142; 69 E. R. 61.

Annotations:—*Consd.* *Blaker v. Herts & Essex Waterworks Co.* (1889), 41 Ch. D. 399. *Refd.* *Ames v. Birkenhead Docks Trustees* (1855), 20 Beav. 332; *Imperial Mercantile Credit Asscn. v. Newry & Armagh Ry. & Joint Stock Discount Co.* (1868), 16 W. R. 1070. *Mentd.* *Gardner v. L. C. & D. Ry.* (No. 1), *Drawbridge v. Same*, *Gardner v. Same* (No. 2), *Imperial Mercantile Credit Asscn. v. Same* (1867), 2 Ch. App. 201; *Re Manchester & Milford Ry., Ex p. Cambrian Ry.* (1880), 14 Ch. D. 645.

8415. —.]—An order made in a mtgee.'s suit, appointing the chairman of the trustees of the Birkenhead Docks receiver of the rates, tolls, & property, with powers to defray the expenses of carrying on the undertaking, following the form in *Potts v. Warwick & Birmingham Canal Navigation Co.*, No. 8414, *ante*, supported; & a judgment creditor of the trustees restrained from proceeding against the rates & tolls due to the trustees by attachment & execution under C. L. P. Act, 1854 (c. 125), ss. 60–67.—*AMES v. BIRKENHEAD DOCKS TRUSTEES* (1855), 20 Beav. 332; 24 L. J. Ch. 540; 25 L. T. O. S. 121; 1 Jur. N. S. 529; 3 W. R. 381; 52 E. R. 630.

Annotations:—*Refd.* *Imperial Mercantile Credit Asscn. v. Newry & Armagh Ry. & Joint Stock Discount Co.* (1867), 16 W. R. 335; *Davies v. Thomas*, [1900] 2 Ch. 462. *Mentd.* *Great Southern & Western Ry. v. Corry, Turquand, etc.* (1867), 15 W. R. 650; *Re Manchester & Milford Ry., Ex p. Cambrian Ry.* (1880), 14 Ch. D. 645.

8416. — Undertaking sold—Purchase-money paid into court.]—Railway debentures were granted, by which the "undertaking, & all tolls & sums of money arising by virtue of the Act, & all estate, right & interest of the co.," were assigned to the debenture creditors. Other creditors subsequently obtained judgments against the co., & afterwards, by authority of an Act of Parliament, the railway was sold, & the purchase-money paid into ct.:—*Held*: the debentures, being prior in date, had priority over the judgments as against the purchase-money.—*FURNESS v. CATERHAM RY. CO.* (1859), 27 Beav. 358; 7 W. R. 660; 54 E. R. 140.

Annotations:—*Consd.* *Re Panama, New Zealand & Australian Royal Mail Co.* (1869), 39 L. J. Ch. 162. *Refd.* *G. S. & W. Ry. v. Corry, Turquand, etc.* (1867), 15 W. R. 650; *Imperial Mercantile Credit Asscn. v. Newry & Armagh Ry. & Joint Stock Discount Co.* (1868), 16 W. R.

1070; *Re Woking Urban Council (Basingstoke Canal) Act, 1911*, [1914] 1 Ch. 300. *Mentd.* *Holland v. Cork & Kinsale Ry.* (1868), 16 W. R. 1217.

8417. —.]—*LEGG v. MATHIESON*, No. 8379, *ante*.

8418. — Land seized & sold.]—*WICKHAM v. NEW BRUNSWICK & CANADA RY. CO.*, No. 8374, *ante*.

8419. — Payment of mortgage not due.]—A mtgee. of the undertaking of a railway co. under a debenture has a title prior to that of a subsequent judgment creditor who has obtained an *elegit*, & if his security is in danger of being impaired by the acts of the judgment creditor, he may file a bill to protect his security, although the time fixed for the payment of the mtge. money has not yet arrived.—*WILDY v. MID-HANTS RY. CO.* (1868), 18 L. T. 73; 16 W. R. 409, L. C.

Annotations:—*Apld.* *Edwards v. Standard Rolling Stock Syndicate*, [1893] 1 Ch. 574. *Consd.* *Re London Pressed Hinge Co., Campbell v. London Pressed Hinge Co.*, [1905] 1 Ch. 576. *Refd.* *Re Mersey Ry., Gibbs v. Mersey Ry.* (1895), 11 T. L. R. 390; *Lawrence v. West Somerset Mineral Ry.*, [1918] 2 Ch. 250.

8420. — Proceeds of sale of surplus land.]—Railway Companies Act, 1867 (c. 127), s. 23, does not give to creditors of a railway co. in respect of mtges., bonds or debenture-stock, any lien or charge which they did not possess before the Act so as to entitle them to payment in priority out of the proceeds of surplus lands of the co., which have been sold on the application of the judgment creditors of the co.—*Re HULL, BARNESLEY & WEST RIDING JUNCTION RY. CO.* (1888), 40 Ch. D. 119; 58 L. J. Ch. 205; 59 L. T. 877; 37 W. R. 145, C. A.

Annotations:—*Refd.* *Re East & West India Dock Co.* (1890), 62 L. T. 239; *Proffitt v. Wye Valley Ry.* (1891), 64 L. T. 669; *Re Liskeard & Caradon Ry.*, [1903] 2 Ch. 681.

— **Appointment of receiver obtained by lender.]**—*See* Nos. 8434, 8438, *post*.

C. Remedies.

(a) Action.

8421. When action lies—Action of covenant.]—A canal co. were authorised by statute to raise money by an instrument under their common seal, upon the security of the undertaking, rates, duties, etc., by way of mtge., so as that all who advanced money should be creditors in equal degree, & no preference be given to any, in respect to the priority of advancing their money or the dates of their securities. It was provided in the deed-poll, given in pursuance of the statute, by which money advanced by pltf. to the co. was secured, that the interest should be paid half-yearly. The assets of the co. not being sufficient to discharge all their debts:—*Held*: an action of covenant against the co. for arrears of interest was not maintainable; pltf.'s remedy being against the undertaking, rates, duties, etc., under the statute.—*PONTET v. BASINGSTOKE CANAL CO.* (1837), 3 Bing. N. C. 433; 3 Hodg. 46; 4 Scott, 182; 6 L. J. C. P. 177; 132 E. R. 477.

Annotations:—*Distd.* *Hart v. Eastern Union Ry.* (1852), 7 Exch. 246. *Refd.* *Doe d. Myatt v. St. Helen's Ry.* (1841), 2 Q. B. 364; *Pardoe v. Price* (1844), 13 M. & W. 267; *Re Woking Urban Council (Basingstoke Canal) Act, 1911*, [1914] 1 Ch. 300. *Mentd.* *R. v. Balby & Workop Turnpike Road Trustees* (1853), 17 Jur. 734.

8422. — Effect of provisions of special Act.]—7 & 8 Vict. c. lxxxv., "for making a railway from Colchester to Ipswich," empowered the co. to borrow money on mtge. Sect. 49 enacted, "That the co. may, if they think proper, fix a period for the repayment of the money so borrowed, with the interest thereof; & in such case the co. shall cause such period to be inserted in the mtge. deed

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or bond, & upon the expiration of such period the principal sum together with the arrears of interest thereon, 'shall be paid' to the party entitled to such mtge. or bond." By sect. 50, if no time was fixed in the mtge. deed for repayment, the mtgee. might at the expiration of twelve months, demand payment of the principal & interest, upon giving six months' previous notice; & the co. might at all times pay off the money borrowed upon giving the like notice. By sect. 51, if such interest remained unpaid for thirty days after it became due, & demand thereof made in writing, the mtgee. might either sue for the interest so in arrear by action of debt, or require the appointment of a receiver. By sect. 52, if such principal & interest were not paid within six months after the same became payable, & after demand thereof in writing, the mtgee. might sue for the same in any ct. of law or equity, or, if his debt amounted to a certain sum, require the appointment of a receiver. Pltf. lent to defts. £1,000 upon the security of a debenture—in the form given in a schedule to 7 & 8 Vict. c. lxxxv.—which provided that the principal was "to be repaid on Jan. 1, 1851":—*Held*: (1) where a corpn. is created for certain purposes, with power to sue & be sued, to borrow money for the completion of those purposes, & to secure the repayment of such money by an instrument which on its face imports a covenant for repayment; if money be so borrowed & so secured, an action *primâ facie* may be maintained against the corpn. on breach of the covenant; (2) in this case such right of action was not taken away or affected by 7 & 8 Vict. c. lxxxv., since sects. 51 & 52 of that Act did not give a right of action but merely recognised it as already existing, & provided an additional remedy by the appointment of a receiver.—*EASTERN UNION RY. CO. v. HART* (1852), 8 Exch. 116; 22 L. J. Ex. 20; 19 L. T. O. S. 314; 17 Jur. 89; 155 E. R. 1283; *sub nom. HART v. EASTERN UNION RY. CO.*, 6 Ry. & Can. Cas. 818, Ex. Ch.

Annotations:—As to (1) *Apld. Bolckow v. Herne Bay Pier Co.* (1852), 1 E. & B. 74; *Coleman v. Llanelly Ry. & Dock Co.* (1867), 17 L. T. 86. *Generally, Mentd. Attrec v. Hawe* (1878), 9 Ch. D. 337; *Re Parker, Wignall v. Park*, [1891] 1 Ch. 682.

8423. ———.]—By Llanelly Railway (New Lines) Act, 1862 (c. ccxvii.), the whole undertaking was divided into three parts with separate capital, & by sect. 64 it was enacted that no mtgee. of the co. should have any right or remedy against the co. or their undertaking except only with respect to such part as was included in his mtge., & that the liabilities of the co. to their several mtgees. should be limited accordingly:—*Held*: this did not prohibit an action being brought against the co. generally by a mtgee. to recover the principal due on his mtge. deed, but it only applied to the rights & remedies flowing from execution.—*COLEMAN v. LLANELLY RY. & DOCK CO.* (1867), 17 L. T. 86; 15 W. R. 1014.

8424. ———. **Suspense period as regards liabilities incurred before Act—Debentures issued in substitution of liability incurred before Act.**]—An Act which was passed with a view to relieving a railway co. from pressure by its creditors provided for the issue of several different classes of irredeemable debenture-stock to judgment debtors & different classes of debenture-holders in substitution for their existing securities, & another class of debenture-stock for arrears of interest on debentures existing at the date of the passing of the Act, & thereby treated as being capitalised, & a suspense period was created

within which no action or suit was allowed to be commenced without leave, except in respect of liabilities contracted after the passing of the Act, with certain specified exceptions:—*Held*: the debenture-stock so issued was within the protection of the Act, & the holders were not entitled without leave to institute a suit for the purpose of obtaining payment of interest in arrear.—*LONDON FINANCIAL ASSOCN. v. WREXHAM, MOLD & CONNAH'S QUAY RY. CO.* (1874), L. R. 18 Eq. 566; 30 L. T. 491; 22 W. R. 681.

8425. ———. **Action of mandamus.**]—*WEBB v. HERNE BAY COMRS.*, No. 8401, *ante*.

8426. **In whose name action must be brought—Transferee.**]—The transferee of a bond, transferred to him under 1845 Act, is the party in whose name an action upon the bond must be brought.—*VERTUE v. EAST ANGLIAN RYS. CO.* (1850), 5 Exch. 280; 1 L. M. & P. 302; 6 Ry. & Can. Cas. 252; 155 E. R. 120; *sub nom. VERTUE v. EAST ANGLIAN RYS. CO.*, *MILLS v. SAME*, 19 L. J. Ex. 235; 15 L. T. O. S. 116.

8427. **How action entitled—Debenture-holder suing on behalf of class.**]—*MARSHALL v. SOUTH STAFFORDSHIRE TRAMWAYS CO.*, No. 8450, *post*.

8428. **Stay of proceedings—More than one action brought—Right of plaintiff in stayed action.**]—In a suit instituted by a debenture-holder against a railway co., it was ordered that the proceedings in another suit commenced by an earlier debenture-holder against the co. were to be stayed, & that pltf. in that suit should be allowed to prove his claim under the decree made in the suit of the second debenture-holder. The ct. subsequently refuse with costs an application on the part of the first debenture-holder to discharge the order.—*HARRISON v. LONDON, CHATHAM & DOVER RY. CO.* (1867), 16 L. T. 581.

(b) Appointment of Receiver.

See, generally, RECEIVERS.

8429. **When appointed—Canal company.**]—*FRIPP v. CHARD RY. CO.*, *FRIPP v. BRIDGEWATER & TAUNTON CANAL, ETC., CO.*, No. 8441, *post*.

8430. ———.]—By a canal co.'s Act, the proprietors were empowered to borrow on the credit of the undertaking & to assign the property & rates as a security for the sum borrowed, in a form which fixed no date for the repayment of the principal. It was declared that there should be no priority by reason of date or otherwise amongst the debenture-holders; & that every holder of a debenture might transfer the same according to a form specified. It was further provided, that the interest due on the moneys so borrowed should be paid in preference to any dividend to shareholders. By a subsequent Act, further borrowing powers were given to the co., & it was provided that all persons to whom mtges. should be made under that Act should be entitled to the co.'s rates & property in proportion to the "interest" of the sums for which such mtges. should be executed:—*Held*: the holder of a debenture of the specified form was entitled, upon non-payment by the co., after six months' notice of the principal money secured by the debenture, to a receiver; although there was not, & never had been, any arrear of interest; & although some of the debenture-holders refused, & others might not be able, to consent to be paid off.—*HOPKINS v. WORCESTER & BIRMINGHAM CANAL (PROPRIETORS)* (1868), L. R. 6 Eq. 437; 37 L. J. Ch. 729.

Annotations:—*Folld. Postlethwaite v. Maryport Harbour*

Trustees (1869), 20 L. T. 138. *Refd.* Preston v. Great Yarmouth Corpn. (1872), 7 Ch. App. 657, n.

8431. ——— Railway company.]—RUSSELL v. EAST ANGLIAN RY. CO., No. 8404, *ante*.

8432. ———.]—EASTERN UNION RY. CO. v. HART, No. 8422, *ante*.

8433. ——— Of tolls, etc.]—Where pltfs. were mtgees. of the undertaking authorised by the special Act of a railway co., & of "the tolls & sums of money arising by virtue of the same Acts," the ct. appointed a receiver of the undertaking & of the tolls, etc., in the terms of their mtge. deeds.—*Griffin v. Bishop's Castle Ry. Co.* (1867), 16 L. T. 345; 15 W. R. 1058.

——— **At instance of judgment creditor.]—**
See RAILWAYS & CANALS.

8434. ——— Tramway company.]—In an action by a debenture-holder on behalf of himself & the other holders of an issue of £15,000 debentures:—*Held*: the holders of that issue were entitled to stand in the position of judgment creditors for £15,000, & a receiver of the property of the co. subject to be seized by a judgment creditor was appointed.—*Hope v. Croydon & Norwood Tramways Co.* (1887), 34 Ch. D. 730; 56 L. J. Ch. 760; 56 L. T. 822; 35 W. R. 594.

*Annotations:—*Consd. Cleary v. Brazil Ry. (1915), 85 L. J. K. B. 32. *Refd.* Marshall v. South Staffordshire Tram. Co., [1895] 2 Ch. 36.

8435. ——— Water company.]—An unregistered co. incorporated by Act of Parliament will not be ordered to be wound up on the petition of unpaid debenture-holders when the special Act gives the debenture-holders a remedy by the appointment of a receiver.—*Re Herne Bay Waterworks Co.* (1878), 10 Ch. D. 42; 48 L. J. Ch. 60; 39 L. T. 324; 27 W. R. 36.

*Annotation:—*N.F. *Re* Portsmouth Borough (Kingston, Fratton & Southsea) Tram. Co., [1892] 2 Ch. 362.

8436. Effect of appointment—Position of receiver—Agent of company.]—Where there is an express provision in Acts of Parliament to the effect that no mtgee. of a co. is to have any benefit out of the tolls & rates, except that he is to be paid without any preference by reason of priority of date, there are strong reasons for holding that any mtgee. who finds that others are being paid, without having taken possession, in priority & in preference to himself—there being no covenant to pay by the co., & the only fund being that formed by the tolls, rates & duties—might be entitled to file a bill to restrain payment of the other mtgees. in preference to himself, & to have himself & them put upon an equality; & that without being obliged to ask the ct. for a receiver or putting himself in possession of the mortgaged property. Where the whole of the mtgees., or some or one or more of them on behalf of the others of them, put themselves in possession of the property, a co-mtgee. who does not acquiesce in the proceedings—& he need not do so—may, under the Acts say, as between him & the co., & the receivers of the tolls, that he had a right to look upon the receivers as agents of the co.; & that the co-mtgees. are entitled to share *pari passu*. Where therefore a pltf., a second mtgee., subject to the above principles filed a bill for an account on behalf of himself alone against his co-mtgees. & others as agents of the co., but failed to establish his case as to the agency, his bill was dismissed as to that, but he was held entitled to an account.—*Frupp v. Bridgwater & Taunton Canal & Stolford Railway & Harbour Co.* (1857), 29 L. T. O. S. 176.

8437. ——— As regards judgment creditors—Right to levy execution against lands not covered by order for receiver.]—Pltfs. being mtgees. of

property of debts. held under several Acts of Parliament, obtained an order generally for a receiver & manager. G., a debenture-holder under another Act, recovered judgment, issued an *elegit*, & gave notice to the tenants to pay their rents to him. An order directing G. to withdraw the notices, & restraining him from all interference having been made:—*Held*: the order must be discharged, on the ground that the lands in which G. was interested were not covered by the order for a receiver, which could extend only to the lands, etc. in which pltfs. were interested.—*Gardiner v. London, Chatham & Dover Ry. Co., Drawbridge v. London, Chatham & Dover Ry. Co., Ex p. Grissell* (1866), 15 L. T. 494, L. J. J.; *subsequent proceedings* (1867), 2 Ch. App. 385, L. J. J.

8438. ——— Judgment creditor also debenture-holder.]—After the appointment of a receiver of a railway undertaking, made in a suit in behalf of debenture-holders, a debenture-holder recovered judgment at law, & petitioned for leave to issue execution:—*Held*: petitioner was not entitled to issue execution otherwise than as a trustee for himself & all other debenture-holders entitled by the special Acts to be paid *pari passu* with himself; but an inquiry was directed whether it would be for the benefit of the debenture-holders that any proceeding should be taken by the receiver for the purpose of making the judgment available for them.—*Bowen v. Brecon Ry. Co., Ex p. Howell* (1867), L. R. 3 Eq. 541; 36 L. J. Ch. 344; 16 L. T. 6; 15 W. R. 482.

*Annotations:—**Refd.* *Re* Potteries, Shrewsbury & North Wales Ry. (1869), 5 Ch. App. 67; *Potteries, Shrewsbury & North Wales Ry. v. Minor* (1871), 6 Ch. App. 621. *Mentd.* *Waterlow v. Sharp, Gardner v. Sharp* (1869), 20 L. T. 903; *Re Regent's Canal Ironworks Co.* (1876), 45 L. J. Ch. 360.

8439. ——— Judgment recovered by Crown—Debenture-holders not parties to action.]—A decree was made for the specific performance by a railway co. of a contract by them to purchase some Crown lands. The co. had entered into possession of the lands, but had not paid the purchase-money. Debenture-holders of the co. who were not parties to the Crown's suit, afterwards obtained, in another, the appointment of a receiver over the lands. The Crown then presented a petition, praying an order to be put in possession of the lands, notwithstanding the appointment of the receiver:—*Held*: as the Crown had not obtained any declaration of lien, & even if it had, as the debenture-holders were not parties to the Crown suit, the petition must be dismissed.—*A.-G. v. Sittingbourne & Sheerness Ry. Co.* (1866), L. R. 1 Eq. 636; 35 Beav. 268; 35 L. J. Ch. 318; 14 L. T. 92; 14 W. R. 414; 55 E. R. 899.

(c) Appointment of Manager.

See, generally, RECEIVERS.

8440. Power of court to appoint—Railway company.]—RUSSELL v. EAST ANGLIAN RY. CO., No. 8404, *ante*.

8441. ———.]—(1) Where several mtges. were made, under the authority of an Act of Parliament, of a canal navigation & undertaking, & the works, lands, hereditaments & capital subscription, calls, debts, sums of money, property, estate & effects, belonging, due or owing, or thereafter to belong or be due or owing thereto, & all tolls, rates & duties arising by virtue of the Acts under which the co. was formed, the mtgees. being equally entitled, one with the other, to their proportions of the tolls & premises, the ct., at the suit of one of the mtgees. whose interest had been

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a long time unpaid, appointed a receiver of the tolls, rates & duties, & of the estate of the co.

A receiver was appointed by the ct. of the rates, tolls, duties & other property of a canal & railway co., incorporated by Act of Parliament, notwithstanding that the Act of incorporation provided that a committee of twelve of the proprietors should be elected at every annual general meeting to manage the affairs of the co.

A receiver of the rates, tools, duties & other property of the co., appointed by the ct. at the suit of a mtgee. whose interest was long in arrear, notwithstanding the Act of incorporation gave the mtgee. in such a case the specific remedy of applying to & obtaining the appointment by two justices of the peace of a receiver of such rates, tolls & duties. until the interest in arrear & the costs & charges should be satisfied, accompanied by a provision that the Act should be without prejudice to any remedies which such mtgee. might have either in law or equity.

It is no objection to the appointment of a receiver over the property of a co. whose business is in the nature of a trade that the application is made by one of several mtgees. who, according to the terms of their mtges., have the legal estate in the property; nor is it any objection that the co. has duties to perform, the neglect of which might subject them to indictment, for the order of the ct. always gives the parties liberty to apply, whereby any such consequence may be averted.

A receiver appointed at the suit of a mtgee. having a charge of £10,000 forming about a ninth of the entire mtge. debt of the co., although the other eight-ninths of mtgees. did not concur in the application.

(2) Considerations on the selection of a receiver & manager of the property & business of a co., so as to avoid the appointment of any person whose individual pecuniary interests might conflict with the duties of his office, in respect to those for whose benefit the appointment is made.—**FRIPP v. CHARD RY. CO., FRIPP v. BRIDGEWATER & TAUNTON CANAL, ETC. CO.** (1853), 11 Hare, 241; 1 Eq. Rep. 503; 22 L. J. Ch. 1084; 17 Jur. 887; 1 W. R. 477; 68 E. R. 1264.

Annotations:—As to (1) **Folld.** Griffin v. Bishops Castle Ry. (1867), 16 L. T. 345. **Refd.** Ames v. Birkenhead Docks Trustees (1855), 20 Beav. 332; Stephens v. Chown, Stephens v. Clark, [1901] 1 Ch. 894. **Mentd.** Preston v. Yarmouth Corpn. (1872), 20 W. R. 358.

8442. ———.] — **GARDNER v. LONDON, CHATHAM & DOVER RY. CO. (No. 1), DRAWBRIDGE v. SAME, GARDNER v. SAME (No. 2), IMPERIAL MERCANTILE CREDIT ASSOCN. v. SAME, No. 8375, ante.**

8443. ———.] — **GRIFFIN v. BISHOP'S CASTLE RY. CO., No. 8433, ante.**

——— **At instance of judgment creditor.]—**
See RAILWAYS & CANALS.

8444. ——— **Tramway company.] — CITY OF LONDON CONTRACT CORPN., LTD. v. COVENTRY DISTRICT TRAMWAYS CO. (1892), cited 69 L. T. 560.**

Annotations:—Folld. Bartlett v. West Metropolitan Tram. Co. (1893), 69 L. T. 560. **Refd.** Marshall v. South Staffordshire Tram. Co. [1895] 2 Ch. 36.

8445. ———.] — By an order made in a debenture-holders' action a receiver & manager was appointed of the undertaking, property, & business of a tramways co., which under the provisional order of the Board of Trade whereby it was formed, & Tramways Act, 1870 (c. 78), ss. 28 & 56, was liable to penalties in case of neglect to keep in good repair the rails & tramways. Subsequently at the instance of the county council,

an order was made by the petty sessional divisional ct. against the tramways co. for the payment of a certain sum, the amount of penalties incurred by not keeping in good repair the rails of the tramways, such sum in default of payment to be levied by distress & sale of the co.'s goods. On the application of the county council for leave to distrain on the co.'s goods for payment of the sum notwithstanding the appointment of the receiver & manager:—**Held:** the order appointing the receiver & manager would not have been made since the decision of the Ct. of Appeal in *Marshall v. South Staffordshire Tramways Company*, No. 8450, *post*; the county council were not affected by it except that it prevented them from touching the property of the co. without the leave of the ct.; & the county council were entitled to the leave they asked for.—**PEGGE v. NEATH DISTRICT TRAMWAYS CO.,** [1895] 2 Ch. 508; 64 L. J. Ch. 737; 73 L. T. 25; 44 W. R. 72; 11 T. L. R. 470; 39 Sol. Jo. 622; 2 Mans. 474; 13 R. 762; *on appeal*, [1896] 1 Ch. 684, C. A.

Annotations:—Refd. Reeve v. Medway Upper Navigation Co. (1905), 21 T. L. R. 400; *Re* Crosbie, Johnson & Hughes v. Crosbie (1909), 74 J. P. 25.

8446. ———.] — **MARSHALL v. SOUTH STAFFORDSHIRE TRAMWAYS CO., No. 8450, post.**

8447. ——— **Water company.] —** Conveyancing Act, 1881 (c. 41), s. 19, conferring on a mtgee., where the mtge. is by deed, a power of sale, does not apply to the debentures of a joint-stock co.

By a provisional order under Gas & Water Works Facilities Act, 1870 (c. 70), authorising a waterworks undertaking, two individuals, " & the survivor of them & the exors. or administrators of such survivor, their or his assigns " were declared to be the " undertakers " for the purposes of the order, & power was conferred on the undertakers to acquire lands by agreement—but not compulsorily—to construct waterworks, & to supply water to the inhabitants of a district & charge rates for such supply; the amount of the capital of the undertaking was specified, & the amount of all moneys borrowed by the undertakers & " secured by mtge. of the undertaking," was not at any time to exceed a specified sum. The undertaking was assigned to a limited co. formed for that purpose, & the co. issued debentures whereby they " charged " their undertaking lands, works, property & effects—both present & future—with repayment of the money borrowed, the charge being expressed to be a floating security not hindering any sale, exchange, or lease of the lands, or the receipt or payment of any moneys, or any other dealings in the course of the business of the co., but attaching to all the property for the time being, whether real or personal, of the co. By a subsequent provisional order further powers were conferred on the co. & they only were recognised as undertakers for the purposes of that order. The co. afterwards made default in payment of the principal moneys secured by the debentures on the day named therein for payment. In an action by debenture-holders claiming—amongst other relief—a sale of the undertaking & property comprised in the debentures as a going concern, & the appointment of a manager until sale:—**Held:** (1) the waterworks undertaking being for a public purpose & not a mere private undertaking, the principle of the decision in *Gardner v. London, Chatham, & Dover Ry., No. 8375, ante*, was applicable; (2) the debentures did not confer upon the holders of them a power to sell the undertaking, & the ct. ought not to direct a sale of the undertaking or the appointment of a manager.—**BLAKER v. HERTS & ESSEX**

WATERWORKS Co. (1889), 41 Ch. D. 399; 58 L. J. Ch. 497; 60 L. T. 776; 37 W. R. 601; 5 T. L. R. 421; 1 Meg. 217.

Annotations:—As to (1) *Refd.* Sadler v. Worley, [1894] 2 Ch. 170; Marshall v. South Staffordshire Tram. Co., [1895] 2 Ch. 36. As to (2) *Distd.* Re Barton-upon-Humber & District Water Co. (1889), 42 Ch. D. 585. *Apprvd.* Marshall v. South Staffordshire Tram. Co., [1895] 2 Ch. 36. *Refd.* Deyes v. Wood, [1911] 1 K. B.

(d) *Foreclosure or Sale.*

8448. When ordered—Railway company.—A creditor who had obtained a judgment against a railway co., the tolls of which were wholly inadequate to meet the debts of the co. was held entitled to a charge on the tolls. He was also appointed receiver. A sale of the lands was refused, but inquiries were directed as to the best means of making the undertaking profitable.—*FURNESS v. CATERHAM RY. CO.* (1858), 25 Beav. 614; 27 L. J. Ch. 771; 32 L. T. O. S. 170; 4 Jur. N. S. 1213; 53 E. R. 771.

Annotations:—*Refd.* G. S. & W. Ry. Co. v. Corry & Turquand (1867), 15 W. R. 650; *Re* Woking Urban Council (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300.

— — — — —.]—*See, generally,* RAILWAYS & CANALS.

8449. Tramway company.—A tramway co. was incorporated by a special Act, with which Tramways Act, 1870 (c. 78), s. 44, was incorporated. In an action by debenture-holders of the co. to enforce their security, which comprised the undertaking of the co. & all the tolls & sums of money arising therefrom:—*Held*: the ct. had jurisdiction to order the undertaking & tramway of the co. to be sold as a going concern, subject to the consent of the Board of Trade.—*BARTLETT v. WEST METROPOLITAN TRAMWAYS CO.*, [1894] 2 Ch. 286; 63 L. J. Ch. 519; 70 L. T. 491; 42 W. R. 500; 38 Sol. Jo. 385; 1 Mans. 272; 8 R. 259.

Annotation:—*N.F.* Marshall v. South Staffordshire Tram. Co., [1895] 2 Ch. 36.

8450. — — — — —.—Where the holders of debentures issued by a tramway co. governed by the Tramways Act, 1870 (c. 78)—whether the co. be incorporated under 1862 Act, or by a special Act—by which debentures the undertaking of the co. & all its property present & future, including uncalled capital, are charged, are, in the event of default by the co. entitled only to the appointment of a receiver of the undertaking of the co. & the net earnings thereof:—*Held*: (1) they were not entitled to an order for the sale of the undertaking; (2) nor to the appointment of a manager.

Pltfs. suing on behalf of a class should specify that class as accurately as possible. For instance, where, in an action brought by a debenture-holder suing on behalf of himself & all other the holders of debentures in a limited co. which had been dissolved & reincorporated by a special Act under the name of deft. co., pltf. was described in the title of the action as suing “on behalf of himself & other the holders of the debentures of deft. co. & its predecessors in title”:—*Held*: this description was too vague & required amendment.—*MARSHALL v. SOUTH STAFFORDSHIRE TRAMWAYS CO.*, [1895] 2 Ch. 36; 64 L. J. Ch. 481; 72 L. T. 542; 43 W. R. 469; 11 T. L. R. 339; 39 Sol. Jo. 414; 2 Mans. 292; 12 R. 275, C. A.

Annotations:—As to (1) *Distd.* Re Crystal Palace Co., Fox

v. The Co. (1911), 104 L. T. 251. *Refd.* Re St. Neots Water Co. (1906), 22 T. L. R. 478; *Re* Woking Urban Council (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300. As to (2) *Folld.* Bartlett v. West Metropolitan Tram. Co. (1893), 69 L. T. 560. *Refd.* Pegge v. Neath District Tram. Co., [1895] 2 Ch. 508.

8451. Water company.—*BLAKER v. HERTS & ESSEX WATERWORKS CO.*, No. 8447, *ante*.

(e) *Petition for Winding up.*

8452. When winding up ordered—Dock company.—(1) The exception from the power to wind up unregistered cos. given by 1862 Act, s. 199, of railway cos. incorporated by Act of Parliament, applies only to cos. whose principal object is the construction of a railway; & therefore a co. whose principal object is the construction of docks is not brought within the exception by reason of having power also to make a branch railway for purposes connected with the docks.

(2) Where, in an Act of Parliament incorporating a co., it is stated that the construction of the works authorised by the Act is of public advantage, the ct. will be reluctant to make an order to wind up the co., unless it is shown that there is no other process by which its difficulties can be overcome.

Debenture-holders of a co. being empowered by Act of Parliament to enforce the payment of principal & interest by the appointment of a receiver:—*Held*: until a receiver had been actually appointed, & had failed to obtain payment, the ct. would not, at the instance of debenture-holders, order the co. to be wound up.—*Re EXMOUTH DOCKS CO.* (1873), L. R. 17 Eq. 181; 43 L. J. Ch. 110; 29 L. T. 573; 22 W. R. 104.

Annotations:—As to (2) *N.F.* Re Portsmouth Borough (Kingston, Fratton & Southsea) Tram. Co., [1892] 2 Ch. 362. *Refd.* Re Herne Bay Waterworks Co. (1878), 10 Ch. D. 42. *Generally, Mentd.* London & India Docks Co. v. G. E. Ry. & Mid. Ry. (1901), 86 L. T. 29.

8453. — — — — — Tramway company.—A tramway co. incorporated in 1883 by Act of Parliament, in exercise of a power conferred upon them by their Act, issued debentures in the form prescribed in 1845 Act, sched. C., which was incorporated in the special Act. The time for repayment of the principal owing upon the debentures had expired without its being repaid. A debenture-holder, who had brought an action to enforce his security, & had obtained the appointment of a receiver, presented a petition to wind up the co.:—*Held*: the exercise of his remedy as a debenture-holder did not deprive him of his right as an ordinary creditor to present a winding-up petition, & he was entitled to the order.—*Re PORTSMOUTH BOROUGH (KINGSTON, FRATTON & SOUTHSEA) TRAMWAYS CO.*, [1892] 2 Ch. 362; 61 L. J. Ch. 462; 66 L. T. 671; 40 W. R. 553; 8 T. L. R. 516; 36 Sol. Jo. 462.

Annotations:—*Appld.* Re St. Neots Water Co. (1906), 22 T. L. R. 478. *Refd.* Bartlett v. West Metropolitan Tram. Co. (1894), 63 L. J. Ch. 519; Marshall v. South Staffordshire Tram. Co. (1895), 2 Ch. 36.

8454. — — — — — Water company.—*Re HERNE BAY WATERWORKS CO.*, No. 8435, *ante*.

8455. — — — — — Creditor's other remedies not exhausted.—*Re EXMOUTH DOCKS CO.*, No. 8452, *ante*.

The directors presented a petn. for the winding up of the co. without the authority of the shareholders given at a meeting of the co.:—*Held*: the directors had no power under Companies Clauses Consolidation Act, 1845, to present the petn.—*Re GALWAY & SALTHILL TRAMWAY CO.* (1917), 1 L. T. 41.—*IR.*

PART IX. SECT. 14, SUB-SECT. 4.—
C. (e).

8453 i. When winding up ordered—Tramway company.—Where an order in Council, after giving borrowing powers, expressly provided the mtgees. might enforce payment by the appointment of a Receiver:—*Held*: This did

not preclude a mtgee. who had obtained judgment against the co. from obtaining a winding-up order.—*Re PORTSTEWART TRAM CO.*, *Ex p.* O'NEILL, [1896] 1 L. R. 265.—*IR.*

8453 ii. — — — — —.—A co. was incorporated by private Act of Parliament incorporating the Companies Clauses Consolidation Act, 1845.

Sect. 14.—Borrowing: Sub-sect. 4, D.; sub-sects. 5 & 6. Sect. 15: Sub-sect. 1.]

D. Interest on Securities.

8456. Out of what funds payable.]—BLOXAM *v.* METROPOLITAN RY. CO., No. 8193, *ante*.

8457. In respect of what period payable—Failure to redeem principal—Continuance after date of redemption.]—The G. W. Ry. Co. issued to pltfs. debentures in the following form:—"We, the G. W. Ry. Co., in consideration of £1,000 to us paid by P. & G., do assign unto them the said undertaking, & all the estate, etc., to hold the same until the said sum of £1,000, together with interest for the same after the rate of £5 for every £100 for a year, payable as hereinafter mentioned, shall be fully paid. It is hereby stipulated that the said principal sum of £1,000 shall be payable & paid on Jan. 15, 1844, & that in the meantime the said co. shall, in respect of interest as aforesaid on the said principal sum, pay to the bearer of the coupons or interest warrants hereunto annexed, the several sums mentioned in such warrant respectively," etc. In Jan. 1844, the interest due on the bonds up to Jan. 15, 1844, was paid to pltfs. The co. did not then pay, nor did pltfs. require, the principal, nor did the co. give to pltfs. notice that they were ready to pay it:—*Held*: these debentures continued to carry interest from Jan. 15, 1844, until payment.

This is substantially a mtge., & the practice in such cases invariably is, to give interest by way of damages. If defts. wish for the future not to pay interest, they must have the money ready at their banker's, & give notice to their creditors of their being ready to pay them; strictly, they must tender the money (PARKE, B.).—PRICE *v.* GREAT WESTERN RY. CO. (1847), 16 M. & W. 244; 4 Ry. & Can. Cas. 707; 16 L. J. Ex. 87.

*Annotations:—*Refd. Hart *v.* Eastern Union Ry. (1852), 7 Exch. 246; Gordillo *v.* Weguelin (1877), 5 Ch. D. 287. *Mentd.* Morgan *v.* Jones (1853), 8 Exch. 620.

Default in payment—Remedy of lender.]—See Sub-sect. 4, C., *ante*.

8458. When claim barred—Warrant never presented.]—A railway co.—incorporated by a special Act, authorising it to issue debenture-stock, bearing interest, subject to Companies Clauses Act, 1863 (c. 118), Part III.—in 1885 issued debenture-stock, for which it gave certificates under its common seal, & also a warrant for interest under the signature of the secretary. The warrant was never presented for payment, & in 1896 the co. went into voluntary liquidation under another Act:—*Held*: the liability being statutory, the period of limitation was twenty years, & the claim for interest mentioned in the warrant was therefore not statute-barred.—*Re* CORNWALL MINERALS RY. CO., [1897] 2 Ch. 74; 66 L. J. Ch. 561; 76 L. T. 832; 61 J. P. 535; 46 W. R. 5; 13 T. L. R. 402; 41 Sol. Jo. 508.

*Annotation:—*Refd. *Re* Artisans Land & Mortgage Corp., [1904] 1 Ch. 796.

SUB-SECT. 5.—REGISTER OF MORTGAGES.

8459. Right of inspection—Nature of—Right to take copies.]—The statutory right of a registered shareholder & debenture-stockholder in a co. of inspecting the registers & the other books of the co. carries with it, as a general rule, as incidental to it, a right to take copies & extracts; & this right is exercisable by a holder of shares or stock, notwithstanding that he has acquired his interest in the co. as the nominee of a rival co., provided that he do not claim to represent or to be suing on

behalf of the other shareholders in the co.—MUTTER *v.* EASTERN & MIDLANDS RY. CO. (1888), 38 Ch. D. 92; 57 L. J. Ch. 615; 59 L. T. 117; 36 W. R. 401; 4 T. L. R. 377, C. A.

*Annotations:—*Appld. Nelson *v.* Anglo-American Land Mortgage Agency Co., [1897] 1 Ch. 130. *Folld.* Boord *v.* African Consolidated Land & Trading Co., [1898] 1 Ch. 596. *Distd.* *Re* Balaghât Gold Mining Co., [1901] 2 K. B. 665. *Consd.* Ormerod, Grierson & Co. *v.* St. George's Ironworks, [1905] 1 Ch. 505; Davies *v.* Gas, Light & Coke Co., [1909] 1 Ch. 708. *Refd.* Bevan *v.* Webb, [1901] 2 Ch. 59.

8460. — Exercise of—By shareholder acting for rival company.]—MUTTER *v.* EASTERN & MIDLANDS RY. CO., No. 8459, *ante*.

8461. — Necessity for assigning reasons for requiring inspection.]—The right given to holders of stock & debentures by 1845 Act, ss. 45, 63, & by Cos. Clauses Act, 1863 (c. 118), s. 28, of inspecting the registers of a co., is not confined to an inspection of the names & addresses only of the holders of stock & debentures, may be exercised without assigning any reason for requiring inspection, & can be enforced by an injunction restraining interference by the co. with the stockholder's right, without his being compelled to apply *mandamus* calling upon the directors to inspect.—HOLLAND *v.* DICKSON (1888), 37 Ch. D. 669; 57 L. J. Ch. 502; 58 L. T. 845; 36 W. R. 320; 4 T. L. R. 285.

*Annotations:—*Folld. Boord *v.* African Consolidated Land & Trading Co., [1898] 1 Ch. 596; Davies *v.* Gas, Light & Coke Co., [1909] 1 Ch. 708. *Refd.* Mutter *v.* Eastern & Midlands Ry. (1888), 38 Ch. D. 92.

8462. — Enforcement of—Injunction.]—HOLLAND *v.* DICKSON, No. 8461, *ante*.

Company books & documents generally.]—See Sect. 11, sub-sect. 3, *ante*.

SUB-SECT. 6.—STAMP DUTIES.

8463. "Issue of loan capital"—Substitution of new stock for extinguished stock.]—Defts., under powers conferred upon them by a special Act of Parliament, issued certain debenture-stocks at different rates of interest. By a subsequent Act those stocks were cancelled, & it was provided that there should be, by virtue of the Act, created, in lieu of the stocks so extinguished, certain new debenture-stock, at a uniform rate of interest & that every holder of the existing stock should be entitled to receive such nominal amount of the new stock as would yield to the holder in cash the same amount of interest previously received by him in respect of the existing stock, & that the new stock was to be held upon the same terms as those upon which the existing stock was held immediately before the substitution:—*Held*: the existing debenture-stocks having been extinguished by the special Act, & new stock substituted therefor, whereby the indebtedness of the co. was largely increased, the new stock was loan capital, & defts. had proposed "to issue any loan capital" within Finance Act, 1899 (c. 9), s. 8 (1), & were therefore bound to deliver to the Inland Revenue Comrs., for the purposes of stamp duty, a statement of the amount proposed to be secured by the new debenture-stock.—A.-G. *v.* REGENT'S CANAL & DOCK CO., [1904] 1 K. B. 263; 73 L. J. K. B. 50; 89 L. T. 599; 68 J. P. 105; 52 W. R. 211; 20 T. L. R. 92; 48 Sol. Jo. 115, C. A.

*Annotations:—*Folld. A.-G. *v.* London & India Docks Co. (1907), 98 L. T. 655. *Distd.* A.-G. *v.* South Wales Electrical Power Distribution Co., [1920] 1 K. B. 552.

8464. — Issue of deferred warrants in payment of debenture interest—Warrants bearing

interest.]—Deft. co., having already issued debentures, issued under statutory authority prior lien debentures, &, in respect of the interest on the previously issued debentures, issued deferred warrants bearing interest & payable out of the first available funds of the co. subject to prior charges:—*Held*: defts. had not, by the issue of the deferred warrants, issued “loan capital” within Finance Act, 1899 (c. 9), s. 8, & were not liable to pay an *ad valorem* duty under that sect.—*A.-G. v. SOUTH WALES ELECTRICAL POWER DISTRIBUTION CO.*, [1920] 1 K. B. 552; 89 L. J. K. B. 145; 122 L. T. 417; 36 T. L. R. 126, C. A.

8465. — **Consolidation of debenture-stock.**—Under the powers of their special Act a co. incorporated in the United Kingdom “modified the rights” of the holders of their existing debenture-stock—which bore interest at 4 per cent—by dividing it into two classes of debenture-stock, A. & B., in certain proportions, called in & cancelled the certificates of the existing stock, & gave to the holders certificates of the new A. & B. stock—which bore interest at 3 per cent—in such amounts as to give to each holder interest equivalent to his former interest. The interest on the B. stock ~~remained next after the interest on the A. stock~~:—*Held*: this was an “issue of debenture-stock” within the meaning of Finance Act, 1899 (c. 9), s. 8, & the co. were liable to the duties imposed by the Act.—*LONDON & INDIA DOCKS CO. v. A.-G.*, [1909] A. C. 7; 78 L. J. K. B. 132; 99 L. T. 2; 16 Mans. 51, H. L.; *affg.* S. C. *sub nom.* *A.-G. v. LONDON & INDIA DOCKS CO.* (1907), 98 L. T. 655, C. A.

Annotation:—*Refd.* *A.-G. v. South Wales Electrical Power Distribution Co.*, [1920] 1 K. B. 552.

1. 15.—WINDING UP.

SUB-SECT. 1.—COMPANIES WHICH MAY BE WOUND UP.

Compare Part III., Sect. 36, sub-sect. 1, C., *ante*, & Part VII., Sect. 2, sub-sect. 2, *ante*.

8466. Canal company.—A canal co. formed under a private Act of Parliament may be the subject of a winding-up order under 1862 Act.—*Re BASINGSTOKE CANAL (PROPRIETORS)* (1866), 14 W. R. 956.

Annotation:—*Mentd.* *Re Woking Urban Council (Basingstoke Canal) Act*, 1911 (1913), 83 L. J. Ch. 201.

8467. —.]—Winding-up order made in the case of a canal co. incorporated by special Act of Parliament, on the ground of its being just & equitable, under 1862 Act, s. 199, the canal being worked at a loss.—*Re WEY & ARUN JUNCTION CANAL CO.* (1867), L. R. 4 Eq. 197; 36 L. J. Ch. 509; 16 L. T. 150.

Annotations:—*Folld.* *Re Bradford Navigation Co.* (1870), L. R. 10 Eq. 331. *Refd.* *Re Exmouth Docks Co.* (1873), L. R. 17 Eq. 181; *Re Barton-upon-Humber & District Water Co.* (1889), 42 Ch. D. 585. *Mentd.* *Re Woking Urban District Council (Basingstoke Canal) Act*, 1911 (1913), 110 L. T. 49.

8468. —.]—The ct. has jurisdiction under 1862 Act, s. 199, to wind up a canal co. incorporated by Act of Parliament, & will make a winding-up order in such a case, although it may be necessary to apply for an Act of Parliament to enable the property of the co. to be sold.—*Re BRADFORD NAVIGATION CO.* (1870), L. R. 10 Eq. 331; 35 J. P. 20; 18 W. R. 592; *on appeal*, 5 Ch. App. 600, L. J.

Annotations:—*Refd.* *Re Exmouth Docks Co.* (1873), L. R. 17 Eq. 181; *Re Barton-upon-Humber & District Water Co.* (1889), 42 Ch. D. 585; *Re Woking Urban Council (Basingstoke Canal) Act*, 1911, [1914] 1 Ch. 300.

8469. Dock company—Authorised to make branch railway.—*Re EXMOUTH DOCKS CO.*, No. 8452, *ante*.

8470. Railway company.—*Re EXMOUTH DOCKS CO.*, No. 8452, *ante*.

8471. —.]—A railway co. was ordered by Act of Parliament to be wound up in the same manner & with the same incidents as if it were a co. registered under the Cos. Acts. After resolutions had been passed for a voluntary winding up a petition was presented asking for a supervision order. The ct. made the order as prayed.—*Re BRISTOL & NORTH SOMERSET RY. CO.* (1884), 1 T. L. R. 22.

8472. Telegraph company.—A telegraph co. obtained an Act of Incorporation. It laid down about 400 miles of wires, but had spent the whole subscribed capital of £26,000 & £16,000 beyond, & judgments to the extent of £1,800 had been entered up against the co. On the petition of a shareholder it was ordered to be wound up, though opposed by a director on behalf of the holders of one-eighth of the shares, who objected that the Act of Parliament would thereby become void, & stated that the materials would sell for very little, that the works might be completed for a small sum, & that there was some prospect of obtaining further pecuniary assistance:—*Held*: under the circumstances, petitioner ought not to be compelled to go on with an undertaking, which might possibly double his present liability.—*Re ELECTRIC TELEGRAPH OF IRELAND* (1856), 22 Beav. 471; 52 E. R. 1189.

8473. Tramway company.—An unregistered tramway co. incorporated by a special Act does not fall within the exception of “railway cos. incorporated by Act of Parliament” in 1862 Act, s. 199, & it may therefore be wound up under that sect.—*Re BRENTFORD & ISLEWORTH TRAMWAYS CO.* (1884), 26 Ch. D. 527; 53 L. J. Ch. 624; 50 L. T. 580; 32 W. R. 895.

Annotation:—*Folld.* *Re Portsmouth Borough (Kingston, Fratton & Southsea) Tram. Co.*, [1892] 2 Ch. 362.

8474. —.]—*Re PORTSMOUTH BOROUGH (KINGSTON, FRATTON & SOUTHSEA) TRAMWAYS CO.*, No. 8453, *ante*.

8475. —.]—A contributory no less than a creditor is entitled to petition under 1862 Act, s. 199, for the winding up of an unregistered co.—*e.g.*, a tramway constituted by special Act of Parliament.—*Re SOUTH STAFFORDSHIRE TRAMWAYS CO.* (1894), 1 Mans. 292; 8 R. 288.

8476. Water company.—The ct. has jurisdiction to make an order for the winding up of a water co., incorporated by registration under Cos. Acts, upon which powers for the public benefit have been conferred by a provisional order of the Board of Trade—made under the Gas & Water Works Facilities Act, 1870 (c. 70), & afterwards confirmed by a special Act—though it might not be possible to sell the undertaking & property of the co. without the authority of an Act of Parliament.—*Re BARTON-UPON-HUMBER & DISTRICT WATER CO.* (1889), 42 Ch. D. 585; 58 L. J. Ch. 613; 61 L. T. 803; 38 W. R. 8; 1 Meg. 412.

Annotations:—*Folld.* *Re St. Neots Water Co.* (1906), 22 T. L. R. 478. *Refd.* *Re Portsmouth Borough (Kingston, Fratton & Southsea) Tram. Co.*, [1892] 2 Ch. 362. *Mentd.* *Re Woking Urban Council (Basingstoke Canal) Act*, 1911, [1914] 1 Ch. 300.

8477. —.]—The ct. has jurisdiction to make a winding-up order against a co., incorporated under a special Act for supplying water to a district, upon the petition of a judgment creditor.—*Re ST. NEOTS WATER CO.* (1906), 22 T. L. R. 478.

Sect. 15.—Winding up: Sub-sects. 2, 3, 4 & 5. X. Sects. 1 & 2.]

SUB-SECT. 2.—GROUNDS FOR WINDING UP.

See, generally, Part III., Sect. 36, ante; Part VII., Sect. 2, sub-sect. 3, ante; & Part VIII., Sect. 1, sub-sect. 6, B., ante.

8478. Undertaking worked at loss.]—*Re WEY & ARUN JUNCTION CANAL CO.*, No. 8467, *ante*.

SUB-SECT. 3.—PROCEDURE.

See, generally, Part III., Sect. 36, sub-sect. 3, ante, & Part VII., Sect. 2, sub-sect. 4, ante.

Who may petition—Debenture-holder.]—*See* Nos. 8452, 8453, *ante*.

8479. Winding-up order—Appeal—Who may appeal against order—Stranger to company.]—No person has a right to be heard against a petition for winding up a co., except creditors & contributories, & although the ct. may reasonably hear other persons who have an interest in the property of the co. as *amici curiæ*, yet such persons cannot appeal against the decision.

Upon a petition to wind up a canal co., presented by the co., another canal co., whose canal communicated with that of the petitioning co., were heard in opposition to the petition:—*Held*: the opposing co. had no *locus standi* to appeal against the winding-up order.—*Re BRADFORD NAVIGATION CO.* (1870), 5 Ch. App. 600; 39 L. J. Ch. 733; 23 L. T. 487; 18 W. R. 1093, L. JJ.

Annotations:—Refd. Re Woking Urban Council (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300. Mentd. Re Exmouth Docks Co. (1873), L. R. 17 Eq. 181; Re Barton-upon-Humber & District Water Co. (1889), 42 Ch. D. 585.

8480. — Effect of—Right of creditor to sue

shareholder.]—The ct. has no jurisdiction to restrain a creditor of a joint-stock co. from suing one of the members, on the ground that an order has been made for winding up the affairs of the co.—*Re DOVER & DEAL RY. CO.* (1850), 17 Sim. 18; 60 E. R. 1033.

Who may prove.]—*See* No. 8172, *ante*.

SUB-SECT. 4.—DISTRIBUTION OF ASSETS.

See, generally, Part III., Sect. 36, sub-sect. 12, ante, & Part VII., Sect. 2, sub-sect. 8, ante.

8481. Right of preference shareholders—Payment of dividends out of undistributed profits—Assets insufficient to return capital.]—*Re ACCRINGTON CORPN. STEAM TRAMWAYS CO.*, No. 8219, *ante*.

Distribution of parliamentary deposit.]—*See* PARLIAMENT.

SUB-SECT. 5.—COSTS.

See, generally, Part III., Sect. 36, sub-sect. 3, F., ante.

8482. Unsuccessful appeal by liquidator.]—*Re HOYLAK RY. CO.*, *Ex p.* LITTLEDALE, No. 8081, *ante*.

8483. Application for payment of calls — & interest thereon—Judgment for less amount than that claimed.]—*Re LEOMINSTER & BROMYARD RY. CO.* (1890), 6 T. L. R. 440.

SECT. 16.—ARRANGEMENTS WITH CREDITORS.

See RAILWAYS & CANALS.

Part X.—Chartered Companies.

SECT. 1.—CREATION.

Grant of charter.]—*See, generally, CONSTITUTIONAL LAW*, Vol. XI., pp. 502, 577, & *CORPORATIONS*, pp. 291 *et seq.*

8484. — Subject to fulfilment of certain conditions—Effect.]—Bill by one of the shareholders of a co., which was incorporated by charter, alleging that the public purposes of the grantors of the lands & mines which the co. held, & in furtherance of which pltf. had subscribed for shares, had not been fulfilled; & that such grants had been diverted in a great degree to private objects; & that the charter had been granted by the Crown on condition that a moiety of the capital should be subscribed for, & a fourth thereof paid up within a limited time, which condition also had not been fulfilled; & that, having failed to fulfil such intentions & conditions, it was a fraud on the part of the directors to certify that they had been performed, & to commence the business of the co. & make calls, as they had done; & praying repayment of such calls, an injunction to restrain the directors from making calls & carrying on business for the future, & an indemnity to pltf.

The co. & directors demurred to the bill, & the demurrer was allowed.

It is no ground for relief in equity, at the suit of a shareholder against the co., that the charter from the Crown or the grant to the co. from a private person has been obtained by misrepresentation to the Crown or to such grantor. It is for the Crown or the grantor, if either should complain of the fraud & misrepresentation, to take proceedings to set aside the charter or the grant.

The provision that the business of the co. should commence from the date of the certificate of the directors that a stipulated number of shares had been subscribed for, & the stipulated capital paid up:—*Held*: not to mean that the co. was not to exist antecedently to that date—where the deed also provided that the parties were to be associated, the business to be carried on, & the directors to have power to act for the co., notwithstanding the full number of shares were not subscribed for.

The averment in the bill that defts. alleged that the other shareholders had concurred—or the admission of defts., the directors, that the other shareholders had concurred—in the prosecution of

PART X. SECT. 1.

d. Grant of charter—Proof of.]—The recitals in an imperial statute are sufficient proof of the charter of a co.—*WOODHILL v. SULLIVAN* (1864), 14 C. P. 265.—**CAN.**

the business of the co., notwithstanding the terms of the charter were not satisfied, does not afford ground for a decree which might prejudice the interests of the other shareholders; for the allegations, or admissions of defts. cannot be taken as proof of the conduct, or affect the rights, of such other shareholders.—*MACBRIDE v. LINDSAY* (1852), 9 Hare, 574; 22 L. J. Ch. 165; 68 E. R. 641; *sub nom.* *EASTERN ARCHIPELAGO CO., McBRIDE v. LINDSAY*, 19 L. T. O. S. 120; 16 Jur. 535.

8485. — Obtained by misrepresentation—Rights of shareholders.]—*MACBRIDE v. LINDSAY*, No. 8484, *ante*.

8486. Whether consistent with prior subscription contract.]—The subscription contract of a projected banking co., after reciting that the capital was agreed to consist of £1,000,000, with power to increase it to £3,000,000, & that application had been made to the Crown for a charter, nominated certain persons directors until the charter should be obtained, with power for them to arrange the terms of the charter in such manner as they should think necessary in compliance with the requisition of the government, & to narrow or extend the objects of the co. as might be necessary. When the charter should have been sealed, the directors were empowered to prepare a deed of settlement & to call for a first instalment from the subscribers, & to declare a forfeiture of the shares of any subscribers who did not execute such deed of settlement. A charter was obtained incorporating the co., with a capital of £644,000, & power to increase it to £1,000,000 with the consent of the Lords of the Treasury. A call was made & a deed of settlement prepared reciting the charter, the call & its payment by the parties to the deed of settlement:—*Held*: (1) the power of the directors was not terminated on the grant of the charter; (2) the charter was not inconsistent with the subscription contract; (3) the call was properly made; (4) the deed of settlement was binding on the subscribers to the subscription contract; but (5) as the deed of settlement made the payment of the call a requisite preliminary, & the subscription contract did not make non-payment of the call a ground for forfeiture, the directors could not declare a forfeiture for non-execution of the deed of settlement.

The directors executed the subscribers' contract, but the number of shares taken by each was omitted to be set opposite to their respective names:—*Held*: the qualification [of fifty shares] required by the subscribers' contract did not apply to directors appointed by the deed of settlement.—*NORMAN v. MITCHELL* (1854), 5 De G. M. & G. 648; 24 L. T. O. S. 53; 2 W. R. 685; 43 E. R. 1022, L. JJ.

How far company entity distinct from members.]—See CORPORATIONS, Vol. XIII., pp. 369, 370, Nos. 1010–1021.

Promoters—Issue to themselves of shares as fully paid-up—Validity.]—See No. 8490, *post*.

SECT. 2.—MEMBERSHIP.

See, generally, CORPORATIONS, Vol. XIII., pp. 300 *et seq.*

8487. What constitutes—Allotment of shares—Payment of deposit & calls—Deed of settlement not executed.]—During the formation of a joint-stock co. the brokers of the co. put down deft.'s name as an appct. for shares, & the promoters allotted to him fifty shares, & sent him an allotment letter informing him thereof, “& on your

execution of the deed prepared in conformity with the provisions in the royal charter you will be entitled to fifty share certificates of the co.” Deft. paid the deposit on the shares; the royal charter was afterwards granted & the deed prepared & executed by many of the shareholders, but not by deft. Deft. subsequently paid several calls, but refused to pay the calls now sued for. The deed required the shares to be numbered in succession, beginning with one, & each share to be distinguished by its separate number, & a register of shareholders to be kept. In the register the names of the shareholders were entered, deft.'s among them, but against his name in the column for the number of shares was a blank:—*Held*: deft. not having executed the deed was not liable for the calls under & by virtue of the deed as alleged in the declaration.—*IRISH PEAT CO. v. PHILLIPS* (1861), 1 B. & S. 598, 629; 30 L. J. Q. B. 363; 4 L. T. 806; 7 Jur. N. S. 1189; 9 W. R. 873; 121 E. R. 837, 849, Ex. Ch.

Annotations:—*Mentd.* *East Gloucestershire Ry. v. Bartholomew* (1867), L. R. 3 Ex. Ch. 15; *Portal v. Emmens* (1876), 1 C. P. D. 201; *Re Printing Telegraph & Construction Co. of Agence Havas, Ex p. Cammell* (No. 2) (1894), 38 Sol. Jo. 437.

8488. Register of members—Refusal of company to register—Remedy of member.]—(1) A *mandamus* will not be issued to a trading co. to register a member as the proprietor of a certain number of shares, where there is no legal obligation upon the co. to form or keep any register of shareholders.

(2) A *mandamus* will not be issued to a trading corp'n. to receive the vote of a member at meetings of the corp'n.

The writ of *mandamus* is the proper remedy, where there is a legal right, & the law affords no other sufficient legal remedy. Appct. fails to show a legal right to be upon any register of shareholders. There is nothing in the charter of the co., in any Act of Parliament, or in any bye-law requiring that there should be any such register. If there be any such in existence, it must be a mere list or memorandum of names kept by some officer of the co. for his own convenience, or that of the Ct. of Assistants. If appct. have a right to vote at the meetings of the co. in a particular way, that is a legal right, for the invasion of which there is a legal remedy by action; but it is not matter for a *mandamus* (*LORD CAMPBELL, C.J.*).—*R. v. COPPER MINERS OF ENGLAND CO.* (1850), 16 L. T. O. S. 148.

8489. — — — — —.]—A co. was incorporated by royal charter, which required that provision should be made in the deed of settlement for the due registration of shareholders; the deed accordingly provided that the directors of the co. should cause a register of shareholders to be regularly kept, & that the personal representatives of a deceased shareholder should be entitled to be registered as the owners of the deceased's shares on performing certain conditions. Pltf., being the administrator of a deceased shareholder, & having performed the conditions, brought an action for damages against the co. for not registering him as a shareholder, & also claimed in his declaration, under Common Law Procedure Act, 1854 (c. 125), s. 68, a *mandamus* to the co. to register him:—*Held*: this was a case in which, before the Act, a *mandamus* would have been granted, & pltf. was therefore entitled to claim it under the Act.

Semble: sect. 68 is not to be strictly confined to cases in which the writ would have been granted before the Act.—*NORRIS v. IRISH LAND CO.* (1857), 8 E. & B. 512; 27 L. J. Q. B. 115; 30 L. T. O. S.

132; 4 Jur. N. S. 235; 6 W. R. 55; 120 E. R. 191.

Annotations:—**Mentd.** Bush v. Beavan (1862), 1 H. & C. 500; Fotherby v. Met. Ry. (1866), 36 L. J. C. P. 88; R. v. Wigan (1874), L. R. 9 Q. B. 317.

SECT. 3.—SHARES.

8490. Issue—As fully-paid—By promoters to themselves—Validity.]—Four projectors of a public co. obtained a charter, by which they & all persons who might become subscribers, were incorporated. The capital was declared to be £20,000, which was to be divided into 400 shares. Before any other subscribers had joined, the four projectors, of common assent, divided the 400 shares amongst themselves, accounting to the corpn., & as was alleged, for £12,000 & not £20,000. They afterwards disposed of the shares. A bill being subsequently filed by the corpn. against the projectors, impeaching the transaction & to compel them to pay the full consideration:—*Held*: though at the time they were the only persons interested in the co., yet it was not competent for them to take the shares without paying the full consideration.—**SOCIETY OF PRACTICAL KNOWLEDGE v. ABBOTT** (1840), 2 Beav. 559; 9 L. J. Ch. 307; 4 Jur. 453; 48 E. R. 1298.

Annotations:—**Consd.** Masons' Hall Tavern Co. v. Nokes (1870), 22 L. T. 503. **Distd.** Re British Seamless Paper Box Co. (1881), 17 Ch. D. 467. **Refd.** London Trust Co. v. Mackenzie (1893), 62 L. J. Ch. 870; Re Darby, Ex p. Brougham, [1911] 1 K. B. 95. **Mentd.** Overend, Gurney v. Gurney (1869), 4 Ch. App. 707, n.; Riche v. Ashbury Ry. Carriage Co. (1874), L. R. 9 Exch. 224; Phosphate Sewage Co. v. Hartmont (1877), 5 Ch. D. 394; Re Newman, [1895] 1 Ch. 674; Jenkin v. Pharmaceutical Soc. of Great Britain, [1921] 1 Ch. 392.

8491. Scrip—Whether scrip-holders liable as members—Whether option to exchange scrip for shares exercised.]—C. applied for & was allotted shares in a banking co., paid the first instalment in the usual way, & received provisional certificates which, on payment of the second instalment, & on executing the deed by a given day, were to be exchanged for shares, but in default of payment the rights & privileges appurtenant to the certificates were to be forfeited. He failed to pay the second instalment & to exchange his certificates. The co. passed into liquidation:—*Held*: he was under no obligation to take shares, & his interest was forfeited, & he was therefore not liable to be placed on the list of contributories.—**Re ASIATIC BANKING CORPN., Ex p. COLLUM** (1869), L. R. 9 Eq. 236; 39 L. J. Ch. 59; 21 L. T. 350; 18 W. R. 245.

Annotation:—**Refd.** McIlwraith v. Dublin Trunk Connecting Ry. (1871), 7 Ch. App. 134.

— — —.]—*See, generally*, Part III., Sect. 18, sub-sect. 3, *ante*.

8492. Calls—Power of directors to make—Between sealing of charter & execution of deed of settlement.]—**NORMAN v. MITCHELL**, No. 8486, *ante*.

8493. Lien—Bye-law conferring lien—Power of company to make.]—Hudson's Bay Co., etc. may by their bye-laws make restrictions upon their stock, viz. that it shall first be liable to pay the debts due to themselves from their own members, or to answer the calls of the co. upon the stock.—**CHILD v. HUDSON'S BAY CO.** (1723), 2 P. Wms. 207; 24 E. R. 702, L. C.

Annotation:—**Refd.** R. v. Westwood (1830), 7 Bing. 1; Chilton v. London & Croydon Ry. (1847), 16 M. & W. 213. **Mentd.** Kinder v. Taylor (1825), 3 L. J. O. S. Ch. 68.

8494. Validity.]—**GIBSON v. HUDSON'S BAY CO.** (1725), 2 Eq. Cas. Abr. 122; 7 Vin. Abr. 125; 1 Stra. 645; 22 E. R. 104, L. C.

Annotations:—**Refd.** Mellorucchi v. Royal Exchange Assce. (1728), 1 Eq. Cas. Abr. 8. **Mentd.** Small v. Oudley (1727), 2 P. Wms. 427.

8495. Transfer—Effected by fraud—Set aside.]—Sale of East India stock by a wrongful administrator, the purchaser having notice of the fraud:—*Held*: to be transferred back to the rightful administrator, & the administratrix of the purchaser to account.—**JOHNSON v. EAST INDIA CO.** (1679), Cas. temp. Finch, 430; 23 E. R. 234.

8496. — Refusal by company to register—Mandamus.]—The ct. will not grant a *mandamus* to a private trading corpn. to permit a transfer of stock to be made in their books.

This co., although carried on under a royal charter, is a mere private partnership. But the writ of *mandamus* is a high prerogative writ, & is confined to cases of a public nature (*per CUR.*).—**R. v. LONDON ASSURANCE CO.** (1822), 5 B. & Ald. 899; 1 Dow. & Ry. K. B. 510; 106 E. R. 1420.

Annotation:—**Mentd.** Leeman v. Lloyd, Wilkinson v. Lloyd (1845), 14 L. J. Q. B. 165.

8497. — — — Name of transferee not given.]—Declaration in case, alleging that *pltf.* was possessed of a share in the stock standing in the books of debts., the East India Co., in his name, which stock was according to the statutes, transferable in debts.' books by debts. making, at reasonable times, such transfer to any other person as the proprietor should require; & that, before the committing, etc., no transfer of *pltf.*'s share had been so made; by reason whereof it was debts.' duty to make & enter in their books, at all reasonable times, such transfer of *pltf.*'s share as he should reasonably require: that afterwards *pltf.* requested debts. to make & enter in their books, on, etc., being the proper & usual time, a transfer of his said share to such person as he might name for that purpose at the time of the transfer: that afterwards, on, etc., *pltf.* was ready & willing to transfer his said share to a proper person then about to be named by *pltf.*, & who was then ready & willing to receive the same, & was a person to whom the same might be lawfully & properly transferred: notice to debts., & request to them by *pltf.* to transfer: whereupon it was the duty of debts. to make, within a reasonable time, a transfer of the share to the said person then about to be named, & who was then ready & willing to accept the same. Breach, that debts., before *pltf.* had named the said person to whom, etc., did not nor would, when so requested & authorised, or within a reasonable time, etc., make the said transfer of the said stock, or any transfer whatsoever, but refused to make & enter in their books any transfer thereof to any person whatsoever:—*Held*: on demurrer to a subsequent pleading, the declaration showed no duty to enter a transfer to a transferee not named at the time of the proposal to transfer; the refusal alleged must be taken with reference to the demand; & the declaration was bad in substance for not showing a breach corresponding with the duty.—**GREGORY v. EAST INDIA CO.** (1845), 7 Q. B. 199; 14 L. J. Q. B. 220; 5 L. T. O. S. 90; 9 Jur. 686; 115 E. R. 463.

8498. Transmission—Liability of deceased shareholder's estate.]—**Re GRIFFITHS, TATE v. ROLLS**, [1880] W. N. 159.

8499. Forfeiture—Validity.]—**NORMAN v. MITCHELL**, No. 8486, *ante*.

8500. — — — Compliance with formalities required by charter.]—By the charter of the co. it was provided, that there should be held in each

year a general meeting at a particular time. Special general meetings might also be called, of which notice was to be given by advertisement. No business was to be transacted at any special general meeting besides the business for which it was called. By the cos.' Act—6 Geo. 4 (c. 39), s. 14—no advantage was to be taken of the forfeiture of shares, unless the same should be declared to be forfeited at some general or special general meeting. A meeting, after the time named in the charter for the annual general meeting, was called by advertisement "to receive the annual report; to declare the forfeiture of certain shares, etc., & on other business; & the co. thereby further gave notice that the said general meeting was made special for the purpose of electing directors":—*Held*: such meeting was competent, as a special general meeting, to declare the shares forfeited.

By the same sect. of the Act no advantage was to be taken of the forfeiture of any shares until after thirty days' notice should have been given to the owner or owners thereof. By sect. 12, in cases where the holder of any share should become bkpt., etc., an affidavit should be made & delivered to the clerk of the co. that he may register, etc., & until such affidavit should have been delivered, ~~no such person should be entitled to sell or assign such share or to claim any dividend.~~ R., the proprietor of shares, having become bkpt. in 1847, his assignees took no steps to procure their names to be placed on the register till 1853. Calls were made of which the assignees had notice. In 1851 the shares were declared forfeited by the co. Notice of such forfeiture was served upon the bkpt., his name being at the time on the register as owner of the shares:—*Held*: such notice was properly served upon the bkpt.—*GRAHAM v. VAN DIEMEN'S LAND CO.* (1856), 1 H. & N. 541; 26 L. J. Ex. 73; 28 L. T. O. S. 219; 2 Jur. N. S. 1191; 5 W. R. 149; 156 E. R. 1316, Ex. Ch.

SECT. 4.—DIRECTORS.

Compare Part III., Sect. 28; Part IX., Sect. 9, *ante*.

8501. Nature of office.—The office of a director is of a mixed nature, public as arising from the charter of the Crown, but at the same time is not an employment that affects the public government, for none of the directors of the great cos. are required to qualify by taking the sacrament.—*CHARITABLE CORPN. v. SUTTON* (1742), 2 Atk. 400; 9 Mod. Rep. 349; 26 E. R. 642, L. C.

Annotations:—*Reid*. *Shrewsbury & Birmingham Ry. v. L. & N. W. Ry.* (1853), 4 De G. M. & G. 115; *Re Dover & Deal Ry. Cinque Ports, Thanet & Coast Junction Co., Londesborough's Case* (1854), 4 De G. M. & G. 411; *Overend, Gurney v. Gurney* (1869), 4 Ch. App. 701; *Turquand v. Marshall* (1869), 20 L. T. 766; *Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394; *Metropolitan Bank v. Heiron* (1880), 5 Ex. D. 319. *Mentd.* *Steward v. East-India Co.* (1742), 9 Mod. Rep. 387; *A.-G. v. Wilson* (1840), Cr. & Ph. 1; *Power v. Hoey* (1871), 19 W. R. 916.

PART X. SECT. 6.

a. Power to sell rights of company—*Not franchise itself.*—Deft. & H. agreed to purchase from plffs. all their claims against an incorporated co., & their interest in the same, & as far as they could sell it, their control over the charter of the co., for \$3,000. Deft. & H. subsequently gave plffs. a written promise to pay the price agreed upon "for the charter," as expressed in writing:—*Held*: evidence was admissible to show that the subject of the sale was not the franchise itself, but a mere claim against or right in the co., capable of being legally sold.—

MILLER v. THOMPSON (1866), 16 C. P. 513.—**CAN.**

1. Power to issue bonds for building.—A co. whose charter provides that it "may acquire, own, lease & sell real estate," & "build, sell, lease & otherwise deal with elevators, etc.," & further "may issue bonds bearing interest to an amount not exceeding the cost of any elevator built by it," has the power to issue such bonds for the price of an elevator bought by it.—*ROYAL TRUST CO. v. GREAT NORTHERN ELEVATOR CO.* (1906), Q. R. 30 S. C. 499.—**CAN.**

g. Liability of prohibited acts—For-

8502. —.]—(1) Where a person standing in the relation of confidential agent to another, has, by his participation in a fraud, induced the latter to part with his property at an under value, his representatives may be proceeded against in equity to make good the loss occasioned by fraud, even though the agent himself derived no pecuniary benefit.

(2) Where a person has been induced, by a joint fraudulent scheme of two others to make sales to them at an undervalue, a single bill against both to set aside the sales, though they were entirely distinct transactions, is not multifarious.—*WALSHAM v. STANTON* (1863), 1 De G. J. & Sm. 678; 3 New Rep. 56; 33 L. J. Ch. 68; 9 L. T. 357; 9 Jur. N. S. 1261; 12 W. R. 63; 46 E. R. 268, L. JJ.

Annotations:—*As to* (1) *Reid*. *Peck v. Gurney* (1873), L. R. 6 H. L. 377. *Generally*, *Mentd.* *Bent v. Yardley* (1865), 2 Hem. & M. 602.

8503. Qualification—Necessity for holding qualification shares.—*NORMAN v. MITCHELL*, No. 8486, *ante*.

8504. Powers—Duration of—Appointment "until charter obtained"—*Whether powers terminated by grant of charter.*—*NORMAN v. MITCHELL*, No. 8486, *ante*.

SECT. 5.—REGULATION AND MANAGEMENT.

See, generally, CORPORATIONS, Vol. XIII., pp. 307 *et seq.*, 325 *et seq.*, 339 *et seq.*, 348, 349.

8505. Voting—Refusal of company to receive vote—Mandamus.—*R. v. COPPER MINERS OF ENGLAND CO.*, No. 8488, *ante*.

Bye-laws—Conferring lien on shares—Validity.—*See* Nos. 8493, 8494, *ante*.

8506. Servant—Recovery of damages against—Right of servant to indemnity.—Where one recovered in trover against a servant of the African Co.:—*Held*: equity would not relieve, because plff. in equity might at law have defended himself; but the co. should indemnify the servant; & plff. at law—one of defts. in equity—might prosecute the decree in the servant's name.—*ROYAL AFRICAN CO. OF ENGLAND v. DOCKRA & LANGDON* (1703), Colles, 327, II. L.; *affg.* *S. C. sub nom. LANGDON (EXECUTOR OF DICKENSON) v. AFRICAN CO. & DOCKWRAY*, 2 Eq. Cas. Abr. 586.

SECT. 6.—POWERS AND LIABILITIES.

See CORPORATIONS, Vol. XIII., pp. 358, 359; & *generally*, CORPORATIONS, Vol. XIII., pp. 349 *et seq.*, 378 *et seq.*, 398 *et seq.*, 408 *et seq.*

SECT. 7.—DISSOLUTION.

See, generally, CORPORATIONS, Vol. XIII., pp. 434 *et seq.*

feiture.—Where a co. is prohibited from doing certain things by its charter, & it does these things, they are not *ultra vires* but a *sci fa.* may be brought & the charter forfeited.—*BONANZA CREEK GOLD MINING CO. v. R.* (1916), 26 D. L. R. 273.—**CAN.**

PART X. SECT. 7.

h. Winding up—Branch of English company.—*Re* *INDIAN COMPANIES ACT, 1866, Re* *COMMERCIAL BANK CORPN. OF INDIA & THE EAST, Re* *AGRA & MASTERMAN'S BANK, LTD.* (1866), 1 Ind. Jur. N. S. 335.—**IND.**

Sect. 7.—Dissolution. Parts XI. & XII. Sects. 1, 2, 3

8507. Winding up—Jurisdiction of court to order.]—(1) In the charter of a co. incorporated by royal charter in 1851 there was a provision that, "on the winding up of the affairs of the corp., all & every the proprietors for the time being of any interest or shares in the capital thereof shall be liable to contribute to the payment of the debts & liabilities of the corp." to the extent therein mentioned. The charter also contained provisions for winding the corp. up in the event of a loss of a certain amount of the capital, or in the event of the charter being revoked. At the date of the grant of the charter, cos. incorporated by royal charter could be wound up under statutory powers:—*Held*: the expression "winding up of the affairs of the corp." applied to a winding up under the statutory powers for the time being in force.

(2) The ct. has jurisdiction, under 1862 Act, to order the winding up of a co. incorporated by a royal charter granted under the powers conferred on the Crown by Chartered Companies Act, 1837 (c. 73).—*Re ORIENTAL BANK CORPN.* (1885), 54 L. J. Ch. 481; 1 T. L. R. 273; *sub nom. Re ORIENTAL BANK CORPN., Ex p. CLAYTON & HARTAS*, 52 L. T. 556, C. A.

— — —.]—*Compare* No. 7657, *ante*.

8508. Effect of dissolution—On distribution of assets—Division of profits not in accordance with charter.]—Upon the dissolution of a chartered co. the distribution of its assets among the shareholders must be regulated by a consideration of the entire contract *inter se*, created as well by the dealings of the co. as by the terms of their charter & Acts of Parliament.

The charter of a co., after recognising the fact

that £100,000 had been subscribed as the co.'s capital by paid-up shares of £25 each & that £200,000 more was to be raised, declared that the capital of the co. should be £300,000, in shares of £25 each, of which at least two-thirds should be paid up within twelve months from the date thereof, but that the charter should be in full force notwithstanding the remaining one-third should not have been paid up; & it provided that the proprietors, before or after any call, might pay money in advance upon their shares, & that the co. should pay interest upon the moneys so paid in advance, & that every shareholder should be entitled to the "profits & advantages" attending the capital in proportion to the number of shares held by him. By the deed of settlement it was provided that the concurrence of three-fourths of the shareholders should be necessary to enable the directors to make calls. The co. afterwards raised an additional £100,000 by 8000, £25 shares, on which only £12 10s. was paid. They divided profits in proportion to the amount actually paid. On the dissolution of the co.:—*Held*: the assets were divisible on the same principle, & the shareholders who had paid up £25 per share were not entitled to have £12 10s. per share first paid to them, nor were they entitled to be paid interest, on that sum.—*SOMES v. CURRIE* (1855), 1 K. & J. 605; 26 L. T. O. S. 38; 1 Jur. N. S. 954; 69 E. R. 602.

Annotations:—*Expld.* *Sheppard v. Seinde*, *Punjaub & Delhi Ry.* (1887), 56 L. J. Ch. 866; *Re Driffield Gas Light Co.*, [1898] 1 Ch. 451. *Consd.* *Re Beeston Pneumatic Tyre Co.* (1898), 14 T. L. R. 338; *Re North West Argentine Ry.*, [1900] 2 Ch. 882. *Refd.* *Re Bridgewater Navigation Co.* (1889), 57 L. J. Ch. 809.

— **Reconstruction—Under Joint Stock Companies Arrangement Act, 1870 (c. 104), s. 2.]—***See* No. 8556, *post*.

Part XI.—Livery Companies.

See CORPORATIONS, Vol. XIII., pp. 437, 438.

Part XII.—Foreign Companies.

SECT. 1.—DEFINITION OF FOREIGN COMPANY.

8509. What is a foreign company—Company registered under English Companies Acts—Business carried on abroad—Members foreigners.]—A co. was formed having for its object business connected with land generally, but particularly with land situated abroad; all its directors & registered shareholders were foreigners; all its meetings were

held abroad & all its operations related to foreign land & were carried on wholly abroad. It was, however, registered under 1862 Act, & had its registered office in Westminster, where its register of shareholders was kept under the charge of an agent.

There was nothing in the memorandum or arts. of assocn. inconsistent with the management of the co. being in England, but rather they seemed

PART XII. SECT. 1.

*k. What is a foreign company.]—*The locality of the *forum* of litigation determines whether a corp. is foreign or not.—*CLARKE v. UNION FIRE INSURANCE CO.* (1883), 10 P. R. 313.—**CAN.**

l. — Agent within jurisdiction.]

—An American steamship co. having its head office in S. was the lessee of certain premises in V., where applications for freight & passage could be made to an agent:—*Held*: the co. was a foreign co. within Cos. Act, s. 144.—*ALASKA S.S. Co. v. MACAULAY* (1901), 8 B. C. R. 84.—**CAN.**

*m. — — —.]—*A land investment co. incorporated & having its head office in C., employed as agents in United Kingdom, Scottish legal firms who issued advertisements inviting application for investment in the co.'s debentures to be lodged with them, & instructing that money invested

to contemplate such management:—*Held*: the co. was properly constituted & such a company might be wound up under the Act.

The arts. contained a provision that shares not fully paid up might be transferable by the delivery of certificates issued with that object:—*Held*: whether or not this provision was *ultra vires*, upon which no opinion was expressed, it did not affect the validity of the incorporation of the co.

The memorandum of assocn. of a co. intended to be registered under 1862 Act, may be signed exclusively by foreigners resident abroad, but they thereby contract to make themselves liable to the laws of England, & the Cos.' Acts in particular, & a petition to wind up such a co. may be presented by a foreigner resident abroad.—*REUSS (PRINCESS) v. Bos* (1871), L. R. 5 H. L. 176; 40 L. J. Ch. 655; 24 L. T. 641, H. L.; *affg.* S. C. *sub nom.* *Re GENERAL CO. FOR PROMOTION OF LAND CREDIT* (1870), 5 Ch. App. 363, L. J.

Annotations:—*Expld.* *Re Tumacacori Mining Co.* (1874), L. R. 17 Eq. 534. *Distd.* *Re Capital Fire Insee. Assocn.* (1882), 21 Ch. D. 209. *Refd.* *Matthaei v. Galitzin* (1874), 22 W. R. 700. *Mentd.* *Re Nassau Phosphate Co.* (1876), 2 Ch. D. 610.

8510. ————,]—A foreigner, who was domiciled abroad, by deed transferred certain ~~shares~~ ^{securities}, of which some were at the time in a bank in London but the greater part in various banks abroad, to a co. incorporated in England for charitable purposes in connection with Jews, & having its registered office in England. The general meetings of the co. were, by the arts. of assocn., held in London, but the affairs of the co. were under the control of a council which met at the co.'s office in Paris. By the deed of transfer, which was in the English language & in English form, the co. were to pay the income from the securities to the donor during his life, & after his death to apply them for the benefit of Russian Jews. The securities at the death of the donor were still, for the most part, foreign securities situate abroad:—*Held*: the co. was an English co., & as the trusts of the deed would have to be enforced in an English ct., succession duty & estate duty were payable under the Succession Duty Act, 1853 (c. 51) & the Finance Act, 1894 (c. 30), on the death of the donor, upon the principal value of the securities.—*A.-G. v. JEWISH COLONIZATION ASSOCN.*, [1901] 1 K. B. 123; 70 L. J. Q. B. 101; 83 L. T. 561; 65 J. P. 21; 49 W. R. 230; 17 T. L. R. 106, C. A.

Annotations:—*Refd.* *A.-G. v. Johnson*, [1907] 2 K. B. 885; *A.-G. v. Burns*, [1922] 1 K. B. 491.

should be paid into a Scottish bank. The debentures were executed in O. & issued to investors in S. through the agents. Attorneys of the co. in S. exercised on its behalf certain powers with regard to transfers of debentures, confirmation, & probate. The co. did not own or pay rent for any office or pay a salary to any official in the United Kingdom; the remuneration of its representatives here being derived solely from commissions & fees of transference:—*Held*: the co. had not established a place of business in the United Kingdom within 1908 Act, s. 274.—*LORD ADVOCATE v. HURON & ERIE LOAN & SAVINGS CO.*, [1911] S. C. 612; 48 Sc. L. R. 554; 1 S. L. T. 280.—*SCOT.*

PART XII. SECT. 3.

n. Liability of members.]—If one domiciled in M., a British subject, becomes by purchase in M. a holder of shares in a co. in U.S.A., formed under the laws of U.S.A., he becomes subject to liabilities belonging to holders of

shares in the co. under such laws.—*ALLEN v. STANDARD TRUST CO.*, [1919] 3 W. W. R. 974.—*CAN.*

o. ————,]—The liability of shareholders in a co. incorporated in one country & carrying on business in another is regulated by the law of the country in which the co. was incorporated.—*BATEMAN v. SERVICE* (1881), 6 App. Cas. 386; 50 L. J. P. C. 41.—*AUS.*

p. ————,]—Where a foreign co. carries on business in a country where there is no limitation of a member's liability, in such country the members are liable *in solidum* on transactions carried out wholly in that country by the agent of the co. on the express authority of a resolution passed by the members of the co.—*NETHERLANDS AGRICULTURAL EMIGRATION CO. (TRUSTEES) v. FOP SMIT (HEIRS OF)* (1879), 1 N. L. R. 1.—*S. AF.*

q. Rights of members—To bring actions.]—A shareholder in a co. incorporated under the laws of a foreign state, but having its principal place of

See, also, *ALIENS*, Vol. II., pp. 128, 145, 146, Nos. 48, 49, 194–199.

Domicil & residence of foreign companies—For purposes of taxation.]—*See* *INCOME TAX*; *REVENUE*.

— **For purpose of service of legal process.**]—*See* *PRACTICE & PROCEDURE*.

SECT. 2.—RECOGNITION OF FOREIGN COMPANIES.

8511. Whether within purview of English Companies Acts—Foreign company complete & carrying on business abroad.]—A railway co. & partnership complete & existing in a foreign country is not within the purview of the English Joint Stock Companies Acts, 1856, 1857, so as to enable H. B. Majesty's Consular Ct. in Egypt to issue sequestration against such of the members of the co. as were resident within the jurisdiction of that ct. for not complying with an order of the ct. to register the co. as one of limited liability under the English Acts.—*BULKELEY v. SCHUTZ* (1871), L. R. 3 P. C. 764; 8 Moo. P. C. C. N. S. 170; 17 E. R. 276, P. C.

Annotations:—*Apld.* *Bateman v. Service* (1881), 6 App. Cas. 386. *Distd.* *Re Syria Ottoman Ry.* (1904), 20 T. L. R. 217. *Refd.* *Colquhoun v. Heddon* (1890), 54 J. P. 392.

SECT. 3.—MEMBERSHIP.

8512. English shareholder—Knowledge of law of country where company formed.]—A person residing in England, who is a member of a co. carrying on business in a colony must be taken to know the law of the colony.—*BANK OF AUSTRALASIA v. HARDING* (1850), 9 C. B. 661; 19 L. J. C. P. 345; 14 Jur. 1094; 137 E. R. 1052.

Annotations:—*Consd.* *Copin v. Adamson*, *Copin v. Strachan* (1874), L. R. 9 Exch. 345. *Refd.* *Risdon Iron & Locomotive Works v. Furness*, [1906] 1 K. B. 49. *Mentd.* *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *Kelsall v. Marshall* (1856), 1 C. B. N. S. 241; *Barber v. Lamb* (1860), 8 C. B. N. S. 95; *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; *Thelwall v. Yelverton* (1864), 16 C. B. N. S. 813; *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600.

SECT. 4.—RESTRICTIONS ON RIGHTS.

Power to own ships.]—*See* *SHIPPING & NAVIGATION*.

8513. Right to use of name—Granted by foreign

business, offices & works in N. S., may maintain an action in N. S. to enforce the performance of duties imposed upon the co. in relation to its shareholders. The non-residence of the shareholder is no bar to such action.—*MERRITT v. COPPER CROWN CO.* (1902), 36 N. S. R. 383; 22 C. L. T. 239.—*CAN.*

r. ————,] *To be entered on register.*]—Although a co. had kept its register of shareholders at an office outside the province, a purchaser from the sheriff under execution of certain shares was held entitled to compel the co. to make the proper entries to show him as the registered holder of the shares, the situs of the shares being in British Columbia in so far as the provisions of the Execution Act are concerned.—*OLIVER v. GRANBY CONSOLIDATED MINING, ETC., CO.*, [1923] 1 W. W. R. 50; 1 D. L. R. 1163; 31 B. C. R. 450.—*CAN.*

PART XII. SECT. 4.

s. Right to own real property.]—The registrar is not justified in refusing to register a non-registered foreign co. as

Sect. 4.—Restrictions on rights.]

legislature—Fancy name resembling that of English company.]—A co. is not, in the absence of fraud, entitled to restrain a foreign co. from trading in this country under a name conferred upon it by

the legislature of the foreign country which has incorporated the co., & used in the foreign country, though the name be a fancy name & is so similar to the name of the English co. that some confusion may possibly occur, provided the user of the

the owner of land.—*Ex p.* NEW VANCOUVER COAL MINING & LAND CO. (1890), 9 B. C. R. 571.—CAN.

t. —.]—In proceeding by way of *caveat* & petition under Real Property Act, if the caveator is an incorporated co., it is not necessary for the petitioners, although a foreign corp., to show that they are authorised to hold real estate.—NORTH OF SCOTLAND CANADIAN MORTGAGE CO. v. THOMPSON (1900), 20 C. L. T. 181; 13 Man. L. R. 95.—CAN.

a. Right to contract—Western Australian Joint Stock Companies Ordinance Act, 1858.]—The above Act does not apply to foreign corps. or to cos. incorporated out of Western Australia & properly & lawfully carrying on business as such. Consequently a limited co. incorporated elsewhere, not having complied with its provisions, can nevertheless carry on business & make contracts in Western Australia by its agent without its members being liable individually for its debts & engagements.—BATEMAN v. SERVICE (1881), 6 App. Cas. 386.—AUS.

b. Right to carry on business.]—Pltf. were a co. chartered by the state of N. Y. to carry on mutual insurance in the county of G. Their charter gave them a lien by way of mtge. on the property insured, & upon the title of the insured to the land on which such property stood.—*Held*: the co., from the very nature & object of its charter, was incapable of carrying on its business in Ontario.—GENESSEE MUTUAL INSURANCE CO. v. WESTMAN (1852), 8 U. C. R. 487.—CAN.

c. — Necessity for licence.]—PORTER v. GOLD EAGLE MINING CO. (1902), 40 N. S. R. 625.—CAN.

d. —.]—Extra-provincial corporations which have not taken out a licence under 63 Vict. c. 24 (Ont.), s. 6, are forbidden by the legislature to sell their goods in the province, & sect. 14 provides that so long as such extra-provincial corp. remains unlicensed it cannot maintain any action in any ct. in Ontario.—BESSEMER GAS ENGINE CO. v. MILLS (1904), 4 O. W. R. 325; 25 C. L. T. 12; 8 O. L. R. 647.—CAN.

e. —.]—By a guarantee, debt. guaranteed to pltf. the due payment by one M. of the purchase price of a traction engine, etc., sold by pltf. to M. In an action on the guarantee, one of the defences put in was that pltf. were an unregistered foreign co. within the meaning of the Foreign Cos. Ordinance of 1903, & therefore incapable of maintaining the action.—*Held*: this defence was not available in this action, pltf.' cause of action having accrued before that Ordinance came into effect.—SAWYER-MASSEY CO. v. FOSTER (1905), 2 W. L. R. 197.—CAN.

f. —.]—MCDONALD v. KLONDIKE GOVERNMENT CONCESSION, LTD., KLONDIKE GOVERNMENT CONCESSION, LTD. v. MCDONALD (1906), 4 W. L. R. 151.—CAN.

g. —.]—Pltf. co., a co. incorporated under the laws of Illinois, & having its head office in Chicago in that State, sought to recover damages against debt. for breach of contract made at Halifax, in this Province.—*Held*: non-compliance with the provisions of the statute requiring registration did not render invalid contracts entered into by the co. within the province or prevent the co. from recovering thereon.—AMERICAN HOTEL SUPPLY CO. v. FAIRBANKS (1907), 41 N. S. R. 444.—CAN.

—.]—Dominion Insurance Act, 1910, ss. 4 & 70, which prevent a provincial co. operating within the limits of the province where it has been incorporated from operating within another province, notwithstanding that it has obtained permission from the authorities of the other province, without the licence of the Dominion Minister, are *ultra vires*. The Dominion Parliament has power under the heads in B. N. A. Act, s. 91, which refer to the regulation of trade & commerce, & to aliens, to impose, by properly framed legislation, a restriction requiring a foreign co. to take out a licence from the Dominion Minister even in a case where the co. desires to carry on its business only within the limits of a single province.—RE INSURANCE ACT, 1910, A.-G. FOR CANADA v. A.-G.'S FOR ALBERTA & OTHER PROVINCES (1916), 34 W. L. R. 192.—CAN.

action brought in the Supreme Ct. of British Columbia, by a co. incorporated under the authority of the Cos. Act of Canada, R. S. C., 1906, c. 79, with head-office in Manitoba, & authorised to carry on, throughout the Dominion, the business of dealers in agricultural implements, etc., to recover from debt. damages for breach of a contract to accept & pay for certain goods ordered by debt. in British Columbia from an agent of the co. in that province, & to recover the amount of a cheque given in part payment for the goods, was dismissed, the co. not being registered or licensed in British Columbia.—JOHN DEERE PLOW CO., LTD. v. DUCK (1913), 24 W. L. R. 844.—CAN.

l. —.]—The provisions of the M. Act. requiring a Dominion co. to obtain a provincial licence before doing business in Manitoba are *intra vires* of the legislature of Manitoba, & the fact that a Dominion co. has not obtained a licence precludes it from carrying out its objects & undertakings in the province of Manitoba, & renders it incapable of occupying & holding lands in the province, & subjects it to the penalties prescribed by the Manitoba Cos. Act.—DAVIDSON v. GREAT WEST SADDLERY CO., [1917] 2 W. W. R. 914; 35 D. L. R. 526; 27 Man. L. R. 576; *reversd.* [1921] 2 A. C. 91.—CAN.

m. —.]—HARMER v. MACDONALD (A.) CO., LTD., [1917] 2 W. W. R. 435; 33 D. L. R. 363; *reversd.* [1921] 2 A. C. 91.—CAN.

n. —.]—A licence under the Insurance Act, 1910, is a prerequisite to the doing of any insurance business in any province of Canada by a co. incorporated by a foreign state. On an application by foreign fire insurance co. without a dominion licence for a provincial licence the superintendent of insurance should, at least, stay his hand, for the discretion which he possesses, under British Columbia Fire Insurance Act, s. 6, can only be exercised legally by a refusal of the application.—GUARDIAN ASSURANCE CO., LTD. v. GARRETT, [1918] 2 W. W. R. 405; 40 D. L. R. 455; *reversd.* 58 S. C. R. 47.—CAN.

o. —.]—The title to land acquired & held by an unlicensed foreign co. is not invalid under Cos. Act, s. 119, as against any other than the Crown. A corp. of one state has the right to exercise all or any of its powers in another state, unless the law-making power of the latter state has forbidden it to do so. A province has the right to pass legislation prescribing the conditions upon which any corp. not incorporated under the laws of the province may acquire or hold

real estate in the province or prohibiting it from doing so.—CAMPBELL v. MORGAN, [1919] 1 W. W. R. 268.—CAN.

p. —.]—Pltf., who were in fact a corp. incorporated under the laws of the State of N.Y., brought action under the name of "The Alexander Hamilton Institute, N.Y., U.S.A.," without setting out in the statement of claim the particulars of their status, & the evidence adduced by them at trial threw no light upon such status, although the question had been raised in the statement of defence.—*Held*: a motion to dismiss on such ground was rightly allowed, because, while as a general rule foreign cos. may sue in the cts. of the province, they must prove that they are incorporated in the foreign country, also because of the provisions of the Cos. Act requiring such cos. to register & take out a licence before beginning to carry on business in the province.—ALEXANDER HAMILTON INSTITUTE v. G. N. [1921] 3 W. W. R. 520.—CAN.

—.]—HALIFAX CITY v. LYALL & SONS (1922), 65 D. L. R. 305.—CAN.

Special provision in memorandum of association.]—A co. incorporated under the Cos. Act, R. S. B. C., 1911, c. 39, & the memorandum of assocn. of which gives it power "to do any or all of the above things in any part of the world," has the capacity, analogous to that of a natural person, to exercise extra-provincial powers.—*Re* LANDS & HOMES OF CANADA, LTD., ROBERTSON'S CASE, [1918] 3 W. W. R. 935; 44 D. L. R. 325.—CAN.

s. —.]—Effect of subsequent registration.—Foreign Companies Ordinance, 1903, s. 3, prohibits a foreign co. from carrying on any part of their business unless they are duly registered under the Ordinance; & sect. 10 provides that a foreign co. shall not, while unregistered, be capable of maintaining any action or other proceeding in any ct. in respect of any contract made in whole or in part in the Territories in the course of or in connection with business carried on without registration contravary to the provisions of sect. 3. Defts., a foreign co., carrying on business in Alberta without registration, became creditors of D., who, to secure them, transferred land & mortgaged goods to them. The assignee for the benefit of the creditors of D. began this action to set aside the transfer & mtge., & after the commencement of the action, but before appearance, defts. became registered under the Ordinance.—*Held*: pltf. was not entitled to have the transfer & mtge. set aside by reason of defts. being, at the time the action was begun, an unregistered foreign co. Upon the proper interpretation of sect. 10, the contracts of defts. were not void, but only unenforceable in the provincial cts. while defts. remained unregistered; & upon defts. becoming registered, the contracts were not only valid but enforceable.—SMITH v. WESTERN CANADA FLOUR MILLS CO. (1911), 17 W. L. R. 531.—CAN.

t. —.]—Before July 1, 1910, pltf., a foreign unregistered co., sold goods to debt. in British Columbia, & obtained promissory notes for the price thereof, which notes became due before July 1, 1910.—*Held*: pltf. had no right of action upon the notes or for the price of the goods before Companies Act of 1910; & although they had become registered in B. C. since July 1, 1910, when that Act came into force, they did not, by

name so conferred be without abbreviation, addition, or other modification.—**SAUNDERS v. SUN LIFE ASSURANCE CO. OF CANADA**, [1894] 1 Ch. 537; 63 L. J. Ch. 247; 69 L. T. 755; 42

W. R. 315; 10 T. L. R. 143; 38 Sol. Jo. 113; 8 R. 125.

Annotation:—**Refd.** *Daimler Motor Co. (1904), Ltd. v. London Daimler Co. (1907)*, 24 R. P. C. 379.

sect. 166 or otherwise become entitled to sue.—**CALGARY BREWING CO. v. JARVIS** (1911), 18 W. L. R. 474.—**CAN.**

a. ————.]—**Alberta Foreign Cos. Ordinance**, s. 10, provides that "any foreign co. required by this Ordinance to become registered, shall not while unregistered be capable of maintaining any action or other proceeding in any ct. in respect of any contract made in whole or in part in the province in the course of or in connection with business carried on without registration contrary to the provisions of sect. 3 hereof":—*Held*: a co. which the Ordinance required to become registered, & which sued on a contract to which sect. 10 applied, though not registered at the commencement of the action, could subsequently become registered, & continue & succeed in the action.—**SLATER SHOE CO. v. BURDETTE** (1913), 26 W. L. R. 109.—**CAN.**

b. ————.]—The only disabilities imposed by the Cos. Act, 1913, upon a foreign co. which does not

incapacity to maintain an action on a contract, & such co. may acquire rights within the province which it may enforce by action if it has obtained the necessary licence before the action is commenced.—**MICKELSON v. MICKELSON** (1916), 34 W. L. R. 155; 10 W. W. R. 261.—**CAN.**

c. ————.]—**Companies Act Amendment Act, 1917**, s. 2 (3), which permits an unlicensed extra-provincial co. which has begun an action to maintain anew such action if it obtains a licence, the expression "maintain anew," in a case where an appeal has been dismissed, not on the merits, but because of the lack of a licence, means that the Ct. of Appeal should hear the appeal as if its previous decision had never been rendered.—**KOMNICK SYSTEM SANDSTONE BRICK CO. v. BRITISH COLUMBIA PRESSED BRICK CO.**, [1918] 2 W. W. R. 561; 41 D. L. R. 423.—**CAN.**

d. ————.]—*Whether applicable to all companies.*—**HALIFAX CITY v. McLAUGHLIN CARRIAGE CO.** (1907), 39 S. C. R. 174.—**CAN.**

e. ————.]—*Refusal to register—Mandamus.*—A co. incorporated under the laws of B. C., to carry on in B. C., throughout Canada, & in any other country that may seem desirable, the business of a general loan and investment co., applied for registration in Alberta, under **Foreign Companies Ordinance**:—*Held*: the registrar could not be said to be wrong in refusing to register the co.; & the ct. should not exercise its discretion to grant a *mandamus* to compel him to do so. The registration would, under the Ordinance, s. 12, amount, in some respects at least, to the same thing as incorporation; & if application was made for incorporation for a co. with the object stated, the Registrar might properly refuse.—**Re INTERNATIONAL HOME PURCHASING CONTRACT CO. & REGISTRAR OF JOINT STOCK COMPANIES** (1913), 23 W. L. R. 279.—**CAN.**

f. ————.]—*Practice.*—**NORTH WYOMING LAND CO. v. BUTLER** (1915), 25 Man. L. R. 288; 8 W. W. R. 340; 23 D. L. R. 274.—**CAN.**

g. ————.]—*Lien.*—Foreign co. within the meaning of **Foreign Cos. Ordinance**, which is not registered under the Ordinance, may file a lien for materials supplied & is entitled to rank for the value of such materials.—**WORTMAN v. FRID-LEWIS CO.** (1915),

33 W. L. R. 119; 9 W. W. R. 812.—**CAN.**

h. ————.]—*Effect on liability of company.*—A trust co. incorporated by the Parliament of Canada was registered in Ontario, & as security for the performance of the duties to which it might be appointed under the **Loan & Trusts Corp'n. Act**, R. S. O. 1914, c. 184, & by the order-in-council admitting it to registry under the Act, procured debts. to give a bond to the Minister under whose direction the Act was administered, in the penal sum of \$100,000 conditioned for the due performance of such duties. The trust co. was appointed exor. of B.'s will, & took upon itself the administration of the estate passing by the will. Shortly afterwards, the trust co. was declared insolvent, & an order was made for its winding-up. It was found that the trust co. was indebted to the B. estate in a sum of more than \$2,000; & this action was brought by the A.-G., upon the bond given by debts., to recover the amount of the penalty, with a view to satisfying the claim of the B. estate, as a creditor of the trust co.:—*Held*: debts. were not in a position to raise the defence that the bond was illegal & void because the provisions of the **Loan & Trusts Corpns. Act**, requiring a co. incorporated by or under a statute of Canada to obtain registration in Ontario & a licence from the provincial authorities, were *ultra vires* of the Ontario Legislature; for, when the trust co. acquiesced in the requirements of the provincial authorities, & procured the bond, the co. either recognised the right as existing, or, regarding it as doubtful, decided not to dispute it. If the trust co. relied on the powers conferred upon it by its Act of Incorporation, it in the most formal manner decided to supplement them by obtaining the added powers afforded by registration under the provincial statute. Even where principals are not bound, sureties may still be liable. Whether the provincial Act was or was not *ultra vires*, no defect or illegality was established in regard to the bond itself; & there was no evidence that the trust co. had not power to give the security.—**A.-G. FOR ONTARIO v. RAILWAY PASSENGERS ASSURANCE CO.** (1917), 41 O. L. R. 234.—**CAN.**

k. ————.]—*Effect on liability in winding up.*—A mtge. was given by the N. L. Co., to secure a certain bond issue, the trustee under the mtge. deed was a foreign corp'n., not having a licence to do business within the province of New Brunswick, as required by **Cons. St. N. B. 1903**, c. 18, & therefore, under the provisions of the provincial Act, 5 **Edw. VII.**, c. 28, was unable to take or hold property in New Brunswick. After the bonds were issued & the mtge. executed, the N. L. Co. went into liquidation, & a liquidator was appointed under the provisions of the **Winding-up Act** (R. S. C. 1906, c. 144):—*Held*: while the mtge. deed was not effectual to convey to the foreign corp'n. the property it was intended or purported, to convey, yet, inasmuch as it was clear upon the face of the bonds that the bondholders acquired the bonds under an agreement that they were to be secured by a mtge. upon the property of the N. L. Co. the bondholders (who were not responsible for the failure of the co. to appoint a competent trustee), were entitled in equity as against the co. & its liquidator, to a first charge, as security for the payment of such bonds, upon all the property of the co., specified as intended to be so charged

in the bonds themselves & in the ineffectual mtge. deed.—**HARRISON v. NEPISQUIT LUMBER CO.** (1911), 11 E. L. R. 314.—**CAN.**

l. ————.]—*Carrying on business within province.*—**SEAMAN v. SEAMAN**, 25 C. L. T. Occ. N. 109.—**CAN.**

m. ————.]—A. held himself out as the agent in St. John of the **Columbian Insurance Co.**, whose head office was in New York. His course of business was to receive applications for insurance addressed to the co., which he would forward to B., an insurance broker in Boston. The latter would send the application to the co., when, if it was accepted, a policy would be delivered to him, & the premium charged against him at the time. The policy was then forwarded by B. to A., who would deliver it to the assured taking the premium note direct to himself, & sending to B. his own note for nine-tenths of the amount (the balance being kept for commissions):—*Held*: this was an indirect carrying on of insurance in the province by the co., contrary to the Act of Assembly, 19 **Vict. cap. 45.**—**JONES v. TAYLOR, Re OULTON** (1874), 2 **Pug.** 391.—**CAN.**

n. ————.]—A co. incorporated abroad, but doing business of a continuous character within the province through agents, is liable to the payment of an annual licence fee in the place where such business is carried on.—**HALIFAX CITY v. JONES** (1896) 28 N. S. R. 452.—**CAN.**

o. ————.]—*Pltfs., a co. incorporated in the State of Pennsylvania, to carry on a printing, publishing & bookbinding business, with the head office in that State, had, as one of its departments, under a special charter therefor, procured in the same State, & with the same head office, what was called "The International Correspondence School," the object being to give, by correspondence through the mails, instruction to appcts. for enrolment as students, the co. having representatives throughout the province for procuring such applications, all of which were submitted to the head office for approval, & if accepted, the certificates of enrolment were sent direct to the students with the lesson & instruction papers, followed at stated intervals by further instruction & lesson papers, pamphlets, etc., & when the contract so provided, lesson books in bound form, drawing materials, photographic & other outfits, were lent to the students. The co. had an office in Toronto, over which their name was affixed, with a superintendent, cashier, & a number of stenographers, to which all money collected in this province were forwarded, & from there remitted to the head office; while the bound lesson books, etc., for convenience of passage through the customs, were sent from the head office to Toronto, & after the payment of the duties were forwarded by the postmaster to the students. Salaries were paid by the cashier at Toronto out of the moneys in his hands:—*Held*: pltfs. were carrying on business in Ontario within the meaning of the Act, so as to necessitate their taking out a licence, & their omission to do so precluded them from maintaining an action for the recovery of money claimed to be due from one of the enrolled students.—**INTERNATIONAL TEXT BOOK CO. v. BROWN** (1907), 8 O. W. R. 835; 9 O. W. R. 369; 13 O. L. R. 644.—**CAN.***

p. ————.]—A carriage co. agreed with a dealer in Halifax to supply him with their goods & give him

Sect. 4.—Restrictions on rights. Sects. 5 & 6.]

8514. Right to purchase assets of English company—1908 Act, s. 192.]—An English co. cannot transfer or sell its business to a foreign co. under 1908 Act, s. 192. The "transferee" co. mentioned in that sect. must be a "co." within the definition in sect. 285.—**THOMAS v. UNITED BUTTER COMPANIES OF FRANCE, LTD., [1909]** 2 Ch. 484; 79 L. J. Ch. 14; 101 L. T. 388; 25 T. L. R. 824; 53 Sol. Jo. 733; 16 Mans. 345.

Annotation:—*Reid. Re Anglo-Continental Supply Co., [1922] 2 Ch. 723.*

SECT. 5.—LAW APPLICABLE TO CONTRACTS, ETC.

See No. 8532, post, & generally, CONFLICT OF LAWS, Vol. XI., pp. 387 et seq.

the sole right to sell the same, in a territory named, on commission, all money & securities given on any sale to be the property of the co., & goods not sold within a certain time to be returned. The goods were supplied & the dealer assessed for the same as his personal property:—*Held*: the co. was not "doing business in the City of Halifax."—**HALIFAX CITY v. McLAUGHLIN CARRIAGE CO. (1907), 39 S. C. R. 174.—CAN.**

an unlicensed extra-provincial corpn., sold absolutely to depts., a corpn. within New Brunswick, at B., in the State of New Jersey, two car-loads of empire cream separators, to be delivered f.o.b. at Sussex & St. John, to be paid for by promissory notes to be given on delivery; depts. to have the exclusive right of sale in certain named counties, & undertaking not to sell or handle any other separators in the counties. Depts. advertised in New Brunswick as the sole agents of the separators, with the consent & at the expense of pltf.s.:—*Held*: depts. were the resident agents of pltf.s. in New Brunswick, & the sale was a contract made in part within the province, within the meaning of sects. 12 & 18 of the Act, & no action could be maintained on the notes.—**EMPIRE CREAM SEPARATOR CO. v. MARITIME DAIRY CO. (1907), 38 N. B. R. 309; 4 E. L. R. 191.—CAN.**

r. ———.]—The sale, in S., of the capital stock of a foreign co. not registered in S., is not a transaction in the course of or in connection with the business of the co.; & such a co. may, therefore, maintain an action in Saskatchewan to recover the price of the stock sold, notwithstanding the provisions of the Foreign Cos. Ordinance.—**CANADIAN CO-OPERATIVE CO. v. TRAUNICZEK (1908), 8 W. L. R. 550; 1 Sask. L. R. 143.—CAN.**

s. ———.]—The aid of the Cts. is not "doing business" in British Columbia.—**CHARLES H. LILLY CO. v. JOHNSTON FISHERIES CO. (1909), 10 W. L. R. 2.—CAN.**

t. ———.]—Incorporated by Dominion Companies Act, but not licensed in B. C., entered into an agreement in B. C., through their resident agent, to supply certain machinery to deft. co., a B. C. corporation:—*Held*: pltf.s. were carrying on business within the Province as contemplated by the Cos. Act, 1897, & should have taken out a licence to do so.—**WATEROUS ENGINE WORKS CO. v. OKANAGAN LUMBER CO. (1909), 14 B. C. R. 238.—CAN.**

u. ———.]—Pltf., an extra-provincial corporation, sued deft. on a contract, made in N. Y., by which

pltf. was to ship goods at T. to deft. in N. B., by freight, deft. to pay freight. Pltf. shipped the goods by express & prepaid the charges, which were afterwards paid by deft.:—*Held*: this was not carrying on business within N. B. as the title to the goods passed in T.—**CULBERT v. McCALL CO. (1911), 40 N. B. R. 385; 10 E. L. R. 98.—CAN.**

v. ———.]—Incorporated under the Dominion Companies Act, had its head office in Winnipeg, & did not become licensed under the British Columbia Companies Act. In Feb., 1911, the co. entered into an agreement with A., domiciled in British Columbia, giving him the exclusive right to sell its goods in British Columbia, in pursuance of which he ordered goods from the co. to be shipped from Winnipeg to him, f.o.b. Calgary, he assuming all risks & charges from that place to Elko, British Columbia, where the goods were to be received & sold by him. He gave the co. promissory notes, dated at Winnipeg, for the price of the goods, some of the notes being actually signed by him at Elko:—*Held*: these transactions did not constitute the carrying on of business within the province.—**JOHN DEERE PLOW CO. v. AGNEW (1912), 17 B. C. R. 543; 48 S. C. R. 208.—CAN.**

w. ———.]—Where a co. enters into a contract in O. for the sale of certain machinery & plant, to be shipped to a place in B. C., & further undertakes to erect the plant & machinery upon arrival at its agreed destination there, & to demonstrate the capacity thereof by a specified three days' test, that co. is carrying on business within the province.—**KOMNICK BRICK CO. v. BRITISH COLUMBIA PRESSED BRICK CO. (1912), 17 B. C. R. 454.—CAN.**

x. ———.]—Companies Act, s. 166, which subjects extra-provincial cos. to penalties for carrying on in the Province any part of their business without license or registration, indicates that the Legislature by the phrase "carrying on business" contemplated such conduct on the part of the co. as would, according to the general principles of law, amount to a submission to the jurisdiction of B. C. cts. No co. would therefore come within the penalties or disabilities so imposed, unless it had a fixed place of business at which it carried on some part of its own business within the Province.—**WHITE & CO., LTD. v. DONKIN (1914), 19 B. C. R. 565.—CAN.**

y. ———.]—A co. had its chief place of business in the Province of Quebec, but was incorporated under the Dominion statute

SECT. 6.—SHARES.

8515. Nature of shares—Company owning lands abroad.]—*Semble*: shares in a commercial co., possessing lands in a foreign country, are not real property so as to attach to them the incidents of the law of the country in which the property is situated.—*Re RICHARDSON, Ex p. RICHARDSON (1839), 3 Deac. 496; Mont. & Ch. 43; 8 L. J. Bcy. 27, Ct. of R.*

Annotations:—*Mentd. Re Worcester, Ex p. Agra Bank (1868), 3 Ch. App. 555; Colonial Bank v. Whinney (1880), 11 App. Cas. 426.*

8516. Calls on shares—Company incorporated by colonial Act—Simple contract debts.]—"Never indebted" is a good plea to an action for calls founded on Colonial Acts; such calls constituting a simple contract debt.—**WELLAND RY. CO. v. BLAKE (1861), 6 H. & N. 410; 30 L. J. Ex. 161; 3 L. T. 678; 7 Jur. N. S. 373; 9 W. R. 386; 158 E. R. 169.**

Annotation:—*Mentd. Philpott v. Adams (1862), 31 L. J. Ex. 421.*

with power to trade & carry on its business throughout the Dominion of Canada. It had not, however, complied with the provisions of the Foreign Cos. Act, R. (S. Saskat. 1909, c. 73, requiring registration previous to carrying on business within the Province of Saskatchewan. An action being brought against it in Saskatchewan for the contract price of machinery brought into & installed within the province was dismissed:—*Held*: the mere setting up & starting the working of the machinery by the extra-provincial co. was not a carrying on business in the Province within the Foreign Cos. Act.—**LANDE CANADIAN REFRIGERATOR CO. v. SASKATCHEWAN CREAMERY CO. (1915), 51 S. C. R. 400.**

z. ———.]—Pltf. co. was incorporated in S. & agreed to sell deft., who resided in O., land in S. A written agreement was drawn up in S. executed by the co. there & executed by deft. in O. The co. sued in O. for specific performance of the agreement:—*Held*: in entering into the agreement sued on, pltf. co., incorporated in S., was not carrying on business beyond the limits of S.; the co. executed the agreement in S. & by it was bound to sell the land with which it dealt to pltf. on the terms which the agreement contained, & the fact that it was executed by deft. in O. did not affect the question whether pltf. co. was carrying on business in Ontario, nor did the facts that the oral arrangement for sale was made in Ontario, & a promissory note for part of the purchase-money was given to the co.'s agent there, & payments thereon were received by the agent there, bear upon the question.—**WEYBURN TOWNSITE CO., LTD. v. HONSBURGER (1919), 45 O. L. R. 176.—CAN.**

aa. ———.]—An isolated sale of goods by an unregistered extra-provincial co. to residents of Manitoba which was made by correspondence through brokers carrying on business in Manitoba & was performed on the part of the seller by the delivery of the goods f.o.b. at a place outside the province, is not a carrying on of business by the co. in Manitoba in violation of Companies Act, R. S. M. 1913, c. 25, s. 118.—**PACIFIC FRUIT & PRODUCE CO. v. DINGLE & STEWART, [1922] 1 W. W. R. 870; 65 D. L. R. 64; 32 Man. L. R. 4.—CAN.**

PART XII. SECT. 6.

h. Transfer of shares—Dominion companies.]—The right to sell its own shares is a right inherent in a co. by virtue of its incorporation. Any provincial legislation which denies or restricts that right as against cos.

8517. Whether calls authorised.]

(1) To a declaration by a railway co. for calls made pursuant to Colonial Acts, which provided that no calls should in any one year exceed a prescribed amount, deft. pleaded that the directors made more calls for money, & to a greater amount than were prescribed by the Acts; & that the call sued upon was a call made in excess of the calls by the Acts empowered to be made. Pltf. replied that the calls in the plea mentioned, other than the call sued for, were not authorised by the Acts, & were therefore void; & that the call sued for was not a call made in excess of the calls empowered to be made, if the void calls were not reckoned as calls empowered to be made; & that deft. did not pay the void calls, or any part thereof, nor were the same, or any part thereof, paid on the shares in respect of which deft. was sued:—*Held*: the replication did not answer the plea, inasmuch as it was consistent with the plea that the co. had treated the unauthorised calls as valid, & received the greater part of the money in respect of them.

(2) As against the co., as long as the call remains on their proceedings, & not withdrawn or notice given that they do not mean to enforce, it is subject to this difficulty, that is to say, that against all persons claiming under the call:—*Per Lord, C.B.*—*WELLAND RY. CO. v. BERRIE* (1861), 6 H. & N. 416; 30 L. J. Ex. 163; 3 L. T. 818; 9 W. R. 385; 158 E. R. 171.

8518. Transfer of shares—Share certificate with form of transfer & power of attorney on back—Operative by delivery.]—Certificates of shares in a foreign co. on which a form of transfer & power of attorney has been indorsed & executed in blank may be liable to probate duty, if they are marketable in this country & are operative by delivery.—*STERN v. R.*, [1896] 1 Q. B. 211; 65 L. J. Q. B. 240; 73 L. T. 752; 44 W. R. 302.

Annotations:—*Refd.* Scottish Widows' Fund Life Assce. Soc. v. Farmer, Farmer v. Scottish Widows' Fund Life Assce. Soc. (1909), 5 Tax Cas. 502; Winans v. A.-G., [1919] A. C. 27.

—*See, also*, *BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS*, Vol. VI., pp. 452, 453, Nos. 2890, 2891.

8519. Transmission of shares—Shares sold before death to English purchaser—Completion—Right of purchaser to take out administration.]—Where the legal estate in shares of a foreign railway co. was vested in an intestate, who died domiciled in England, but had before his death sold the beneficial interest & delivered the documents necessary to complete such sale to a purchaser residing in this country, administration was granted to a person claiming through the purchaser to enable him to get in the legal estate by having himself registered in the books of the foreign railway co., & so to complete his title.—*In the Goods of AGNESE*, [1900] P. 60; 69 L. J. P. 27; 82 L. T. 204.

8520. Liability to stamp duty—Stamp Act, 1891 (c. 39), s. 82—Marketable security—Promissory notes secured by bonds.]—An American railway co., as security for a temporary loan, handed through their agents in England to the lender an instrument which stated that for value received they promised to pay twelve months after date to the order of themselves the amount named in it. It also contained a statement that it was one of a series & was secured by a deposit of gold bonds which (or a sufficient amount of their proceeds) were to be held in trust for the benefit of the holders

of the instruments. The instruments were dealt in upon the Stock Exchange, but were not officially quoted there:—*Held*: the instrument was not a mere promissory note, but that as it contained a contract that the holder should be entitled to the benefit of the security it was a marketable security within Stamp Act, 1891 (c. 39), s. 82 (1) (b), & was chargeable with stamp duty as such.—*BROWN, SHIPLEY & CO. v. INLAND REVENUE COMRS.*, [1895] 2 Q. B. 598; 64 L. J. M. C. 241; 73 L. T. 377; 11 T. L. R. 585; 39 Sol. Jo. 720; 14 R. 661, C. A.

Annotation:—*Refd.* Speyer v. I. R. Comrs., [1907] 1 K. B. 246.

8521. — — — — — Bearer bonds with certificate endorsed.]—The bonds of an American railway co., payable to bearer, contained a clause that they should not be valid for any purpose unless authenticated by a certificate indorsed on them in accordance with the provisions of a trust deed.

Bonds were prepared in America, & delivered to the trustee under the deed, & were sent to London unauthenticated by the certificate, which was afterwards indorsed on them in London where they were delivered to the persons entitled to them:—*Held*: they were marketable securities made & issued in the United Kingdom within Stamp Act, 1891 (c. 39), s. 82, & were liable to stamp duty.—*REVELSTOKE (LORD) v. INLAND REVENUE COMRS.*, [1898] A. C. 565; 67 L. J. Q. B. 855; 79 L. T. 227; 62 J. P. 740; 47 W. R. 210; 14 T. L. R. 525, H. L.; *affg.* S. C. *sub nom.* *BARING v. INLAND REVENUE COMRS.*, [1898] 1 Q. B. 78, C. A.

Annotation:—*Distd.* Brown v. I. R. Comrs., Gordon v. I. R. Comrs. (1900), 84 L. T. 71.

8522. — — — — — Whether bonds “issued” & “offered for subscription”—**Substitution of bonds on reconstruction.]**—A scheme for the re-organisation of an American railway co. was prepared, by which it was proposed that an executive committee should be formed in America to carry out the scheme, that a new co. should be formed in America to take over the undertaking of the old co., & that the new co. should issue new bonds in order to take up the bonds of the old co. & provide further capital for the new co.

The English holders of bonds of the old co. were invited by circular to accept the scheme & to deposit their bonds with named depositaries in London, in exchange for which they would subsequently receive bonds of the proposed new co.

The scheme was carried out. The new co. executed & delivered to the appointed trustee in America the stipulated number of new bearer bonds, which were duly certified by the trustee & then handed to the executive committee.

The executive committee had full power to deal with any of the new bonds, by sale, pledge, or otherwise, for the purposes of the scheme & for the uses of the new company in its discretion & without accountability to the new co.

The new bonds in question were forwarded by the executive committee to the depositaries in London, by whom they were handed to the persons who had deposited bonds of the old co.:—*Held*: the new bonds given to the holders of old bonds in England were neither “issued” nor “offered for subscription” in England within Stamp Act, 1891 (c. 39), s. 82.—*BROWN v. INLAND REVENUE COMRS.*, *GORDON v. INLAND REVENUE COMRS.* (1900), 84 L. T. 71; 17 T. L. R. 177, C. A.

incorporated by authority of the Parliament of Canada is an invasion of the federal field of legislation under B. N. A. Act, 1867, & Sale of Shares

Act, R. S. C. 1920 (c. 199), in so far as it purports to apply to the sale of its own shares by a Dominion co. is *ultra vires* of a provincial Legislature.—*RUTHE-*

NIAN FARMERS ELEVATOR CO. v. LUKEY & A.-G. FOR SASKATCHEWAN, [1923] 4 D. L. R. 308; 3 W. W. R. 138.—*CAN.*

SECT. 7.—ACTIONS AND PROCEEDINGS.

SUB-SECT. 1.—IN ENGLISH COURTS.

A. Jurisdiction.

8523. Action by company—Extinct under English law.]—In 1914 a Russian bank had its head office in Petrograd & a branch office in London, the manager of which was authorised by a power of attorney to transact business for & bring actions in the name of the bank. By the direction of the Petrograd office the London branch deposited with a London bank certain Brazilian & Chinese Govt. bonds to be held to the order & on account of a French bank as security for a banker's credit opened by the French bank for the benefit of the Russian bank. In & after 1918 the Russian Republic by various decrees & orders nationalised banking in Russia by taking over the assets, share capital & management of all private banks & vesting them in a State Bank, then in a People's Bank, & ultimately in a govt. department. Subsequently the manager of the London branch of the original Russian bank agreed with the French bank to pay off the amount due to the French bank on the banker's credit in return for the bonds. The amount was paid, but the French bank refused to release the bonds. In an action brought in the name of the Russian bank by the manager of the London branch against the French bank & the London bank for the return of the bonds & damages for their detention:—*Held*: (ATKIN, L.J., diss.) (1) in consequence of the decrees & orders of the Russian Republic the Russian bank had ceased to exist, & with its extinction the authority of the manager of the London branch to bring the action in the bank's name had lapsed; (2) defts. were not precluded by estoppel or otherwise from relying on this absence of authority as a defence to the action.—*RUSSIAN COMMERCIAL & INDUSTRIAL BANK v. COMPTOIR D'ESCOMPTE DE MULHOUSE*, [1923] 2 K. B. 630; 92 L. J. K. B. 1053; 129 L. T. 706; 39 T. L. R. 561; 68 Sol. Jo. 12, C. A.

Annotation:—*Refd.* Banque Internationale de Commerce de Petrograd v. Goukassow, [1923] 2 K. B. 682.

8524. — But still recognised under foreign laws.]—Pltf. bank was incorporated in 1869 according to the law of Russia. It had a branch in Paris. Deft. was a customer of the Paris branch, & under the terms of a special contract made with that branch in France he had financial dealings with the bank previously to the commencement of the Russian revolution in 1917, the result of which was that he was largely indebted to the bank. By decrees of the Soviet Govt. of Russia made in 1917 & 1918 all private banks in Russia, including pltf. bank, were extinguished & ceased to exist. The Soviet Govt. is recognised by this country, but the French Govt. refuses to

recognise it or the validity of its decrees. In 1920 the officials who continued to carry on the business of the Paris branch sued the deft. in this country in the name of pltf. bank to recover the amount of his debt:—*Held*: as, according to the decision in *Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse*, No. 8523, ante, pltf. bank had ceased to exist, the action could not be maintained notwithstanding that by the law of France, the country where the contract was made, the action would have been maintainable there.—*BANQUE INTERNATIONALE DE COMMERCE DE PETROGRAD v. GOUKASSOW*, [1923] 2 K. B. 682; 92 L. J. K. B. 1079; 129 L. T. 725; 39 T. L. R. 574; 68 Sol. Jo. 39, C. A.

—.]—*See* CONFLICT OF LAWS, Vol. XI., p. 474, No. 1283; CORPORATIONS, Vol. XIII., p. 429, Nos. 1522–1525.

8525. Action against company—By shareholder—For relief against forfeiture of shares.]—Bill by an English shareholder against a Dutch railway co., to be relieved against a forfeiture of shares, dismissed with costs, the undertaking & direction being foreign, & there being a decision in the Dutch cts. opposed to pltf.'s view.—*SUDLOW v. THE RHENISH RY. CO.* (1855), 21 Beav. 774. *See* also *Saskatchewan Ry. Co. v. The Canadian Ry. Co.* (1909), 100 S. C. 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

8526. — To restrain application to foreign legislature.]—A co. was formed in California for purposes connected with land in that country, but nearly all the shareholders were resident in England. A resolution was passed at a meeting of English shareholders, authorising the trustees to take steps for increasing the preference shares to an extent not allowed by the existing constitution of the co. It appearing that there was no intention to create preference shares, except with the sanction of the Californian legislature:—*Held*: an injunction ought not to be granted to restrain the co. from acting on the resolution, for the ct. will not in general restrain parties from applying to the legislature, whether of this or of a foreign country.—*BILL v. SIERRA NEVADA, ETC. CO.* (1859), 1 De G. F. & J. 177; 29 L. J. Ch. 176; 1 L. T. 256; 6 Jur. N. S. 184; 8 W. R. 205; 45 E. R. 326, L. J.

8527. By stranger—On contract made & broken abroad.]—A banking corpn., incorporated under a colonial ordinance, had an agency in London, where they held themselves out as carrying on business. The corpn. was sued by pltf. abroad in respect of a contract made abroad, & alleged to have been broken abroad, the writ being served on the manager of the agency in London:—*Held*: defts. were liable to be sued in this jurisdiction.—*LHONEX, LIMON & CO. v. HONG KONG & SHANGHAI BANKING CORPN.* (1886), 33 Ch. D. 446; 34 W. R. 753; *sub nom.* DE

PART XII. SECT. 7, SUB-SECT. 1.—A.

k. Action by company.]—A foreign corpn. may sue in this country on a promissory note given to them for goods furnished by them to the maker.—*HOWE MACHINE CO. v. WALKER* (1874), 35 U. C. R. 37.—*CAN.*

l. —.]—A foreign corpn., not registered under the provisions of the Foreign Companies Ordinance, cannot maintain an action or institute proceedings unless it be shown by such corpn. that the contract in respect of which such action is brought arose by an order given to a traveller in the province or by correspondence, & that the corpn. have not in the province any place of business.—*Re NELSON FORD LUMBER CO.* (1908), 8 W. L. R. 79; 1 Sask. L. R. 108.—*CAN.*

m. Action against company.]—If a

foreign corpn., having a branch office in N. S. W., carries on business there in such a way as to be resident for the purposes of service of process then such corpn. can be properly sued in N. S. W. for every cause of action arising there on which a home corpn. may be sued.—*GREAT COBAR COPPER MINING CO. v. COMPTOIR D'ESCOMPTE DE PARIS* (1889), 10 N. S. W. L. R. 55; 5 N. S. W. N. 100.—*AUS.*

n. —.]—If a foreign corpn. does business in N. S. W. in such manner as to make it a resident here, & had a head office through whom it may be served, it can be sued here upon a contract made & to be performed out of the jurisdiction.—*BOWDON BROTHERS & CO. v. IMPERIAL MARINE & TRANSPORT INSURANCE CO.* (1902), 2 S. R. N. S. W. 257; 19 N. S. W. N. 177.—*AUS.*

o. — By administrator of deceased servant.]—Defts., a foreign co., had a place of business in Victoria, where it carried on a trading business, although its principal place of business & head office, where meetings were held, were in England. Pltf., as administrator appointed by the ct. here, to the estate of deceased servant of the co., served a writ on one of the co.'s managers at Victoria. On an application to have the writ set aside:—*Held*: as by the co.'s rules the power to appoint, pay & dismiss, was with the English office, & as, by agreement, deceased's account was kept at that office, & the balance due him from time to time was payable there, the English office must be regarded as the domicile of the co., & the co. could not be sued here by pltf. as administrator of deceased.—*WILSON v. HUDSON'S*

LHONEUX LINON (A) & Co. v. HONG KONG & SHANGHAI BANKING CORPN., 55 L. J. Ch. 758; 54 L. T. 863.

Annotations:—*Refd.* Watkins v. Scottish Imperial Insce. (1889), 5 T. L. R. 511. *Mentd.* Wood v. Anderston Foundry Co. (1888), 36 W. R. 918; Haggin v. Comptoir D'Escompte de Paris, Mason & Barry v. Same (1889), 23 Q. B. D. 519; Golding v. Order of La Sainte Union des Sacrées Cœurs (1892), 67 L. T. 605; Compagnie Générale Transatlantique v. Law, La Bourgogne, [1899] A. C. 431.

—*See, also*, CORPORATIONS, Vol. XIII., p. 429, Nos. 1526–1528.

8528. Action by shareholder against directors—Misapplication of funds.—A bill having been filed by a shareholder in an Irish railway, on behalf of himself & all other shareholders, except defts., to restrain the improper payment by defts. of the moneys of the railway co.:—*Held*: notwithstanding one only of defts. was permanently resident in England, & all the others in Ireland, & the books & papers of the co. were in Ireland, an order of the ct., directing service of a *subpœna* to appear & answer pltf.'s bill on the railway co. in Ireland, was valid & proper.—**LEWIS v. BALDWIN** (1848), 11 Beav. 153; 17 L. J. Ch. 377; 11 L. T. O. S. 305; 50 E. R. 775.

Annotations:—*Refd.* Carron Iron Co. v. Maclaren (1855), 1 Q. B. D. 412; *Scott v. Royal Wax Candle Co.* (1876), 1 Q. B. D. 404; *Westman v. Akt. Fkmans Mekaniska Snickerfabrik* (1876), 45 L. J. Q. B. 327.

8529. ——— Company never registered.—A prospectus was issued by the promoters of an undertaking for the establishment of a co. in France as a *société en commandite*. A number of shares having been taken, the statutes of the co. were drawn up in the French language, & executed in France by the shareholders, most of them English subjects, by which the co. was constituted a *société en commandite*, with limited liability, & *conseil de surveillance* & *gérant*, or manager, appointed. The co. never was registered. A bill was filed by some of the shareholders against the members of the *conseil de surveillance* & others, charging misapplication of the property of the co., & praying for an account, & for the removal of the *conseil de surveillance* & of the *gérant*, & the appointment of others to act in their stead:—*Held*: defts. having obtained money on representations that they were enabled to act according to the scheme of the intended assocn., & acquired property on the faith of those representations, the ct. would secure the money & property for the benefit of those persons for whom they had undertaken to apply it, although it might be impossible to carry out the purposes for which the money was originally subscribed.

Semble: The want of registration does not make a co. illegal as between the shareholders & the promoters, whose duty it was to register it.—**BUTT v. MONTEAUX** (1854), 1 K. & J. 98; 3 Eq. Rep. 190; 24 L. J. Ch. 99; 24 L. T. O. S. 106; 3 W. R. 82; 69 E. R. 385.

B. Practice and Procedure.

See, generally, ADMIRALTY, Vol. I., p. 172, Nos. 835–837; CONFLICT OF LAWS, Vol. XI., p. 474, Nos. 1283, 1293, 1294; CORPORATIONS, Vol. XIII., pp. 429 *et seq.*, & *generally*, PRACTICE & PROCEDURE.

BAY CO. (1884), 1 B. C. R., pt. II. 102.—**CAN.**

p. *Leave to sign final judgment.*—Leave was given to sign final judgment against a co. incorporated & having its head office, & in process of liquidation in England, but doing business & having assets & liabilities in Ontario.—**PLUMMER v. LAKE SUPERIOR NATIVE COPPER CO.** (1885), 10 P. R. 527.—**CAN.**

q. ———.]—A foreign co. was not incorporated in the T. where it had not chosen to be sued but where it possessed immovable property. It was registered & had its head office & board of directors abroad:—*Held*: in the absence of any arrest to found jurisdiction, the ct. had no jurisdiction to entertain a suit against such co.—**HAYDON & Co.'s TRUSTEE v. THISTLE**

8530. Parties—Directors personally liable under foreign law.—A bill stated that pltf. entered into certain contracts with D. for the repair, etc., of the steamship Great Eastern, & that those contracts were afterwards transferred by D. to deft. société, a French co., with limited liability, having offices in France & England. The bill further alleged that, according to the law of France, directors of cos. were personally liable for debts incurred by their cos. unless certain provisions & requisites were complied with, & that in this case those requisites had not been complied with, & it was prayed that certain goods on board the Great Eastern, upon which the pltf. had a lien under the terms of their contract, might be sold, & the proceeds applied towards payment of the pltf.'s claim; & if the assets of the co. should be insufficient, the directors might be declared personally liable to make good the deficiency.

On demurrer for want of equity by E., one of the directors:—*Held*: (1) the allegations were sufficient to show that E. was a director at the time the contracts were entered into; (2) the directors were personally liable under the French law; (3) the ct. had the power of taking the accounts of the co., inasmuch as it had an office in England; (4) E. was a proper party to the taking of such accounts & to the sale of the goods.—**BOWER v. SOCIÉTÉ DES AFFRÉTEURS DU GREAT EASTERN** (1867), 17 L. T. 490.

SUB-SECT. 2.—IN FOREIGN COURTS.

8531. Proceedings against members within jurisdiction—Failure to comply with order of court—To register company.—**BULKELEY v. SCHUTZ**, No. 8511, *ante*.

Effect of foreign judgment.—*See* CONFLICT OF LAWS, Vol. XI., pp. 445, 446, 449, 450, 460, 467, Nos. 1042, 1073, 1074, 1170, 1232, & *generally*, CONFLICT OF LAWS, Vol. XI., pp. 444 *et seq.*

8532. Effect of foreign liquidation—On contract with English company.—A contract for delivery & acceptance of certain quantities of copper was made between a co. whose registered office was in the United Kingdom, & a co. incorporated under decrees & arts. of assocn. according to the law of France, with their principal office in Paris & having no place of business in the United Kingdom. Subsequently the French co. was declared to be in judicial liquidation under the direction & supervision of the Tribunal of Commerce of the Seine:—*Held*: the judicial liquidation in France did not revoke the contract.—**THARSIS SULPHUR & COPPER CO., LTD. v. SOCIÉTÉ DES MÉTAUX** (1889), 58 L. J. Q. B. 435; 60 L. T. 924; 38 W. R. 78; 5 T. L. R. 618, D. C.

Annotations:—*Mentd.* British Wagon Co. v. Gray, [1896] 1 Q. B. 35; *Montgomery v. Liebenthal*, [1898] 1 Q. B. 487.

SUB-SECT. 3.—CONCURRENT PROCEEDINGS IN ENGLISH AND FOREIGN COURTS.

See, also, CONFLICT OF LAWS, Vol. XI., pp. 480, 484, 485, Nos. 1335, 1369–1373, & *generally*, CONFLICT OF LAWS, Vol. XI., pp. 477 *et seq.*

REEF GOLD MINING CO., LTD. (1895), 2 O. R. 175.—**S. AF.**

PART XII. SECT. 7, SUB-SECT. 3.

r. *Appointment of receiver—Where receiver already appointed by English court—Postponed till outcome of English proceedings.*—The holder of bonds of a joint-stock co., after instituting proceedings in England, for

Sect. 7.—Actions and proceedings: Sub-sect. 3.
2.]

8533. Receiver appointed in English proceedings—Before liquidation abroad—Receiver not discharged.]—Defts., a French co., being indebted to pltfs. in a sum of £42,000, allowed judgment to go against them by default on Apr. 1889. On Apr. 8 a receiver was appointed in England of the property, then in this country, the subject of the action, in which defts. had an interest. On Apr. 15 defts. were declared by a French ct. to be in liquidation, & a liquidator was appointed. By French law the appointment of a liquidator dates back ten days earlier than the date of his appointment:—*Held*: the appointment of a liquidator in France could not be held to relate back so as to override the appointment by English law of a receiver of property situate in England.—**MASON & BARRY, LTD. v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX** (1889), 5 T. L. R. 582, C. A.

8534. ——— Right of creditors to prove in foreign liquidation.]—Defts. having on Apr. 4, 1889, obtained a judgment against the Société des Métaux, a receivership order was made on Apr. 8, appointing a person to receive the interest of the Société in certain copper & pay the proceeds towards satisfying the judgment. On Apr. 15 the Société, a French co., was placed in judicial liquidation, & pltfs. were appointed liquidators. On May 11 defts. proved in the liquidation in Paris & were admitted.

the sale of the partnership property, which was situated in Canada, & after appointment of a receiver in England of the estate in England & Canada, filed a bill in this ct. for like purpose, & this ct. appointed the agent of the receiver, receiver here; after which it appeared that the co. went into liquidation, the liquidator being the same person as had been appointed receiver in England. Pltf., after an amendment of his bill stating these proceedings, moved for a decree in the terms of the prayer of the bill; but the ct. refused to make such a decree until it was shown what the position of matters was in England, & the steps about to be taken there, so as to avoid any conflict between the two cts., & mould the order here to give the appropriate relief, without interfering with the steps which were being taken in England for the same object.—**LOUTH v. WESTERN OF CANADA OIL LANDS & WORKS CO., LTD.** (1875), 22 Gr. 557.—CAN.

s. Liquidator empowered to make calls—By order of English court—Leave given to enforce payment.]—A co. registered in England was being wound up by the English cts., & an order had been made giving the Official Receiver & Liquidator leave to make a call upon the contributories of the co. Certain Irish contributories had failed to pay the amount of the call. On an *ex parte* application, leave was given to the Official Receiver & Liquidator to enforce the order of the English ct. by issuing & serving on defaulting Irish contributories an originating summons requiring them to pay the amounts in which they were respectively in default.—**Re BANK OF EGYPT, LTD.**, [1913] 1 I. R. 502.—IR.

t. Jurisdiction not exercised—Pending winding up by English court—Validity of compromise of liability on calls.]—**CARBON (NEW) SYNDICATE, LTD. (IN LIQUIDATION) v. SETON** (1904), 12 S. L. T. 191.—SCOT.

a. Company being wound up by English court—Execution by judgment creditor stayed—Claim directed to be entered under liquidation instead.]—

Where a creditor with notice of the liquidation in England of a co. registered in England but carrying on business & having its principal assets in the Cape Province, obtained a judgment against & attached property belonging to the co. in satisfaction of the judgment, the ct. directed a stay of execution leaving the creditor to claim under the liquidation.—**ALLEN & SHAW, LTD. (IN LIQUIDATION) v. KING** (1912), 3 C. P. D. 115.—S. AF.

b. Liquidators appointed in voluntary liquidation abroad—Recognised subject to rights of local creditors.]—Where the liquidators appointed under a voluntary winding up of a co. in England applied to have their appointment recognised, the ct. declared them entitled to the sole administration of all assets in Cape Colony, subject to certain conditions for the protection of the rights & interests of local creditors.—**Re LENDERS & CO., LTD. (IN LIQUIDATION), Ex p. GUEDALLA** (1908), 25 S. C. 407.—S. AF.

PART XII. SECT. 8, SUB-SECT. 1.

c. Effect of foreign liquidation—On jurisdiction of local court—When company formed under foreign jurisdiction.]—The Winding-up Act, R. S. C. 1906, c. 144, applies to all cos. carrying on business in Canada. The jurisdiction of the ct. to wind up a co. is not taken away or defeated by the fact that a winding-up order has already been made in a foreign country—even in the country of the co.'s origin. As soon as a winding-up order is made, the provisions of Dominion Statute apply, & control the entire situation.—**Re BREAKWATER CO.** (1914), 33 O. L. R. 65; 7 O. W. N. 572.—CAN.

d. ——— On action pending against company locally—Stay of proceedings.]—A trading co. incorporated in England under Companies Act, 1862, has, by virtue of its incorporation, a corporate status in any part of the British dominions. Therefore local legislation is not necessary to confer upon such a co. a corporate character in this colony, although such legislation

On an interpleader issue ordered to be tried between pltfs. & defts.:—*Held*: defts. were not debarred from asserting their rights under the receivership order by the fact of their having proved in the French liquidation.—**LEVASSEUR v. MASON & BARRY**, [1891] 2 Q. B. 73; 60 L. J. Q. B. 659; 64 L. T. 761; 39 W. R. 596; 7 T. L. R. 436, C. A.

Annotations:—Mentd. Re Potts, Ex p. Taylor, [1893] 1 Q. B. 648; *Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727; *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157; *Singer v. Fry* (1915), 84 L. J. K. B. 2025; *Re Pearce, Ex p. Official Receiver*, [1919] 1 K. B. 354.

SECT. 8.—WINDING UP.

SUB-SECT. 1.—IN GENERAL.

8535. Effect of foreign liquidation—On jurisdiction of English court.]—*Re MATHESON BROTHERS, LTD.*, No. 8542, *post*.

8536. ———.]—A colonial co., having a branch office in England, was being wound up voluntarily in the colony, subject to the vision of the ct. Upon a creditor's petition presented for the compulsory winding up of the co. in England, it was arranged between the co. & the co. that the English manager should be appointed the attorney of the colonial liquidator, & that the petition should stand over generally upon the undertaking of the co. not to remove the English assets without the leave of the ct., &

may be needed to enable the co. to pursue some of the special objects for which it has been formed. Under a winding-up order made by the Ct. of Ch. under the above Act, the real & personal assets in N.Z. of an English co. are effectually bound. Therefore, where the leave of the Ct. of Ch. has not been obtained to bring or prosecute an action in the colony against a co. after a winding-up order has been made, the ct. will, on motion, stay the proceedings.—**BANK OF OTAGO v. COMMERCIAL BANK OF NEW ZEALAND**, Mac. 233.—N.Z.

e. ——— On execution levied by local judgment creditor—Stay of execution.]—Where the ct. grants recognition to foreign liquidator, under a foreign scheme of voluntary liquidation, it will stay execution by a local creditor who with knowledge of the facts has proceeded to obtain judgment against the co.—**Re AFRICAN FARMS, LTD.**, [1906] T. S. 373.—S. AF.

f. Principal administration — In country under whose law company formed—When assets not all under same jurisdiction.]—In the administration of the affairs of an insolvent co. which has assets & liabilities in different jurisdictions, the English law requires, that subject to any positive local law, the assets of the co. are to be treated in such manner as to provide for the equal treatment of all creditors, irrespective of the place where their debts were contracted or their proofs made. The country or colony under whose law a co. is first formed is to be deemed the domicile of the co., & the administration of the affairs of the co. in that country or colony is to be deemed the principal administration, & all administrations of the affairs of the co. under other jurisdictions are to be deemed ancillary administrations.—**Re SHAW (A.) & CO., LTD., Ex p. MACKENZIE** (1897), 8 Q. L. J. 93.—AUS.

g. Jurisdiction to make order—When execution levied by foreign judgment creditor.]—The S. Co., incorporated in Victoria, for some time carried on salvaging operations in Tasmania, but meeting with no success

to give notice to petitioner of any action which might be thereafter commenced against the co. The judge refused to sanction this arrangement, & made a compulsory order on the ground that this course was for the interest of all parties, but limited the powers of the official receiver to the collection of the English assets, & the settling the list of English creditors, & intimated that some limitation ought to be placed upon his remuneration:—*Held*: (1) the question being one of convenience, there was no sufficient ground for interfering with the discretion of the ct. below; (2) the liquidator's remuneration must be limited to a percentage on the assets of the co. recovered in England.—*Re FEDERAL BANK OF AUSTRALIA, LTD.* (1893), 62 L. J. Ch. 561; 68 L. T. 728; 37 Sol. Jo. 441; 2 R. 416, C. A.

8537. Provisional liquidator—Appointment.]—*Re MERCANTILE BANK OF AUSTRALIA, No. 8548, post.*

8538. Liquidator—Remuneration.]—*Re FEDERAL BANK OF AUSTRALIA, LTD., No. 8536, ante.*

SUB-SECT. 2.—COMPANIES WHICH MAY BE WOUND UP.

8539. Company with English & foreign bonds—Shares divisible equally between English & foreign allottees.]—An Anglo-Belgian co. constituted a *société anonyme*, with domicil at Brussels, a board of directors there & in London, & shares divisible equally between England & Belgian allottees, was formed for making a railway & canal in Belgium; but being unable to complete the undertaking within the time limited, contracted, with the concurrence of the Belgian Govt., to lend the caution-money to other railway cos. for a definite period:—*Held*: the co. was within the operation of the winding-up Acts, & notwithstanding the collateral contract into which the co. had entered, the ct. had jurisdiction to adjudicate in respect of the English shareholders.—*Re DENDRE VALLEY RAILWAY & CANAL CO., Ex p. MOSS* (1850), 19 L. J. Ch. 474; 15 L. T. O. S. 246; 14 Jur. 754.

8540. Branch offices in England.]—The ct. will not interfere under the winding-up Acts, where there are judicial grounds for holding it not expedient to do so. A joint-stock banking co. established in India, having correspondents & liabilities in this country, suspended payment in India, & proceedings had been taken there by

arrangement between certain shareholders in the co. & some of the creditors, in pursuance of which others of the shareholders were sued, who refused to contribute to the payment of the debts according to an assessment unequally made. A shareholder who was thus sued petitioned to have the affairs of the co. wound up under the winding-up Acts; but the ct., presuming on the whole against the expediency of its interfering, declined to make the order, leaving those concerned to their ordinary remedies.—*Re UNION BANK OF CALCUTTA, Ex p. WATSON* (1850), 3 De G. & Sm. 253; 19 L. J. Ch. 388; 15 L. T. O. S. 389; 14 Jur. 1010; 64 E. R. 467.

Annotations:—*Consd. Reuss v. Bos* (1871), L. R. 5 H. L. 176; *Re Syria Ottoman Ry.* (1904), 20 T. L. R. 217.

8541. — London board.]—By the prospectus of a joint-stock co., provisionally registered in England, it was proposed to form a co., to be constituted a "Compania Anonima" in Spain, for the construction of a railway in that country. It was therein stated that the affairs of the co. would be conducted by a board of directors in London, where the co. had an office, assisted by a committee in Madrid. The objects of the co. having failed:—*Held*: the English law applied to such a co., & it was within the jurisdiction of the ct. to dissolve the co. & wind it up.—*Re MADRID & VALENCIA RY. CO., Ex p. JAMES, Ex p. TURNER* (1849), 3 De G. & Sm. 127; 14 L. T. O. S. 268; 14 Jur. 55; 64 E. R. 410; *on appeal* (1850), 2 Mac. & G. 169, L. C.

Annotations:—*Consd. Re General Company for Promotion of Land Credit* (1869), 5 Ch. App. 363. *Refd. Re Dondre Valley Ry. & Canal Co., Ex p. Moss* (1850), 19 L. J. Ch. 474; *Re Bank of Gibraltar & Malta* (1865), 34 Beav. 556; *Re Matheson* (1884), 27 Ch. D. 225. *Mentd. Carron Iron Co. v. Maclaren* (1855), 5 H. L. Cas. 416.

8542. — English assets—English liabilities.]—The ct. has jurisdiction under 1862 Act, s. 199, to wind up an unregistered joint-stock co., formed, & having its principal place of business in New Zealand, but having a branch office, agent, assets, & liabilities in England. The pendency of a foreign liquidation does not affect the jurisdiction of the ct. to make a winding-up order, in respect of the co. under such liquidation, although the ct. will as a matter of international comity have regard to the order of the foreign ct. It being alleged that proceedings to wind up the co. were pending in New Zealand, the ct., in order to secure the English assets until proceedings should be taken by the New Zealand liquidators to make them available for the English creditors *pari passu*

discontinued them & went into voluntary liquidation in Victoria. While the operations were being carried on in Tasmania, the co. had no office there. Two Tasmanian creditors obtained judgments against the co., & caused the Tasmanian assets of the co., a stranded ship & gear, to be seized under a writ of *fi. fa.* A Victorian creditor filed a petition for winding up the co. under Foreign Companies Acts & obtained, *ex parte*, an order restraining the execution creditors from further proceeding with the execution & directing the bailiff to withdraw from possession. The execution creditors applied to the ct. to rescind this order & subsequently opposed the winding-up petition on the ground that the ct. had no jurisdiction to make a winding-up order:—*Held*: in the circumstances the ct. had jurisdiction to entertain the petition; & the co. should be wound up, & also the restraining order should not be disturbed.—*Re SONGVAAR, ETC. CO.* (1918), 14 Tas. L. R. 92.—AUS.

h. Liquidator — Appointed under foreign jurisdiction—Necessity for recog-

nition — When security required.]—Where a foreign co. under liquidation abroad, has assets in the Transvaal, the proper course is for the foreign liquidators to apply to the ct. to recognise their position & capacity in this Colony. The ct. will deal with each such application on its own merits, & if satisfied that the convenient & proper course is to avoid a double liquidation, will recognise such liquidators, but may safeguard the interests of local creditors by directing security to be lodged or otherwise.—*DONALDSON v. BRITISH SOUTH AFRICAN ASPHALTE & MANUFACTURING CO., LTD.*, [1905] T. S. 753.—S. AF.

k. — Conditions for protection of local creditors' interests.]—When a foreign co., carrying on business in the Cape Province, goes into liquidation & a liquidator is appointed in the foreign country, the ct., in granting recognition of the foreign liquidator, will impose such conditions as may be necessary for the protection of the interests of local creditors, but cannot appoint a local liquidator to act jointly with the foreign liquidator in the

liquidation of the business of the co. in the Cape Province.—*Ex p. ATKEY (LONDON), LTD. (LIQUIDATOR)*, [1921] C. P. D. 692.—S. AF.

l. Procedure—When security for costs required.]—Sect. 287 of Companies Act, 1910, does not apply to a co. not registered in Victoria; but the ct. may, in the exercise of its general direction, order pltf. foreign co., in liquidation, to give security for costs, at all events, where it is not shown that pltf. will have sufficient assets in Victoria, when judgment is given, to satisfy costs which may be awarded to deft.—*J. FARLE HERMANN, LTD. v. LINDEN*, [1914] V. L. R. 615.—AUS.

m. — To set aside winding-up order.]—A winding-up order under 45 Vict. c. 23 (D), winding up a foreign co. doing business in Ontario, made by one judge, will not be set aside by another. An application for that purpose must be made to the divisional ct.—*Re LAKE SUPERIOR NATIVE COPPER CO., LTD., Re PLUMMER* (1885), 9 O. R. 277.—CAN.

Sect. 8.—Winding up: Sub-sect. 2. Sect. 9. Part XIII. Sect. 1.]

with those in New Zealand, sanctioned the acceptance of an undertaking by the solr. for the English agent of the co., that the English assets should remain *in statu quo* until the further order of the ct.—*Re MATHESON BROTHERS, LTD.* (1884), 27 Ch. D. 225; 51 L. T. 111; 32 W. R. 846.

Annotation:—Folld. Re Syria Ottoman Ry. (1904), 20 T. L. R. 217.

8543. ———. ———.]—The ct. has jurisdiction, under 1862 Act, s. 199, to wind up a co. formed & registered in Australia which has a branch office, assets, & liabilities in England.

A petition having been presented in England to wind up an unregistered co., alleging that a winding-up order had been made in Australia, the ct. made a winding-up order, but directed the English liquidator not to act, except under the directions of the judge, save for the purpose of getting in the English assets & settling the list of English creditors.—*Re COMMERCIAL BANK OF SOUTH AUSTRALIA* (1886), 33 Ch. D. 174; 55 L. J. Ch. 670; 55 L. T. 609; 2 T. L. R. 714.

Annotation:—Folld. Re Federal Bank of Australia (1893), 62 L. J. Ch. 561.

8544. ———. ———. **Notice to foreign liquidator.]—***Re VICTORIA DATE CO., LTD.* (1898), 42 Sol. Jo. 755.

8545. ———. ———.]—A foreign co., which is incorporated under the laws of a foreign State, but which has an office & assets in England, can be wound up in this country, under 1862 Act, s. 199.—*Re SYRIA OTTOMAN RY. CO.* (1904), 20 T. L. R. 217.

8546. ———. **English agency.]—**A joint-stock co. formed in India, & incorporated by registration under Indian law, & having its principal place of business in India, with an agent & branch office in England, may be wound up under the 1862 Act.—*Re COMMERCIAL BANK OF INDIA* (1868), L. R. 6 Eq. 517; 16 W. R. 1104.

Annotations:—Consd. Re General Co. for Promotion of Land Credit (1869), 5 Ch. App. 367, n.; *Re Imperial Anglo-German Bank* (1872), 25 L. T. 895. *Folld. Re Matheson* (1884), 27 Ch. D. 225.

8547. ———. ———.]—*Re MATHESON BROTHERS, LTD.*, No. 8542, *ante*.

8548. ———.]—A banking co., incorporated in Australia, having a branch establishment in London, but with no registered office in England, is within 1890 (Winding up) Act.

The official receiver is the person, under the Act & rules of 1890, who should be appointed provisional liquidator in the ordinary course.—*Re MERCANTILE BANK OF AUSTRALIA*, [1892] 2 Ch. 204; 61 L. J. Ch. 417; 67 L. T. 159; 40 W. R. 440; 36 Sol. Jo. 363.

8549. No branch office in England—English agency.]—There is no jurisdiction under 1862 Act, to wind up a foreign co. which has carried on business in England by means of agents, but which has no branch office of its own there.—*Re LLOYD GENERALE ITALIANO* (1885), 29 Ch. D. 219; 54 L. J. Ch. 748; 33 W. R. 728.

Annotation:—Consd. Re Syria Ottoman Ry. (1904), 20 T. L. R. 217.

8550. English held shares—Uncalled share capital in England.]—*Semble:* the ct. has jurisdiction to entertain a petition for winding up a foreign co., some of the shares being held, & there being some uncalled capital, in this country.—*Re JARVIS CONKLIN MORTGAGE CO.* (1895), 11 T. L. R. 373.

8551. Company not fully formed—No incorporation.]—In Apr. 1871, a prospectus was published of a co. to be called the Imperial Anglo-German Bank, the head office to be in Berlin, with a branch in London. The prospectus published the names of the secretary & of twelve direc-

tors, five of whom were resident in Berlin & seven, some of whom were Germans, in England. It stated that by the provisions of the German law, under which the co. was to be incorporated, appcts. for shares could not be made liable before the incorporation of the co., & that their money must therefore be returned in full if the undertaking should not be proceeded with. It further stated that a moiety of the shares had been subscribed for in Germany, & 10 per cent paid thereon, which was required by the German law before the incorporation of a co., & it invited subscriptions for the remaining moiety. On May 20, a large order for advertisements was given at the temporary London office of the inchoate co. to R., an advertising agent, by the secretary in the presence of the principal promoter of the co. The remaining moiety of the shares was allotted in England, & 10 per cent paid thereon. But it having turned out subsequently that the first moiety of the shares had not, in fact, been subscribed for in Germany, nor the requisite percentage paid thereon, the co. was never incorporated. Upon a petition by R. stating these facts, & praying that the Imperial Anglo-German Bank might be wound up by the ct.:—*Held:* the Imperial Anglo-German Bank, not having been incorporated, never came into existence, & could not be wound up. *Semble:* the provisional directors of an inchoate co. do not constitute an assocn. which can be wound up under 1862 Act, s. 199.—*Re IMPERIAL ANGLO-GERMAN BANK* (1872), 26 L. T. 229, C. A.

Annotation:—Refd. Re Matheson (1884), 27 Ch. D. 225.

8552. Company carrying on business in Scotland & in England—Company registered in Scotland.]—*Re SCOTTISH JOINT STOCK TRUST*, [1900] W. N. 114.

8553. Unregistered company of not more than seven members.]—Under 1862 Act the ct. has no jurisdiction to wind up a foreign unregistered co. not consisting of more than seven members.—*NEW YORK & CONTINENTAL LINE* (1909), 54 Sol. Jo. 117.

SECT. 9.—SCHEMES OF ARRANGEMENT.

8554. Under Joint Stock Companies Arrangement Act, 1870 (c. 104)—Whether applicable to colonies.]—Above Act does not apply to the colonies. Accordingly a scheme of arrangement thereunder sanctioned by an English ct. is *quoad* the colonies a proceeding in a foreign ct., & cannot be pleaded by the co. in a Victorian ct. as a defence to an action by a non-assenting Victorian creditor for the full amount of her claim.—*NEW ZEALAND LOAN & MERCANTILE AGENCY CO. v. MORRISON*, [1898] A. C. 349; 67 L. J. P. C. 10; 77 L. T. 603; 46 W. R. 239; 14 T. L. R. 141; 5 Mans. 171, P. C.

Annotations:—Mentd. Re Debtor (No. 333 of 1917), *Ex p. Debtor* (1918), 34 T. L. R. 277; *Re Nelson, Ex p. Dare & Dolphin*, [1918] 1 K. B. 459.

8555. ———. Whether meeting of creditors in England ordered—Meeting of creditors abroad.]—*Re QUEENSLAND NATIONAL BANK* (1893), 37 Sol. Jo. 632.

8556. ———. No liquidation abroad.]—(1) In considering whether a scheme ought to be sanctioned under above Act, the ct. has to see that the Act has been complied with; that the majority are acting *bonâ fide*, & not overriding the minority for purposes of their own; & that the scheme is itself a reasonable one.

A winding-up order having been made against

an English bank carrying on business in Australia, an order convening the creditors provided that "the creditors should be permitted to vote at the meetings personally or by proxy, & that the creditors in Australia should be at liberty to give proxies to persons to be designated for the purpose by the official receiver for or against a scheme, or to any other person entitled to vote at the meeting whom they might think proper, provided that such proxies were deposited at the office in Melbourne or Sydney of the bank, not later than three days prior to the holding of the meetings in London, & that particulars of the proxies so deposited were communicated by telegram to the official receiver for use at the meetings." At a meeting held pursuant to the order a scheme of reconstruction was approved by a majority of creditors largely exceeding, by reckoning the votes of Australian creditors who had deposited proxies in Australia as directed, the statutory majority required by above Act, sect. 2. The proxy papers were not in England at the date of the meeting:—*Held*: (2) there was power to make the order allowing Australian creditors to vote by proxy provided they deposited proxies in Australia, & the results of the proxies were

telegraphed to England; (3) the proxies so deposited in Australia, not being intended for the purposes of voting at one meeting only so as to require a penny stamp before execution, & having been first executed out of the United Kingdom, might be stamped after execution with a 10s. stamp within thirty days after being received in England; (4) the votes of the Australian creditors were valid, & ought to be reckoned.—*Re* ENGLISH, SCOTTISH & AUSTRALIAN CHARTERED BANK, [1893] 3 Ch. 385; 62 L. J. Ch. 825; 69 L. T. 268; 42 W. R. 4; 9 T. L. R. 581; 37 Sol. Jo. 642; 2 R. 574, C. A.

Annotations:—*As to* (1) *Folld.* *Re* London Chartered Bank of Australia, [1893] 3 Ch. 540. *Reid.* *Re* Queensland National Bank (1893), 37 Sol. Jo. 632; *Re* Tea Corp., *Sorsbie v. Same Co.*, [1904] 1 Ch. 12. *As to* (2) *Reid.* *Re* Canning Jarrah Timber Co. (1900), 69 L. J. Ch. 416. *Generally, Reid.* *Re* Syria Ottoman Ry. (1904), 20 T. L. R. 217. *Mentd.* *Re* A Debtor, *Ex p.* Peak Hill Goldfield, [1909] 1 K. B. 430.

8557. Petition for English winding up—For purposes of having scheme sanctioned in England.—*Re* AUSTRALIAN JOINT STOCK BANK, LTD., [1897] 41 Sol. Jo. 469.

Annotation:—*Distd.* *Re* Melbourne Brewery & Distillery, [1901] 1 Ch. 453.

Part XIII.—Illegal Companies.

SECT. 1.—COMPANIES WHICH ARE ILLEGAL.

8558. Unincorporated company acting as corporate body.—In *assumpsit* for work & labour, & money expended in the purchase of shares in a concern called the "Equitable Loan Bank Co.," it appeared that the co. professed to have a capital of £2,000,000, in shares of £50 each; that a deposit of £1 per share was required on the delivery of certificates for shares to the holders; that the shares were to be transferable without any restriction, & that the holders were to be subject to such regulations as might be contained in any Act of Parliament passed for the government of the society, & in the meantime, to such regulations as might be made by a committee of management. No evidence was given as to the particular objects or tendency of the co.:—*Held*: upon this evidence the co. was to be considered illegal, & within the operation of the 6 Geo. 1, c. 18, as having transferable shares, & affecting to act as a body corporate without authority by charter or Act of Parliament; & pltf. consequently could not maintain his action, which arose out of an illegal transaction.—*JOSEPHS v. PEBRER* (1825), 3 B. & C. 639; 1 C. & P. 507; 5 Dow. & Ry. K. B. 542; 3 L. T. O. S. K. B. 102; 107 E. R. 870.

Annotations:—*Reid.* *Jackson v. Cocker* (1841), 4 Beav. 59; *London Grand Junction Ry. v. Freeman* (1841), 2 Man. & G. 606.

8559. —.]—A great number of persons at B. covenanted by a deed of co-partnership to raise a large capital, £20,000, by small subscriptions of £1 for each share, for the purpose of buying corn, grinding it, making bread, & dealing in & dis-

tributing flour or bread amongst the partners, under the name & firm of the B. co., & under the management of a committee; & covenanted that no partner should hold more than 20 shares unless the same should come to him by marriage, etc., or act of law; & that each member should weekly purchase of the co-partnership a certain quantity of bread or flour, not exceeding 1s. in value for each share, as the committee should appoint; & that no partner should assign his share, unless the assignee should enter into covenant with the other partners for the performance of all covenants in the original deed; & that the majority of partners at a public meeting might make bye-laws to bind the whole. Upon an indictment against several of the partners, charging them, upon 6 Geo. 1 (c. 18), ss. 18, 19, as for a public nuisance, with intending to prejudice & aggrieve divers of the King's subjects in their trade & commerce, under false pretences of the public good, by subscribing, collecting, & raising, & also by making subscriptions towards raising a large sum for establishing a new & unlawful undertaking, tending to the common grievance, etc., of great numbers of the King's subjects in their trade & commerce, *i.e.* making subscriptions towards raising £20,000 in 20,000 shares, for the purpose of buying corn, & grinding & making it into flour & bread, & dealing in & distributing the same; & also with presuming to act as a corporate body, & pretending to raise a transferable & assignable stock, for the same purposes: the jury having found specially, that the co. was originally, during the high price of provisions,

PART XIII. SECT. 1.

n. Under Lotteries Acts — Company incorporated in Queensland—Selling land in Victoria.—A co. was formed in Q. for the purpose of disposing by lottery of land in M. belong-

ing to a building society, which was duly incorporated & registered in Q. The lottery was to be drawn in B. Defts. were appointed as agents of the co. in V., & received application for shares in such lottery scheme:—*Held*:

though the lottery was to be drawn in Q., it was an endeavour to dispose of lands in M. by a lottery within Police Offences Act, 1894 (No. 1126), s. 37.—*CAWSEY v. ANDREWS* (1894), 20 V. L. R. 332.—**AUS.**

-Companies which are illegal.]

instituted from laudable motives, & for the purpose of more regularly supplying the town of B. & the neighbourhood with flour & bread, & that the same was originally, & still was, beneficial to the inhabitants at large, but was, *i.e.* at the time of finding the special verdict, which did not include the time of the offence charged in the indictment, prejudicial to the bakers & millers of the town & neighbourhood in their trades:—*Held*: (1) the case was not within the Act on which the indictment was framed; for, (2) the fact of any nuisance was negatived by the special verdict, during the time to which the offence charged related; (3) though defts. were found to have raised a large capital by small subscriptions, which was one ingredient of a nuisance mentioned in the Act; *i.e.* where referable to undertakings prohibited by the Act; & though the shares were made transferable to a certain extent, but to a certain extent only, *i.e.* upon the vendee's entering into similar covenants with the original partners, which might be another ingredient of a nuisance in the Act; & though defts. had assumed certain equivocal *indicia* of a corp., *i.e.* the taking a common name, though this was not found by the jury; having a managing committee, general meetings, & a power to make bye-laws; yet all these things being done for the purpose of buying corn & making it into flour & bread for the supply of the partners, which did not upon the face of it, appear to be a dangerous & mischievous undertaking, tending to the common grievance, etc., nor was it found in fact so to be; & not being one of the specific nuisances prohibited by the Act; namely, the acting or pretending to act as a body corporate; the raising or pretending to raise transferable stock—even if that were a nuisance *per se* within the Act, without reference to the nature of the undertaking; the transferring or pretending to transfer any shares in such stock without authority by statute; the acting or pretending to act under any charter granted for special & different purposes by persons using such charter for raising or transferring stock; or so acting under any obsolete charter, become void or voidable by non-user, abuser, or for want of election; it was not within the terms & intent of the nuisances created by the Act.—*R. v. WEBB* (1811), 14 East, 406; 104 E. R. 658.

Annotations:—*As to* (1) *Refd.* *Brown v. Holt* (1812), 4 Taunt. 587; *Kinder v. Taylor* (1825), 3 L. J. O. S. Ch. 68. *As to* (3) *Distd.* *Josephs v. Pebrer* (1825), 3 B. & C. 639. *Refd.* *Nockells v. Crosby* (1825), 3 B. & C. 814; *Harrison v. Heathorn* (1843), 6 Man. & G. 81.

8560. ———.]—Acting as a corporate body, not being such, is an offence at common law.—*KINDER v. TAYLOR* (1825), 3 L. J. O. S. Ch. 68.

8561. ——— **What amounts to assumption of corporate character — Creation of transferable stock.**]—A co. formed for the purpose of making a railway, one of the regulations of which was, that 15,000 shares of £50 each should be raised, & then, that application should be made to Parliament, & which, after continuing for rather more than a year, was dissolved, because no eligible line of road could be found, is not an illegal co., under 6 Geo. 1, c. 18, so as that a party, who has bought shares, may, on that account, recover back the money paid for them.—*KEMPSON v. SAUNDERS* (1826), 4 Bing. 5; 2 C. & P. 366; 12 Moore, C. P. 44; 5 L. J. O. S. C. P. 6; 130 E. R. 669.

Annotation:—*Mentd.* *Watkins v. Huntley* (1826), 2 C. & P. 410, n.

8562. ———.]—There is no objection

upon 6 Geo. 1, c. 18, ss. 18, 19, as for a public nuisance & grievance, to articles of agreement, whereby 50 persons agreed to raise 200 shares at £210 each, by small monthly subscriptions, for building houses for each other, every holder paying interest on his shares till paid up; with a stipulation for the members to employ certain tradesmen only in the building; with power to each member to sell his shares & transfer them in the books of the society, provided that the purchaser should be approved at a meeting of the society, & should, on his admission, become a party to the original articles; for there is nothing illegal, *per se* in the general object, or in the mode of executing it; nor is such a limited power of transferring the shares a raising of transferable stock within the mischief of the Act.—*PRATT v. HUTCHINSON* (1812), 15 East, 511; 104 E. R. 936.

Annotations:—*Distd.* *Josephs v. Pebrer* (1825), 3 B. & C. 639. *Refd.* *Nockells v. Crosby* (1825), 3 B. & C. 814.

8563. ———.]—Debt on bond, conditioned for paying pltf. £10,000, upon his forming a co., & procuring purchasers for 9,000 shares therein; such co. to carry on a distillery according to a process for which a patent had been granted. Plea, that the patent contained a proviso, rendering it void if transferred to more than five; that it was intended the co. should consist of more than five, & be formed for the purpose of enjoying the benefit of the letters-patent, of acting as a corporate body, & of dividing the benefit of the patent into 10,000 shares, transferable & assignable without charter from the King; & that it was corruptly & illegally agreed between the parties, that pltf. should form the co. for such purposes, & should sell the 9,000 shares in order to raise a larger sum of money, under pretence of carrying on the privilege granted by the patent:—*Held*: the plea was a bar to the action.—*DUVERGIER v. FELLOWS* (1828), 5 Bing. 248; 2 Moo. & P. 384; 7 L. J. O. S. C. P. 15; 130 E. R. 1056; *affd.*, on other grounds (1830), 10 B. & C. 826; (1832), 1 Cl. & Fin. 39, H. L.

Annotations:—*Consd.* *Blundell v. Winsor* (1837), 8 Sim. 601; *Garrard v. Hardey* (1843), 5 Man. & G. 471; *Harrison v. Heathorn* (1843), 6 Man. & G. 81. *Refd.* *London Grand Junction Ry. v. Freeman* (1841), 2 Man. & G. 606; *Sheppard v. Oxenford* (1855), 1 K. & J. 491; *Re Mexican & South American Co., Re Aston* (1859), 27 Beav. 474. *Mentd.* *Solarte v. Palmer* (1834), 2 Cl. & Fin. 93.

8564. ———.]—Raising & transferring stock is not a nuisance at common law. Therefore a plea to a count in *assumpsit* for money lent, stating that pltf. & deft. & other persons, did illegally associate in a certain illegal undertaking, tending to the common nuisance of the subjects; that is to say, that pltf., deft., & the other persons, did act as a corporate body, & pretend to be a trading corp., under the name, etc., & did pretend to raise & transfer stock in the said co., & that the said stock consisted of, etc., & did pretend to transfer & assign shares in such stock, without legal authority by Act of Parliament, etc., & that the money was lent for the purpose of furthering such illegal undertaking:—*Held*: bad, as not describing such an illegal assocn. as would constitute a nuisance at common law.—*GARRARD v. HARDEY* (1843), 5 Man. & G. 471; 6 Scott, N. R. 459; 12 L. J. C. P. 205; 7 Jur. 200; 134 E. R. 648.

8565. ———.]—A trading co. was established in 1835, upon the terms contained in the prospectus, which placed its affairs under the management of individual directors, but contained no provision as to the transfers of shares. The certificates of shares purported to give the

holder a title to the shares, which accordingly were treated as transferable by delivery of the certificates:—*Held*: the having shares transferable by delivery was not such an assumption of a corporate character as to make the co. illegal.—*Re MEXICAN & SOUTH AMERICAN CO., GRISEWOOD & SMITH'S CASE, DE PASS'S CASE* (1859), 4 De G. & J. 544; 28 L. J. Ch. 769; 33 L. T. O. S. 322; 5 Jur. N. S. 1191; 7 W. R. 681; 45 E. R. 211, L. JJ.

Annotation:—*Mentd.* *Re Royal British Bank, Mixer's Case* (1859), 4 De G. & J. 575; *Re Athenæum Life Assco. Soc., Chinnock's Case* (1860), John. 714; *Re Mexican & South American Co., Costello's Case* (1860), 2 De G. F. & J. 302; *Re Esgair Mwyn Mining Co. & Joint Stock Companies Acts, 1856-57, Alexander's Case* (1861), 3 L. T. 883; *Re Phoenix Life Assco., Ex p. Hatton* (1862), 31 L. J. Ch. 340; *Re Consols Insee. Asscn., Benham's Case* (1865), 11 Jur. N. S. 381; *Re National & Provincial Marine Insee., Ex p. Parker* (1867), 2 Ch. App. 685; *Re Smith, Knight, Weston's Case* (1868), L. R. 6 Eq. 238; *Spackman v. Evans* (1868), 19 L. T. 151; *Re Asiatic Banking Co., Ex p. Collum* (1869), 21 L. T. 350; *Re Bank of Hindustan, China & Japan, Ex p. Kintrea* (1869), 5 Ch. App. 95; *Re Consol's Insee. Asscn., Glanville's Case* (1870), L. R. 10 Eq. 479; *Re Smith, Knight, Battie's Case* (1870), 39 L. J. Ch. 391; *Re European Bank, Deering's Case* (1871), 7 Ch. App. 292, n.; *Re European Bank, Masters's Case* (1871), 25 L. T. 582; *Re Great Wheal Busy Mining Co., King's Case* (1871), 40 L. J. Ch. 361; *R. v. Lambourn Valley Rty.* (1888), 22 Q. B. D. 463; *Re Discoverers Finance Corp., [1908] 1 Ch. 141*; *Re Discoverers Finance Corp., Lindiar's Case, [1910] 1 Ch. 312*.

8566. S. P. *Re MEXICAN & SOUTH AMERICAN CO., ASTON'S CASE* (1859), 4 De G. & J. 320; 28 L. J. Ch. 631; 33 L. T. O. S. 229; 5 Jur. N. S. 779; 7 W. R. 539; 45 E. R. 124, L. JJ.

8567. Unincorporated company.]—Joint-stock cos. are not illegal because not incorporated.—*WALBURN v. INGILBY* (1832), 1 My. & K. 61; *Coop. temp. Brough.* 270; 39 E. R. 604, L. C.

Annotation:—*Mentd.* *Houghton v. Reynolds* (1843), 2 Hare, 264.

8568. Company with shares assignable at will—Capital augmentable to unlimited extent.]—A joint-stock co. formed for working gold mines in North America, the shares of which might be increased to an unlimited extent, & were made assignable at the discretion of the holders, was held to be illegal & fraudulent.—*BLUNDELL v. WINSOR* (1837), 8 Sim. 601; 6 L. J. Ch. 364; 1 Jur. 589; 59 E. R. 238.

Annotations:—*Consd.* *Re Mexican & South American Co., Re Aston* (1859), 27 Beav. 474. *Refd.* *London Grand Junction Rty. v. Freeman* (1841), 2 Man. & G. 606; *Butt v. Montaux* (1854), 1 K. & J. 98; *Sheppard v. Oxenford* (1855), 1 K. & J. 491.

8569. —.]—The mere circumstance of defts. having called themselves "The Anglo-American Gold Mining Asscn.," & professing to have stock transferable at the will of the holder, subject only to certain regulations as to registering transfers & proof of title, did not show the asscn. to be a nuisance & public grievance at common law.—*HARRISON v. HEATHORN* (1843), 6 Man. & G. 81; 6 Scott, N. R. 735; 12 L. J. C. P. 282; 1 L. T. O. S. 230; 134 E. R. 817.

Annotations:—*Folld.* *Re Mexican & South American Co., Re Aston* (1859), 27 Beav. 474. *Distd.* *Re Mexican & South American Co., Grisewood & Smith's Case, De Pass's Case* (1859), 4 De G. & J. 544.

8570. Banking company—Non-compliance with 6 Geo. IV., c. 42.]—To an action brought by the Agricultural & Commercial Bank of Ireland, in the name of its public officer, deft. pleaded, that the co-partnership consisted of more than six persons, & was established after the passing of 6 Geo. 4, c. 42, & that the establishments or houses of business of the said co-partnership had been "from the time of the formation thereof until the commencement of this suit, & then were, at places in Ireland less than fifty miles, from

Dublin, contrary to the provisions of the statute":

Held: in order to support this plea, it was incumbent on deft. to show that there was such a branch bank for the whole time, viz. from the time of the original formation of the co. down to the time of the commencement of the suit. *Semble*: the existence at any time of such an establishment would be no defence to an action; but it must at least be shown to have existed either at the time the contract was made, or at the commencement of the action.—*HUGHES v. THORPE* (1839), 5 M. & W. 656; 9 L. J. Ex. 109; 151 E. R. 278.

Annotations:—*Refd.* *Skinner v. Lambert* (1842), 5 Scott, N. R. 197; *Reddish v. Pinnock* (1854), 10 Exch. 213.

See, also, BANKERS AND BANKING, Vol. III., p. 140, No. 125.

8571. Company for purpose of promoting secularist doctrine.]—The Secular Society, Ltd., was registered as a co. limited by guarantee under Cos. Acts, 1862 to 1893. The main object of the co., as stated in its memorandum of asscn., was to promote the principle that human conduct should be based upon natural knowledge, & not upon supernatural belief, & that human welfare in this world is the proper end of all thought & action:—*Held*: it was not illegal in the sense of rendering the co. incapable in law of acquiring property by gift, & a bequest "upon trust for the Secular Society, Ltd." was valid.—*BOWMAN v. SECULAR SOCIETY, LTD.*, [1917] A. C. 406; 86 L. J. Ch. 568; 117 L. T. 161; 33 T. L. R. 376; 61 Sol. Jo. 478, H. L.; *affg.* S. C. *sub nom. Re BOWMAN, SECULAR SOCIETY, LTD. v. BOWMAN*, [1915] 2 Ch. 447, C. A.

Annotations:—*Refd.* *Bourne v. Keane*, [1919] A. C. 815.

Mentd. *Cotman v. Brougham*, [1918] A. C. 514; *Re Tetley, National Provincial & Union Bank of England v. Tetley*, [1923] 1 Ch. 258.

Company not registered under Companies Acts.]—*See* Part III., Sect. 4, sub-sect. 1, *ante*.

8572. Under Lotteries Acts—Loan society—Members to receive loans drawn by lot.]—A society formed for making advances to its members, which selects by lot members who are to receive advances, is not illegal under the Lottery Acts.—*WALLINGFORD v. MUTUAL SOCIETY* (1880), 5 App. Cas. 685; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81, H. L.

Annotations:—*Mentd.* *Edmunds v. Wallingford* (1885), 14 Q. B. D. 811; *Speers v. Daggers* (1885), Cab. & El. 503; *Purkiss v. Low* (1886), 3 T. L. R. 63; *Gunga Narain Gupta v. Tiluckram Chowdhry* (1888), L. R. 15 Ind. App. 119; *Steadman v. Hakin* (1888), 58 L. J. Q. B. 57; *Manger, etc. v. Cash* (1889), 5 T. L. R. 271; *Lawrance v. Norreys* (1890), 15 App. Cas. 210; *Arnold & Butler v. Bottomley*, [1908] 2 K. B. 151.

8573. — Company floating lottery abroad.]—A co., incorporated in England for the purpose of carrying on financial & other operations in Persia, issued a prospectus stating that it was intended to acquire under a certain contract a concession from the Shah, which granted the exclusive privilege of floating lotteries & similar loans in Persia; that the headquarters of the scheme would be in Persia, but that agents would be employed in the chief cities of Eastern Europe for the purpose of obtaining subscriptions; that "five issues have to be made annually in Persia, with minimum drawings of £10,000, & it is estimated that these operations should return continuously increasing dividends." A shareholder moved to restrain the co. from acquiring the concession, or advertising the lottery loans or similar enterprises:—*Held*: the purchase of the concession was legal, & the issue of the prospectus containing the statement of the five annual issues was not a notice of a foreign lottery within 6 & 7 Will. 4, c. 66.—*MACNEE v. PERSIAN INVESTMENT*

Sect. 1.—Companies which are illegal. Sect. 2: Sub-sects. 1 & 2.]

CORPN. (1890), 44 Ch. D. 306 ; 59 L. J. Ch. 695 ; 62 L. T. 894 ; 38 W. R. 596 ; 6 T. L. R. 280.

8574. — Company dealing in lottery bonds.]—A co. was formed for the purpose of dealing in lottery bonds. In some cases the bonds bore a small rate of interest ; in others no interest was paid, but it was added to the principal. All the bonds must be drawn sooner or later, but the drawings extended over a period of eighty years. A petition was presented for an order for the compulsory winding up of the co., on the ground that dealing in premium bonds was contrary to the Lottery Act, & was, moreover, carried on in a fraudulent manner. Investors were promised that on paying the first instalment they would have the benefit of the drawing of bonds, but the same bond was given to two or even three different people :—*Held* : the premium bonds were within the Lottery Acts, & the dealing in them as carried on by the co. was an illegal business. An order was accordingly made for the compulsory winding up of the co.—*Re INTERNATIONAL SECURITIES CORPN., LTD.* (1908), 99 L. T. 581 ; 24 T. L. R. 837 ; *on appeal*, 25 T. L. R. 31, 40, C. A.

See, generally, GAMING AND WAGERING.

SECT. 2.—EFFECT OF COMPANY BEING ILLEGAL.

SUB-SECT. 1.—IN GENERAL.

8575. As regards contracts for sale of shares—Overpayment to agent—Whether recoverable.]—B., being employed by A. to purchase for him certain transferable shares in an unincorporated co., charged & received from him £25 beyond the market price of such shares at the time :—*Held* : an action would not lie to recover back this sum, the co. being within 6 Geo. 1, c. 18, & the parties *in pari delicto*.—*BUCK v. BUCK* (1808), 1 Camp. 547, N. P.

8576. — Agent's right to recover remuneration.]—*JOSEPHS v. PEPPER*, No. 8558, *ante*.

8577. As regards liability of members, officers & servants—Embezzlement of company's money—Whether servant chargeable.]—Where a society, in consequence of administering to its members an unlawful oath, is an unlawful combination & confederacy under 37 Geo. 3, c. 123 ; 39 Geo. 3, c. 79 ; 52 Geo. 3, c. 104 ; & 57 Geo. 3, c. 19, a person charged with embezzlement as clerk & servant to such society cannot be convicted.—*R. v. HUNT* (1838), 8 C. & P. 642.

Annotation :—Refd. Jeffrey v. Bamford, [1921] 2 K. B. 351.

8578. — Whether member chargeable.]—Though an assocn. of more than twenty persons if unregistered is prohibited by 1862 Act, s. 4, a member thereof may be convicted of embezzlement of moneys belonging thereto.—*R. v. TANKARD*, [1894] 1 Q. B. 548 ; 63 L. J. M. C. 61 ; 70 L. T. 42 ; 58 J. P. 300 ; 42 W. R. 350 ; 38 Sol. Jo. 130 ; 17 Cox, C. C. 719 ; 10 R. 149, C. C. R.

Annotations :—Refd. Marrs v. Thompson (1902), 18 T. L. R. 565 ; *Jeffrey v. Bamford, [1921] 2 K. B. 351.*

PART XIII. SECT. 2, SUB-SECT. 1.

a. As regards debts due to company—Right to sue—Money withheld by agent.]—A co. that is by law illegal has no *locus standi* in ct., & cannot sue in respect of any cause of action.—*WALLER v. GIPPS* (1885), 6 N. S. W. Eq. 40, 123 ; 1 N. S. W. W. N. 35.—**AUS.**

p. — Money due on mortgage.]—*MADRAS HINDU MUTUAL BENEFIT PERMANENT FUND v. RAGAVA CHETTI* (1895), 1 L. R. 19 Mad. 200.—**IND.**

q. As regards goods purchased—Liability of directors.]—Directors of a co-operative co. consisting of more than

See, generally, CRIMINAL LAW & PROCEDURE, Vol. XV., p. 932.

8579. — Action against promoter—Promoter cannot set up illegality in formation.]—*BUTT v. MONTEAUX*, No. 8529, *ante*.

8580. — Action against trustee—Illegality will not prevent interlocutory injunction.]—A bill, filed by pltf. on behalf of himself & the other shareholders, in an assocn. formed in England for carrying on mines abroad, stated that the property & also the management of the undertaking had been vested in two trustees, of whom deft. was the survivor ; that no deed of settlement had been executed ; that the evidence of proprietorship consisted in the possession of certain certificates, the holders of which were treated as shareholders, & that pltf. was the holder of some of the shares by virtue of the possession of such certificates ; alleged an intention of deft. to sell the property & prayed an injunction & other relief. A demurrer on the ground of the illegal nature of the partnership, & the defective title of pltf. to a share in the property, & for want of parties, was overruled, the questions raised thereby being reserved to the hearing ; & on motion for an injunction, a case of danger to the property being shown, an injunction was granted, restraining deft. from dealing with the property otherwise than in the ordinary course of business. *Semble* : deft. may demur to a bill after a motion made by pltf., upon which deft. has entered upon the merits.—*SHEPARD v. OXENFORD* (1855), 1 K. & J. 491 ; 25 L. T. 90 ; 3 W. R. 397 ; 69 E. R. 552, L. JJ.

Annotation :—Mentd. Re Great Cambrian Mining & Quarrying Co., Bowen's Case (1856), 4 W. R. 800.

8581. — Illegality will bar action for administration of trust deed.]—*SYKES v. BEADON*, No. 267, *ante*.

As regards debts due to company—Right to prove for in debtor's bankruptcy.]—*See BANKRUPTCY & INSOLVENCY, Vol. IV., p. 330, Nos. 3100, 3101.*

8582. — Right to sue—Advances to members.]—Certain persons, exceeding twenty in number, agreed to form a society & to raise sums of money by monthly subscriptions. All the money so raised was to be lent to members of the society, upon such security as should be approved by the committee, at interest. Each member paid a monthly subscription, & when these subscriptions amounted to £5, such sum was put up for auction & the highest bidder received the £5 on loan at interest at the rate of 5 per cent. Should there be no bidders for the loans, the committee for the time being were empowered to lend the moneys to other similar societies. The society was not registered. Deft., a member of the society, received a loan of £10 pursuant to the rules, & made & gave to pltf., who was trustee of the society, a promissory note for the amount, as security for the loan. In an action by pltf. to recover the amount due on the note :—*Held* : the society was an illegal one within the provisions of 1862 Act, s. 4, being an unregistered assocn. of more than twenty persons formed for the purpose of money-lending, & having for its object the acquisition of gain by its individual members ; & consequently, the note was given for an illegal

20 members & therefore illegal under Cos. Statute, 1864, are liable for goods supplied to the co.—*MASTERTON v. BLAIR* (1871), 2 V. R. (Law) 19.—**AUS.**

r. As regards guarantee—Given to cover liability of company.]—Pltfs. sued on a guarantee, given by deft. as surety & co-principal debtor, for a liability incurred by an assocn. of

consideration & could not be sued upon.—**JENNINGS v. HAMMOND** (1882), 9 Q. B. D. 225; 51 L. J. Q. B. 493; 31 W. R. 40, D. C.

Annotations:—**Apprvd.** *Shaw v. Benson* (1883), 11 Q. B. D. 563. **Apld.** *Phillips v. Davies* (1888), 5 T. L. R. 98. **Consd.** *Marrs v. Thompson* (1902), 86 L. T. 759.

8583. ———.]—T. was the president of a loan society. The objects of the society were to form a fund, from which money might be advanced to enable shareholders to build or purchase a dwelling-house or other buildings, or to lend money to each other on approved personal security; five per cent. interest was to be charged on all moneys advanced by the society. The society consisted of more than twenty members, & was not registered under any statute. The society advanced a sum of money to defts., who signed promissory notes by way of security for the loan; & when T. went out of office, he indorsed the promissory notes to pltf., who succeeded him. Pltf. having sued upon the notes for the benefit of the society:—**Held**: the society not having been registered, was rendered illegal by 1862 Act, s. 4, it being an assocn. having "for its object the acquisition of gain," within the meaning of that enactment. Pltf. could not be in a better position than the society, & therefore could not recover upon the promissory notes.—**SHAW v. BENSON** (1883), 11 Q. B. D. 563; 52 L. J. Q. B. 575; 49 L. T. 651, C. A.

Annotations:—**Apld.** *Phillips v. Davies* (1888), 5 T. L. R. 98. **Consd.** *Marrs v. Thompson* (1902), 86 L. T. 759.

8584. As regards debts due by company—**Illegality good defence to action.**]—**PHILLIPS v. DAVIES** (1888), 5 T. L. R. 98, D. C.

8585. ——— **Separate proceedings taken against committee—Claim against company not allowed.**]—In an action to administer the funds of deft. syndicate brought by a subscriber against the syndicate, the supervising committee, & the bankers, certain inquiries were ordered in the course of which it transpired that the syndicate consisted of more than twenty members & was illegal, not being registered under the Cos. Acts, & advertisements were issued for creditors on which a claim was made by U. Brothers for printing & posting prospectuses. It appeared that U. Brothers were already suing the committee & others in the Q. B. Div. for payment of their debt. On a summons to disallow their claim in this action:—**Held**: the only ground for the claim was that the syndicate had taken the benefit of the work & therefore the claim must rest on a *quantum meruit*. That the doctrine did not apply where other persons were liable, & as the persons or some of them sued in the Q. B. Div. appeared to be liable, the claim in this action ought not to be allowed.—**HUME v. RECORD REIGN JUBILEE SYNDICATE** (1899), 80 L. T. 404.

SUB-SECT. 2.—WINDING UP.

8586. **Whether company can be wound up by court.**]—A co. for establishing a service of steamers was formed in 1871 with more than twenty members, & was not registered. In 1873 it made over its assets & liabilities to a limited co., which was unsuccessful, & passed a resolution for winding up. The solrs. who had acted for the unregistered co. sent in a bill consisting of costs incurred about

the formation of that co., costs incurred in defending actions brought against some of the members which the solrs. were retained by the manager & committee of the co. to defend, & other costs for work done in the carrying on of the co. on the like retainer:—**Held**: the solrs. could not obtain an order to wind up the co., for, as the co. was illegal no legal debt arose in respect of that part of their demand which related to the formation of the co., or was immediately connected with carrying it on; & as to the rest, the solrs. could not show that they were retained on behalf of all the members except by producing a deed of settlement, which was on the face of it illegal. *Qu.*: whether an order can be made for winding up such an illegal assocn. on the application either of members or creditors.—**Re SOUTH WALES ATLANTIC S.S. CO.** (1876), 2 Ch. D. 763; 46 L. J. Ch. 177; 35 L. T. 294, C. A.

Annotations:—**Consd.** *Re Padstow Total Loss & Collision Assce. Assocn.* (1882), 20 Ch. D. 137. **Refd.** *Shaw v. Benson* (1883), 11 Q. B. D. 563; *Re National Debenture & Assets Corpn.* (1891), 60 L. J. Ch. 533. **Mentd.** *Re Shepherd, Ex p. Ball* (1879), 10 Ch. D. 667.

8587. ——— **Illegal under 1862 Act, s. 4.**]—A co. illegal by force of above sect. cannot be wound up under sect. 199, & the ct. has no jurisdiction to make an order for winding up such a co.

Qu.: whether a co. duly registered under above Act, if formed for an illegal purpose, can be wound up under the Act.—**Re PADSTOW TOTAL LOSS & COLLISION ASSURANCE ASSOCN.** (1882), 20 Ch. D. 137; 45 L. T. 774; 30 W. R. 326; *sub nom.* *Re PADSTOW TOTAL LOSS & COLLISION ASSURANCE ASSOCN., Ex p. BRYANT*, 51 L. J. Ch. 344, C. A.

Annotations:—**Consd.** *Shaw v. Benson* (1883), 11 Q. B. D. 563; *Re Bowling & Welby's Contract*, [1895] 1 Ch. 663; *Re Ilfracombe Permanent Mutual Benefit Bldg. Soc.*, [1901] 1 Ch. 102. **Refd.** *Jennings v. Hammond* (1882), 9 Q. B. D. 225; *Marrs v. Thompson* (1902), 86 L. T. 759.

8588. ——— **Non-registration under Building Societies Act, 1874 (c. 42).**]—A building society was established in 1868 under above Act, but had never been incorporated under any subsequent Act. In 1900 the society was found to be insolvent, & a petition was presented by two creditors to wind it up, & the present petitioner had knowledge of it, but that petition was subsequently withdrawn. All the undisputed creditors except the present petitioner & three others had accepted a composition, & the whole of the assets had been sold by the directors, who had contributed out of their own pockets to provide the composition. A petition was now presented by a creditor to wind up the society. *Semble*: although in a literal sense the society was, in the words of 1862 Act, s. 4, "formed in pursuance of some other Act of Parliament," that is, the repealed Building Societies Act, 1836, the word "formed" in that sect. means formed & having its existence recognised under the provisions "of some other Act," & therefore the society, not having been incorporated under the Building Societies Act, 1874, c. 42, was an illegal society, & consequently the ct. had no jurisdiction to make a winding-up order:—**Held**: the petition must be dismissed, but the society, having pleaded its own illegality as a defence, was not entitled to costs.—**Re ILFRACOMBE PERMANENT MUTUAL BENEFIT BUILDING SOCIETY**, [1901] 1 Ch. 102; 70 L. J. Ch. 66; 84 L. T. 146; 17 T. L. R. 44; 45 Sol. Jo. 103.

8589. **Who may petition—Not parties to illegal act of formation—For charges in connection with**

more than twenty persons, which was formed for business purposes, but was not, to pltf.'s knowledge, registered under Cos. Act:—**Held**: as under sect.

22 of the Act, the co. was an illegal assocn. without *persona standi in judicio*, the contract with such assocn. was reprobated by the laws & unenforce-

able, & the surety could incur no liability in respect thereof.—**EATON, ROBINS & CO. v. NEL** (1909), 26 S. C. 365; 19 C. T. R. 625.—**S. AF.**

Sect. 2.—Effect of company being illegal: Sub-sect. 2. Part XIV. Sects. 1 & 2: Sub-sects. 1, 2

formation.]—Re SOUTH WALES ATLANTIC S.S. Co., No. 8586, ante.

8590. Contributories—Liability of past member as contributory—Acquiescence.]—A past member of an illegal marine insurance assocn. was held liable, by reason of acquiescence, to contribute towards the costs of a winding up under an order of the ct. made & acted upon before the illegality was discovered, notwithstanding that, by reason of the policies issued by the assocn. being void, he could not enforce payment of a sum claimed by him in respect of the loss of a ship.—*Re QUEEN'S AVERAGE ASSOCN., Ex p. LYNES* (1878), 38 L. T. 90; 26 W. R. 432; 3 Asp. M. L. C. 576.

8591. Distribution of assets—Right of member holding shares by nominee.]—M. & W. were in partnership as solrs. A benefit society had been formed at W., where the partners resided, to last

for ten years. On the formation of the society W. entered the name of M. as a subscriber for eight shares in the co., he himself having also eight shares. M. never executed the deed of the co. The subscriptions in respect of M.'s shares were always paid by W. At the termination of the ten years the affairs of the co. were wound up & W. claimed to participate in the proceeds of the co. in respect of the eight shares subscribed in the name of M. as well as his own. The co. had never been enrolled or registered under 1844 Act. M. claimed the proceeds in respect of his eight shares so standing in his name. W. resisted this on the ground of the illegality of the co. On a bill filed by M. for the proceeds of the eight shares:—*Held*: as they had been separated & ear-marked & were standing in the name of M. he was entitled to the benefit of these eight shares.—*MASON v. WATKINS* (1864), 10 L. T. 453; 28 J. P. 744; 12 W. R. 735.

Part XIV.—Companies under Private Acts.

SECT. 1.—COMPANIES FOR PUBLIC PURPOSES.

See Part IX., ante.

Agreement relating to Bill—Withdrawal of opposition—Legality.]—See CONTRACT, Vol. XII., pp. 251 et seq.

SECT. 2.—OTHER COMPANIES

SUB-SECT. 1.—PROMOTION.

See, also, CORPORATIONS, Vol. XIII., pp. 295 et seq.

8592. Position of promoters—Fiduciary relationship—Recovery of profits on purchase before incorporation.]—A., B., & C., having agreed for the purchase of certain mines, for £10,000, & to form a joint-stock co. for working them, & that the mines should be sold to the co. for £25,000, of which £10,000 should be paid to F. the proprietor, & the remainder divided amongst themselves & certain of their friends whom they nominated to be directors & officers of the co.; at a meeting of the persons so nominated, at which A., B., & C. were present, but before the co. was established, it was resolved that the co. should purchase the mines for £25,000, to be paid to F.; & a conveyance was afterwards taken from F. to the trustees of the co., & the £25,000 was paid, out of the funds of the co. & distributed in the manner agreed upon. A suit having been instituted, by some of the shareholders, on behalf of themselves & the others, against the persons who had participated in the £15,000, the latter were decreed to refund what they had received; & one of defts. having become bkpt. after he had paid what he had received into ct., under an order upon motion:—*Held*: pltf's. were entitled to receive that sum, & were not to be put to prove their demand under the commission.—*HICHENS v. CONGREVE* (1831), 4 Sim. 420; *sub nom. HITCHENS v. CONGREVE*, Mont. 225; 58 E. R. 157.

Annotations:—Refd. Gluckstein v. Barnes, [1900] A. C. 240. Mentd. Murray v. Arnold (1862), 3 B. & S. 287.

Promotion expenses.]—See Part IX., Sect. 2, ante.

Application to obtain Act—Deposit of money by promoters.]—See PARLIAMENT.

SUB-SECT. 2.—CAPITAL.

Compare Part IX., Sect. 5, ante.

8593. Power of company to alter.]—(1) By the deed of settlement of the British Iron Co., of Apr. 28, 1825, the general body of subscribers covenanted with three members of the co. to pay such instalments upon their shares as should be called for by the directors, in pursuance of the powers vested in them. Deft. having afterwards become the proprietor of several shares by indentures of assignment, executed an indenture in Mar. 1840, by which, after the death of one of the three members, he covenanted with the other two to observe & keep all the covenants in the deed of settlement, & also to pay all such instalments upon his shares as should be called for by the directors of the co., in pursuance of their powers. In July, 1840, an act for granting certain powers to the co. was passed, which enacted, "That all actions, suits, & other proceedings whatsoever, at law or in equity, for any injury or wrong done to any real or personal property of the said co., or upon or in respect of any present or future liability to the co. upon any bonds, covenants, bills of exchange, promissory notes, contracts, or agreements, which already have been, or hereafter shall be given or entered into, to or with the said co., or wherein the said co. is or shall be interested," & all proceedings in bkpcy., " & generally all other proceedings whatsoever, at law or in equity, to be commenced, instituted, or carried on by or on behalf of the said co., or wherein the said co. is or shall be concerned or interested, against any person or persons, or body or bodies politic or corporate, or others, whether such person or persons, or any of such persons, or such body or bodies politic or corporate, or any member or members thereof respectively, is or are, or shall be, or shall have been a proprietor or proprietors of the said co. or not, shall & lawfully may be commenced,

made, executed, instituted, presented, & prosecuted or carried on in the name of the person who shall be the secretary of the said co. at the time when such action, etc., shall be commenced or instituted, or in the name of any one director for the time being of the said co., or in the name of any one proprietor for the time being of the said co., as the nominal pltf., pursuer, complainer, or petitioner, or as acting in any other character for or on behalf of the said co.”:—*Held*: an action upon the covenant of deft. for calls was properly brought in the name of the secretary, though the covenant was entered into with two members of the co.

(2) By the deed of settlement of the co., it was provided, “That the direction & management of the affairs of the co. should be confided to sixteen directors, to be chosen from among the proprietors, in the manner thereafter mentioned, & also that no business should be transacted at any meeting of directors, unless seven directors be present at the commencement of the business, & when a division takes place upon the whole or any part of the business.” By a subsequent clause, it was provided, “That for the better conduct & management of the affairs of the co., it should be lawful for a special general meeting called for the purpose, from time to time to amend, alter, or annul, either wholly or in part, all or any of the clauses of the deed, or of the existing regulations & provisions of the co., & to make any new or other regulations or provisions in lieu thereof, or in addition thereto: & such new regulations & provisions, & such amendment, alteration, or annulment, if confirmed by a subsequent special general meeting, called for the purpose, at a distance of not less than two weeks, nor more than four weeks from such preceding general meeting, shall in such case, but not till then, be binding & conclusive upon the proprietors; provided always, that such amended or altered regulations & provisions do not extend to amend, alter, or annul all or any part of the regulations & provisions established & settled by those presents, for confining the individual responsibilities of each proprietor, as between himself or herself & his or her co-proprietors, to the amount of his or her shares in the capital of the co. for the time being.” A subsequent clause also provided “that the directors of the co. should never consist of more or less than sixteen”:—*Held*: upon the construction of these clauses taken together, it was competent to two special general meetings, duly convened & held, to alter the number of the directors & of the quorum.

(3) By the deed of settlement it was provided, “That the capital of the co. should consist of the sum of £2,000,000 sterling, divided into 20,000 shares, of £100 each, & should be raised from among the proprietors for the time being,” in the manner therein mentioned. By resolutions subsequently passed & confirmed at meetings duly convened & holden in 1826, it was resolved, “That the capital to be raised for the purposes of the co. should no longer consist of the sum of £2,000,000 sterling, divided into 20,000 shares of £100 each, as declared by the deed of settlement, but should be limited to the sum of £1,000,000 sterling, & should be considered as divided into 20,000 shares of £50 each.” By resolutions in 1838, the resolutions of 1826 were rescinded, & the original amount of capital & shares was again restored:—*Held*: the amount of capital & of the shares was part of the constitution of the co., & could not be altered by the above resolutions, not being a matter within the meaning of the clause above set

out relating to the conduct & management of the affairs of the co.—*SMITH v. GOLDSWORTHY* (1843), 4 Q. B. 430; 3 Gal. & Dav. 448; 12 L. J. Q. B. 192; 7 Jur. 389; 114 E. R. 960.

Annotation:—*As to* (2) *Refd.* *Kirk v. Bell* (1851), 16 Q. B. 290.

SUB-SECT. 3.—MEMBERSHIP.

Compare Part IX., Sects. 6 & 7, *ante*.

8594. Capacity—Infant.—By 3 Vict., c. lxxxvi., passed for the establishment & government of an institution called the Royal Naval School, it was provided by sect. 3, that “any person” who should pay to the treasurer of the institution the amount therein fixed should be a member of the corp. One of defts., on whose behalf the required subscription had been paid, was an infant & a pupil at the school, & voted at a meeting of the institution at which an important proposal affecting the future of the school was debated. Upon a summons raising the question whether the expression “any person” included an infant so that he could become a member of the corp. & vote at meetings:—*Held*: there being nothing in the above Act to show that the word “person” included an infant, & having regard to the fact that the corp. was formed for the establishment & management of a school, & that every member of the corp. was eligible for appointment to the council of the institution, the legislature could not have intended that the membership of the corp. should include minors; & the infant, therefore, was not eligible as a member.—*Re ROYAL NAVAL SCHOOL, SEYMOUR v. ROYAL NAVAL SCHOOL*, [1910] 1 Ch. 806; 79 L. J. Ch. 366; 102 L. T. 490; 26 T. L. R. 382; 54 Sol. Jo. 407.

8595. What constitutes — Subscriber — Paying deposit on shares—But not signing contract.—By the Thames Tunnel Act, 5 Geo. 4, c. clvi., s. 23, it was enacted, that the persons who had subscribed, or should thereafter subscribe or advance money towards making the tunnel, should pay the sums by them subscribed at the time & place & in the manner directed by the co., & in case any such subscribers should neglect to pay, the co. were empowered to sue for & recover the money. By sect. 91, reciting that the probable expenses would amount to £160,000, & that more than four-fifths part of such expenses had already been subscribed by several persons under a contract, binding them, their heirs, etc., for payment of the sums so subscribed by them, it was enacted, that the whole £160,000 should be subscribed in like manner, before the Act should be put into force:—*Held*: the word “subscriber” in the Act meant only those who had stipulated to pay, & not those who had paid money, & that a person whose name was inserted in the Act, & who had paid a deposit on shares, but who had not signed the contract, was not a subscriber within the Act, nor liable to be sued by the co.—*THAMES TUNNEL CO. v. SHELDON* (1827), 6 B. & C. 341; 9 Dow. & Ry. K. B. 278; 5 L. J. O. S. K. B. 157; 108 E. R. 477.

Annotation:—*Refd.* *Burke v. Lechmere* (1871), L. R. 6 Q. B. 297.

8596. Rights of members—In property of company—Land bought for purposes of company—Company's works abandoned.—A co., incorporated by Act of Parliament, was thereby empowered to purchase lands, to be vested in them for the purposes of the Act. There was no provision for the disposal of the land if the works should be abandoned. The operations of the co. having for some time ceased, the ct. refused, at the instance of a

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shareholder, to decree a sale of the land acquired under the powers in the Act, for the benefit of the shareholders.—*HALL v. DEAL PIER CO.* (1863), 2 New Rep. 59; 8 L. T. 728.

8597. Execution against members—For debts of company.]—A statute enacted that it should be lawful for pltf. to cause execution upon any judgment obtained by him in an action against the nominal deft. to be issued against all or any of the shareholders for the time being of the co., & that if such execution should be ineffectual, then it should be lawful for him to issue execution against any person who was a shareholder at the time the contract was entered into, provided that no person having ceased to be a shareholder should be liable for any debt for which he would not have been liable as a partner:—*Held*: the execution should issue in the first instance against those persons who were shareholders at the time it was sued out, provided they were shareholders at the time of the contract, & would have been liable to pltf., if the action had been against them, instead of the nominal deft.—*BRADLEY v. EYRE* (1843), 11 M. & W. 432; 1 Dow. & L. 260; 12 L. J. Ex. 450; 1 L. T. O. S. 111; 152 E. R. 873.

Annotations:—*Consd.* Poddell v. Gwyn (1857), 1 H. & N. 590. *Refd.* Philipson v. Egremont (1844), 6 Q. B. 587. *Mentd.* Clay v. Ray (1864), 17 C. B. N. S. 188.

8598. —[By an Act of Parliament for creating a joint-stock co., it was provided that the expenses of applying for & obtaining the Act should be paid out of the funds of the co., in preference to all other payments whatsoever:—*Held*: the remedy of pltf. was not against the funds of the co. only, but they had a right of action against the individual shareholders.—*CLOWES v. BRETTELL* (1843), 11 M. & W. 461; 1 L. T. O. S. 111; *sub nom.* *CLOWES v. BRETTELL, Re BATTY & RYTON*, 12 L. J. Ex. 302.

Annotations:—*Refd.* Hitchins v. Kilkenny & G. S. & W. Ry. (1850), 10 C. B. 160; *Edwards v. Kilkenny & G. S. & W. Ry.* (1863), 14 C. B. N. S. 526.

8599. Liability of executor—Death of shareholder before judgment obtained against company.]—A private Act of Parliament incorporated the shareholders of a joint-stock co., & provided that any judgment obtained against the co. might be enforced, after due diligence against the property of the co., against the person, property & effects of any shareholder for the time being, or any former shareholders, in his natural or individual capacity, where such former shareholder was a shareholder at the time of the making of the contract, etc., in respect of which the judgment had been obtained:—*Held*: an executor of a person, who was a shareholder at the time a bond was executed by the co., & continued a shareholder till his death, but died before judgment on the bond was obtained against the co., was not liable on a *sci. fa.* against the goods of the deceased.—*POOLE v. KNOTT* (1859), 28 L. J. Q. B. 322; 33 L. T. O. S. 182; 5 Jur. N. S. 1393; 7 W. R. 527.

8600. Trustees & executors as members—Whether company bound to recognise trust.]—Notice of a general trust created by a will is not notice of the terms of a particular trust affecting part of the testator's estate. By the terms of their Act of Parliament resps. were not to be bound to see to the execution of any trust affecting any of their shares:—*Held*: they were not liable for registering a transfer of shares executed in breach of trust by the exors., although they had notice that the shares were held in common with others by the transferors as exors. for trust purposes, &

had a copy of the will in their possession; & although previous transfers of others of the testator's shares contained express reference to the trusts of the will. The president of the bank was himself one of the exors., & the law agent of the exors. was also the bank's law agent.—*SIMPSON v. MOLSON'S BANK*, [1895] A. C. 270; 64 L. J. P. C. 51; 11 R. 427, P. C.

Annotation:—*Mentd.* *Re Saunders* (1908), 77 L. J. Ch. 289.

— **Executor—Whether execution lies against—For debts of company contracted in shareholder's lifetime.]—**See No. 8599, *ante*.

SUB-SECT. 4.—SHARES.

A. In General.

Nature generally.]—See Part III., Sect. 14; Part IX., Sect. 8, sub-sect. 1, *ante*.

8601. Issue—Meaning of.]—A. applied for £20 shares in a joint-stock co., which were allotted to him, & paid £1 per share as deposit & £2 per share on allotment, & received certificates of his shares. The co.'s special Act provided that it should not be lawful for the co. to issue any share, nor should any share vest in the purchaser, unless & until a sum not less than one-fifth of the share should have been paid up. The co. was afterwards registered under 1862 Act, & ordered to be wound up under supervision. On application by A. to have his name removed from the list of contributories:—*Held*: the word "issue" referred to the issue of certificates, & the word "vest" to the vesting of shares so as to become the property of the holder for all purposes; but the irregularity of issuing certificates before one-third was paid did not relieve A., the shareholder, of his liability, & A.'s name must remain upon the list of contributories.—*Re WEST LONDON WHARVES & WAREHOUSES CO., LTD., PURDEY'S CASE* (1868), 16 W. R. 660.

Annotation:—*Refd.* McEuen v. West London Wharves & Warehouses Co. (1871), 6 Ch. App. 655.

also, No. 7918, *ante*.

—[Compare Part IX., Sect. 8, sub-sect. 4, *ante*.

Share certificates.]—Compare Part IX., Sect. 8, sub-sect. 3, *ante*.

B. Calls on Shares.

Compare Part IX., Sect. 8, sub-sect. 5, *ante*.

8602. When ordered by court to be made—Unsatisfied judgment against company—Calls sufficient to satisfy judgment made but not paid.]—By 7 Will. 4, & 1 Vict., c. xxx., a co. was established, with power to make calls, & to sue & be sued in the name of their treasurer or any director. An action was brought against the treasurer, & judgment entered up against the co., who appeared to have no assets. The ct. refused to issue a *mandamus* commanding the co. to pay the sum recovered & costs. The ct. also refused to issue a *mandamus* requiring the co. to make calls to enable them to satisfy the debt, it appearing that calls sufficient to satisfy the judgment had been made but not paid, & that the co. had not now the proper officers for making such calls. *Qu.*: whether, if these circumstances had not appeared, a *mandamus* would have gone commanding the co. to make the calls.—*R. v. VICTORIA PARK CO.* (1841), 1 Q. B. 288; 4 Per. & Dav. 639; 113 E. R. 1142.

Annotations:—*Mentd.* *Ward v. Lowndes* (1859), 1 E. & E. 940; *R. v. Poplar B. C.* (No. 1), [1922] 1 K. B. 72.

8603. How payable—May be made payable by

Sect. 2.—Other companies: Sub-sect. 4, C. & D.; sub-sects. 5, 6, 7 & 8, A. & B.]

self a director & secretary of the co. for a time, & that it might be that pltf. had acquired his title through some of those false certificates; & it was proved that pltf. had given a less price than the ordinary one; but *semble*: that would not deprive him of the title he had by the transfer, unless it were shown that he was not the *bond fide* owner.—*DALY v. THOMPSON* (1842), 10 M. & W. 309.

8609. — Registration of transfer—Refusal of company to register transfer—On ground that number of shares authorised by Act already registered.]—*DALY v. THOMPSON*, No. 8608, *ante*.

8610. — Necessity for proof of title by transferee.]—*DALY v. THOMPSON*, No. 8608, *ante*.

8611. — Effect of—On agreement by transferor to take shares.]—M. agreed to take shares in a co. incorporated by an Act of Parliament, providing that the co. should not issue any share, nor should any share vest in the person accepting the same, unless & until a sum not being less than one-fifth of the amount of such share had been paid in respect thereof. M. transferred his shares, without paying one-fifth of the amount thereof. The transfer was duly registered, & M.'s name removed from the register of shareholders. More than a year afterwards the co. commenced to be wound up:—*Held*: M.'s original agreement to take shares was discharged by the transfer, which operated as a new contract between the co., M. & the transferee.—*Re TOWNS' DRAINAGE & SEWAGE UTILIZATION CO., MORTON'S CASE* (1873), L. R. 16 Eq. 104; 42 L. J. Ch. 786; 21 W. R. 933.

8612. — Transfer to avoid liability—Validity.]—By a special Act of Parliament, passed in 1882, eight persons were incorporated into a co., & were made first directors thereof, "to continue in office until the first ordinary meeting held after the passing of the Act." The co. was not registered under 1862 Act. No ordinary meeting of the co. was ever held; & in 1887 an action was brought against the co. to recover certain penalties payable under the Act. While the action was pending the eight first directors held meetings at which they allotted to themselves their qualifying shares, paid a call thereon, & applied the money in payment to one of them of preliminary expenses which under the Act were payable by the co., but which he had paid or was liable to pay. Five of them then transferred their shares to another of them in consideration of money paid to the transferee. Judgment was given against the co. in the action, & pltf. presented a petition for the winding up of the co.:—*Held*: the transfers of their shares by the five directors being for the purpose of escaping their liability, were fraudulent & void, & therefore there were in fact eight members of the co., & the ct. had jurisdiction under 1862 Act, s. 199, to make a winding-up order.—*Re SOUTH LONDON FISH MARKET CO.* (1888), 39 Ch. D. 324; 60 L. T. 68; 37 W. R. 3; *sub nom. Re SOUTH LONDON FISH MARKET CO., Ex p. St. MARY NEWINGTON VESTRY*, 4 T. L. R. 764; *sub nom. Re SOUTH LONDON FISH MARKET CO., PLIMSOLL'S CASE*, 1 Meg. 92, C. A.

Annotation:—Mentd. Re Bowling & Welby's Contract, [1895] 1 Ch. 663.

Transmission.]—Compare Part IX., Sect. 8, sub-sect. 6, *ante*.

D. Forfeiture and Cancellation of Shares.

Compare Part IX., Sect. 8, sub-sect. 9, *ante*.

8613. Validity of forfeiture—Meeting of com-

pany to declare forfeiture—Sufficiency of notice of meeting.]—*GRAHAM v. VAN DIEMEN'S LAND CO.*, No. 8500, *ante*.

8614. Notice of forfeiture—To whom given—Shareholder bankrupt.]—*GRAHAM v. VAN DIEMEN'S LAND CO.*, No. 8500, *ante*.

8615. — Sufficiency of service.]—By an Act incorporating a joint-stock co., the directors were empowered to make calls, giving twenty days' notice of the time & place of payment in the London Gazette & in two or more of the daily London newspapers; & it was enacted, that, if any proprietor of shares should neglect or refuse to pay his calls "during the space of three calendar months next after the time appointed for payment thereof," the person so neglecting or refusing should absolutely forfeit all his share in the capital stock of the co., & all profits & advantages thereof, to & for the use & benefit of the co.; & all shares so forfeited should or might at any time thereafter be sold at a public sale; but that "no advantage should be taken of such forfeiture of any share or shares until after thirty days' notice should have been given by the directors, under the hand of the clerk of the co., to the owner thereof, by notice in writing left at his usual or last place of abode, nor unless the same should be declared to be forfeited at some general or special general meeting of the proprietors which should be held not earlier than three calendar months next after the said forfeiture should happen." A., B., & Co. carried on business in Austin Friars, A.'s private residence being in Hyde Park Gardens. The firm stopped payment in Sept. 1847, & in Mar. 1848, the partnership was dissolved, though the office in Austin Friars was not closed for two or three years after. Upon the stoppage of the firm, A. gave up his private residence, & in May, 1849, he went to reside on the continent. Some time before May, 1852, a board was, without the knowledge of A., affixed to the office in Austin Friars, directing that letters & communications for A., B., & Co., should be left at the office of C. Before A. left England, it was the duty of the clerk at the office in Austin Friars to forward all letters addressed to A., which came there, to his residence in Hyde Park Gardens; & after A. left England, B. gave directions that letters & communications for either of the partners should be forwarded to D., who had been a member of the firm; & D. gave directions that all letters or communications for A. should be forwarded to E.; but E. had no authority to act for A. touching his private affairs. A. was the holder of 200 shares in the co. incorporated by the above-mentioned Act, & was one of the directors thereof. At a general meeting held in Mar. 1851, his shares were declared forfeited for non-payment of calls, & on May 15, 1852, a notice of the forfeiture, enclosed in an envelope addressed to A., was left with C., with a request that he would "procure the acceptance of service on behalf of A." C. believed he sent it to D., but neither of them had any recollection of having seen it: & it never reached the hands or came to the knowledge of A.:—*Held*: not a sufficient service of the notice, although in the deed of transfer of the shares to him, in the resolution appointing him a director of the co. & in every document signed by him in relation to the affairs of the co., he was described as "of 8 Austin Friars."—*VAN DIEMEN'S LAND CO. v. COCKERELL* (1857), 1 C. B. N. S. 732; 140 E. R. 301; *sub nom. COCKERELL v. VAN DIEMEN'S LAND CO.*, 26 L. J. C. P. 203; 28 L. T. O. S. 326; 3 Jur. N. S. 241; 5 W. R. 312, Ex. Ch.

SUB-SECT. 5.—DIRECTORS.

Compare Part IX., Sect. 9, *ante*.

8616. Powers—To advise members of proposed changes—& circularise at company's expense.]—CAMPBELL v. AUSTRALIAN MUTUAL PROVIDENT SOCIETY, No. 8619, *post*.

Liabilities—In respect of contracts.]—See AGENCY, Vol. I., pp. 635, 646, 663, 664, Nos. 2573, 2660, 2783, 2787.

8617. Meetings—Power of company to alter number of directors bound to attend.]—SMITH v. GOLDSWORTHY, No. 8593, *ante*.

SUB-SECT. 6.—SECRETARY AND OTHER OFFICERS.

Compare Part IX., Sect. 10, *ante*.

SUB-SECT. 7.—REGULATION AND MANAGEMENT.

Compare Part IX., Sect. 11, *ante*.

SUB-SECT. 8.—POWERS AND LIABILITIES.

A. In General.

Compare Part IX., Sects. 11, 12, *ante*.

8618. Power to lease—Company empowered to sell & exchange land.]—A corpn. was empowered by a private Act of Parliament to sell & exchange land. This implied a power to lease the land & to give to the lessee an option to purchase the same.—*Re FEMALE ORPHAN ASYLUM* (1867), 17 L. T. 59; 15 W. R. 1056.

8619. Power to carry on business in England—Company empowered to carry on business in or out of colony.]—(1) The cases in which a dissentient minority of shareholders can sustain an action to reverse the course approved by the majority are confined to those in which the acts complained of are fraudulent or beyond the powers of the co.

It is the right & duty of directors to advise the members of a co. as to the prudence of proposed changes in the scope of the co.'s operations, & it is within their powers to circulate statements & arguments in favour of such changes at the expense of the co. There is, however, no obligation, legal or moral, to do the like on behalf of the dissentient members.

(2) A statutory power to carry on business "in or out of" New South Wales:—*Held*: to authorise the extension of the business to the United Kingdom or South Africa.—CAMPBELL v. AUSTRALIAN MUTUAL PROVIDENT SOCIETY (1908), 77 L. J. P. C. 117; 99 L. T. 3; 24 T. L. R. 623; 15 Mans. 344.

8620. Interference by court—When court will interfere—At instance of dissentient shareholder.]—CAMPBELL v. AUSTRALIAN MUTUAL PROVIDENT SOCIETY, No. 8619, *ante*.

PART XIV. SECT. 2, SUB-SECT. 5.

s. Salaries of—Validity of bye-law for payment of.]—Where an Act of incorporation provides that no bye-law for the payment of the president or any director, shall be valid or acted on until same has been confirmed at a general meeting of the shareholders, this applies only to payment for the service of a director *qua* director, & for the services of the president as presiding officer of the board. Where a co. appoints the directors to various salaried offices without a bye-law fixing

the amount of the salaries as required by the Act of incorporation, & such appointments are afterwards confirmed by legislation, they are entitled to prove in the winding up for a *quantum meruit* for services rendered.—*Re ONTARIO EXPRESS & TRANSPORTATION CO., DIRECTORS' CASE* (1894), 25 O. R. 587.—CAN.

PART XIV. SECT. 2, SUB-SECT. 8.—A.

t. General rule.]—As to acts of a co. which are *ultra vires* in the case of cos. constituted by Act of Parliament

B. Contracts.

Compare Part IX., Sect. 12, sub-sect. 4, *ante*.

8621. Before incorporation—Whether binding on company—Clause in special Act saving rights of parties contracting with promoters.]—Projectors of a scheme for the formation of a joint-stock co. entered into a contract for the purchase of land, & with a railway co. to perform certain acts, & then they assigned the contracts to certain persons who were provisional trustees of an intended co. upon certain terms. The scheme was not registered pursuant to the requirements of the Joint-Stock Companies Registration Act, 1844 (c. 110). An Act of Parliament was obtained for incorporating the co., in which was a proviso saving the rights of all parties who had entered into any agreements with the provisional trustees. The promoters filed their bill against the co. for the specific performance of the agreement, to which defts. demurred; but the same was overruled on the ground that, whatever objection there might have been before the Act was obtained on the ground that the contract was made before registration, yet, as the Act obtained, & the clause was inserted saving the right of all parties, the co. must be assumed to have waived all objections with regard to registration & cognisant of all the terms of the agreement.—BROWN v. LONDON NECROPOLIS CO. (1854), 24 L. T. O. S. 127.

8622. After incorporation—Power to draw & accept bills of exchange.]—*Assumpsit* will lie upon a bill of exchange against a trading corpn., whose power of drawing & accepting bills is recognised by statute.—MURRAY v. EAST INDIA CO. (1821), 5 B. & Ald. 204; 106 E. R. 1167.

*Annotations:—***Refd.** Bateman v. Mid-Wales Ry. (1866), Har. & Ruth. 508; Crouch v. Credit Foncier of England (1873), L. R. 8 Q. B. 374. **Mentd.** Tolson v. Kaye (1822), 3 Brod. & Bing. 217; Blades v. Free (1829), 7 L. J. O. S. K. B. 211; R. v. Okeford Fitzpayne (1830), 9 L. J. O. S. M. C. 12; Cowper v. Godmond (1833), 9 Bing. 748; Ward v. Shew (1833), 9 Bing. 608; Esdaile v. La Nauze (1835), 1 Y. & C. Ex. 394; Perry v. Jenkins (1836), 1 My. & Cr. 118; Goldstone v. Tovey (1839), 6 Bing. N. C. 98; Rhodes v. Smethurst (1840), 6 M. & W. 351; Davidson v. Stanley (1841), 2 Man. & G. 721; Webster v. Kirk (1852), 17 Q. B. 944; Re Fuller (1853), 2 E. & B. 573; Thomson v. Harding (1853), 2 E. & B. 630; Curlewis v. Mornington (1858), 27 L. J. Q. B. 439; Sturgis v. Darrell (1859), 4 H. & N. 622; Mesurus v. Gadban, [1894] 2 Q. B. 352; Meyappa Chetty v. Supramanian Chetty, [1916] 1 A. C. 603.

8623. — Power to accept or indorse bills of exchange.]—The directors of a cemetery co. were, by their Act of incorporation, empowered to make contracts & bargains touching the undertaking, & to do & transact all other matters & things requisite to be done & transacted for the direction & management of the affairs of the co.:—*Held*: they had no power under their act to accept or indorse bills of exchange for the purposes of the undertaking.—HARMER v. STEELE (1849), 4 Exch. 1; 19 L. J. Ex. 34; 13 L. T. O. S. 403; 154 E. R. 1100, Ex. Ch.; *varying* S. C. *sub nom.* STEELE v. HARMER (1845), 14 M. & W. 831.

*Annotations:—***Mentd.** Weedon v. Woodbridge (1850), 13 Q. B. 470; Bolshaw v. Bush (1851), 11 C. B. 191; Jewell v. Parr (1853), 13 C. B. 909; Lowe v. Peskett (1855), 16 C. B. 500.

there is an element of public interest which forbids their exceeding their powers even though all the shareholders agree, whereas cos. constituted by deed of settlement may exceed their powers provided all the shareholders agree.—LEE v. ROBERTSON (1862), 1 W. & W. 374.—AUS.

8620 i. Interference by court—When court will interfere—At instance of dissentient shareholder.]—MILES v. SYDNEY MEAT PRESERVING CO. (1912), 17 C. L. R. 639; 30 N. S. W. W. N. 17.—AUS.

Sect. 2.—Other companies: Sub-sect. 8, B.; s sect. 9, A. & B.; sub-sect. 10, A. & B.; sub-sect. 11.]

— **Whether directors personally liable.]—See** AGENCY, Vol. I., pp. 635, 646, 663, 664, Nos. 2573, 2660, 2783, 2787.

SUB-SECT. 9.—LEGAL PROCEEDINGS BY AND AGAINST COMPANIES.

A. In General.

Compare Part IX., Sect. 13, ante.

8624. Action in name of officer—Action against directors—For misappropriation of funds.]—A clause in an Act of Parliament, passed for the regulation of a joint-stock co., provided, that all proceedings, whether at law or in equity, to be carried on by or on behalf of the co. against any person or persons, whether such person or persons should be a member or members of the co. or not, should be instituted & carried on in the name of the chairman or of one of the directors as nominal pltf.; such a clause does not apply to a case in which directors appropriate to their own use part of the joint stock by charging the co. with a much larger sum, as the price of property purchased by them, than was actually paid.—*HICHENS v. CONGREVE* (1828), 4 Russ. 562; 1 Russ. & M. 150; 6 L. J. O. S. Ch. 167; 38 E. R. 917, L. C.

Annotations:—Consd. Mocatta v. Ingilby (1835), 5 L. J. Ch. 145; *Wallworth v. Holt* (1840), 4 My. & Cr. 619; *Foss v. Harbottle* (1843), 2 Hare. 461; *Gluckstein v. Barnes*, [1900] A. C. 240. *Refd. Walburn v. Ingilby* (1833), Coop. temp. Brough. 270; *Vigers v. Audley* (1837), Donnelly, 246; *Benson v. Heathorn* (1842), 1 Y. & C. Ch. Cas. 326; *Harvey v. Collett* (1846), 15 Sim. 332; *Imperial Mercantile Credit Assocn. v. Coleman* (1871), 6 Ch. App. 562, n.; *Craig v. Phillips* (1876), 35 L. T. 198. *Mentd. Kimber v. Barber* (1872), 8 Ch. App. 56; *Dunne v. English* (1874), L. R. 18 Eq. 524; *New Sombroero Phosphate Co. v. Erlanger* (1877), 5 Ch. D. 73; *Omnium Electric Palaces v. Baines*, [1914] 1 Ch. 332.

8625. — Action against member—Non-joinder of other members.]—An Act of Parliament for forming a joint-stock co. authorised all suits on behalf of the co., against any person, to be commenced in the name of the chairman; &, in all proceedings in which it would have been before necessary to state the name of the partners, it was made sufficient to state the name of the chairman only:—*Held*: the Act did not authorise suits to be commenced, by the chairman, against one of the partners without making the others parties.—*MACMAHON v. UPTON* (1829), 2 Sim. 473; 7 L. J. O. S. Ch. 125; 57 E. R. 865.

Annotation:—Refd. Manners v. Rowley (1840), 10 Sim. 470.

8626. — — — For debt due to company—On covenant entered into with other members of company.]—SMITH v. GOLDSWORTHY, No. 8593, *ante*.

8627. — — — —.]—3 & 4 Vict., c. xcv., after reciting that several persons had formed themselves into a co. or partnership for effecting assurances on lives, & that difficulties might arise in recovering debts due to the co., since, by law, all members of the co. must be named in every action or suit for such purpose, enacted that all actions & suits against any person indebted to the co., or upon any bonds, covenants, bills of exchange, promissory notes, contracts, or agreements, &, generally, all other proceedings whatsoever at law or in equity, by or on behalf of the co., against any person or persons, whether such person or persons be a proprietor or proprietors of the co. or not, shall be commenced in the name of the chairman, or of a director, or the secretary of the co. as nominal pltf.:—*Held*: the co. might sue, in the name of the nominal pltf., one of its

own members for a debt due to the co.—

v. PINNOCK (1854), 10 Exch. 213; 156 E. R. 420.

8628. — Action for libel—Reflecting on trade character of company.]—An Act of Parliament by which an insurance co. was incorporated, after reciting that “difficulties had arisen, & might from time to time thereafter arise, as well in bringing & maintaining actions & suits for recovering debts & enforcing obligations due to the said society, & in prosecuting persons who might steal or embezzle any money, goods, or effects of or belonging to the said society, etc., by reason of its being required by law that all the several subscribers or proprietors should sue & prosecute by their several & distinct names & descriptions,” enacted “that all actions & suits commenced or instituted by or on behalf of the said society, for recovering any debts, or enforcing any claims or demands now due or which might thereafter become due or arise to the said society, etc., should be commenced or instituted & prosecuted in the name of the chairman or secretary of the said society as nominal pltf.:—*Held*: this enactment empowered the chairman to sue on behalf of the co., to recover damages for a libel reflecting upon the trading character of the co.—*WILLIAMS v. BEAUMONT* (1833), 10 Bing. 260; 3 Moo. & S. 705; 3 L. J. C. P. 31; 131 E. R. 904.

Annotations:—Refd. Metropolitan Saloon Omnibus Co. v. Hawkins (1859), 4 H. & N. 87; *South Hetton Coal Co. v. North-Eastern News Assocn.*, [1894] 1 Q. B. 133.

8629. Action against officer—Personal liability —Whether creditor entitled to issue execution against defendant.]—By a local Act, 4 Will. 4, it was enacted, that actions against the West Cork Mining Co. might be brought against the person who should be, for the time being, a managing director, or against any one director for the time being of the said co., as the nominal deft. or party proceeded against on behalf of the said co.; & that no action against the co., in the name of such managing director or director, should abate or be discontinued by the death, resignation, removal, or disqualification of such managing director or director. By another local Act, 1 Vict., it was enacted, that it should & might be lawful for any persons entitled to take out execution for or in respect of any judgment against a managing director, or any other director as a nominal deft. on behalf of the co., to levy the amount of his damages & costs upon the reserved fund of the co. & all other property whatsoever belonging to the co.:—*Held*: pltf., who had obtained judgment against deft. as a managing director, was not entitled to issue execution against him personally.—*HARRISON v. TIMMINS* (1838), 4 M. & W. 510; 1 Horn. & H. 410; 8 L. J. Ex. 94; 3 Jur. 173; 150 E. R. 1531; *sub nom. HARRISON v. PIMMINS*, 7 Dowl. 28.

Annotations:—Refd. Vigers v. Pike (1842), 8 Cl. & Fin. 562; *Myers v. Rawson* (1860), 5 H. & N. 99.

8630. Enforcement of judgment—Mandamus—Company without assets.]—R. v. VICTORIA PARK Co., No. 8602, *ante*.

— — — —.]—*Compare* No. 8168, *ante*.

B. Arbitration.

Compare Part IX., Sect. 13, sub-sect. 2, ante.

8631. Powers of umpire to state award in form of special case.]—Defts.’ special Act provided for the reference to arbn. of any question arising on any of their contracts of insurance, & that the “submission to any such arbn.” might be made a rule of ct.:—*Held*: the umpire in a reference under the Act had power to state a special case for the opinion of the ct. under the Common Law Procedure Act, 1854 (c. 125), s. 5.—*ISITT v. RAILWAY*

PASSENGERS' ASSURANCE CO. (1889), 22 Q. B. D. 504; 37 W. R. 477; *sub nom. Re ISITT & RAILWAY PASSENGERS' ASSURANCE CO.*, 58 L. J. Q. B. 191; 60 L. T. 297; 5 T. L. R. 194.

Annotations:—*Mentd. Re Etherington & Lancashire & Yorkshire Accident Insee.*, [1909] 1 K. B. 591; *Ystradowen Colliery Co. v. Griffiths*, [1909] 2 K. B. 533.

SUB-SECT. 10.—BORROWING.

A. In General.

8632. Issue of debentures—Provision for transfer in special Act—Whether applicable to transmission.—By a local & personal Act, transfers of debentures were to be by indorsement by deed & in a given form, & were to be entered in the books of the co., & “after such entry, but not till then, the assignee was to be entitled to the benefit” :—*Held*: this did not apply to a transfer by act of law, as in the case of *bkpcy.*—*LANE v. SMITH* (1851), 14 Beav. 49; 18 L. T. O. S. 3; 15 Jur. 735; 51 E. R. 205.

—.]—*Compare* Part IX., Sect. 14, sub-sect. 1, *ante*.

B Rights and Liabilities of Lenders.

Compare Part IX., Sect. 4, *ante*.

8633. Money lent after company's borrowing powers exhausted—Subrogation to rights of repaid creditors.—The principle of equity whereby a person who makes a loan to a co. with limited borrowing powers, after those powers have been exceeded, is entitled to be subrogated to the rights of a creditor of the co. whose debt has been paid out of the loan, is not confined to debts or liabilities incurred previously to the loan, but extends to *bonâ fide* debts or liabilities accruing subsequently to the date of the loan.

An equitable claim, acquired by subrogation, against a co., in accordance with this principle, is itself a liability of the co. within the meaning of the principle.

W. having advanced to a co., whose borrowing powers were limited to £25,000, a larger amount than £25,000, obtained a judgment against the co. for the £25,000, & so much of the sums advanced as was employed in the payment of debts or liabilities of the co. properly payable by them :—*Held*: W. was not entitled to be subrogated to the rights of creditors whose debts or liabilities had been paid out of the £25,000, inasmuch as at the time the £25,000 was the money of the co., & not of W., & those debts & liabilities had not been paid by the money of W.—*WENLOCK (BARONESS) v. RIVER DEE CO.* (1887), 19 Q. B. D. 155; 56 L. J. Q. B. 589; 57 L. T. 320; 35 W. R. 822; 3 T. L. R. 603, C. A.

Annotations:—*Consd. Redman v. Rymer* (1889), 60 L. T. 385; *Re Wrexham, Mold & Connah's Quay Ry.*, [1899] 1 Ch. 440. *Refd. Re Birkbeck Permanent Benefit Bldg. Soc.*, [1912] 2 Ch. 183; *Reversion Fund & Insee. v. Maison Cosway*, [1913] 1 K. B. 361.

—.]—*Compare* No. 8408, *ante*.

8634. Priorities—As between lenders & judgment creditors.—A co. incorporated for the purpose of erecting a pier & other works, was authorised by their Act of Parliament to raise a certain capital by the issue of shares & a further sum by mtges. The co. granted mtges. of their rates, tolls, & duties in the form prescribed by the Act. Other creditors of the co. afterwards brought actions against the co., & obtained judgments, &

threatened to sue out writs of *elegit*, & take session of the lands of the co., from which the rates, tolls, & duties were to arise. The co. then obtained an Act of Parliament, authorising them to sell their land to pay their debts. The mtges. filed a bill to restrain the judgment creditors from taking possession of the lands, & praying for a declaration that their mtges. formed the first lien on the lands of the co. A general demurrer by a judgment creditor for want of equity was allowed.—*PERKINS v. DEPTFORD PIER CO.* (1843), 13 Sim. 277; 12 L. J. Ch. 212; 60 E. R. 108; *sub nom. PERKINS v. PRITCHARD*, 2 Ry. & Can. Cas. 95; 7 Jur. 29.

8635. Remedies—Action—When action lies—Effect of provisions of special Act.—The Herne Bay Pier Act, 6 & 7 Will. 4, c. cxii., by sect. 9, enables the co. to borrow money on bond, under their common seal, & the money is to be made payable in such manner, at such time, & at such rate of interest, as they shall think proper, & the rents & profits of the undertaking are to be a security for the money so borrowed, with interest, & all bondholders shall be equally entitled to a claim or lien on the rents & profits in proportion to the sums thereby secured, & without any preference by reason of the priority of date of any such securities, or any other account whatever :—*Held*: this clause did not prevent a creditor, to whom the co. had given a bond under their common seal, conditioned for the payment of the principal money at a fixed day, & interest in the meantime, from suing the co. for the penalty of that bond; the clause at the end of the sect. only applying to prevent a creditor recovering under his judgment in preference to others.—*BOLCKOW v. HERNE BAY PIER CO.* (1852), 1 E. & B. 74; 7 Ry. & Can. Cas. 231; 22 L. J. Q. B. 33; 20 L. T. O. S. 79; 17 Jur. 260; 118 E. R. 364; *sub nom. BALKOW v. HERNE BAY PIER CO.*, 1 W. R. 34. *Annotation*:—*Mentd. Great Southern & Western Ry. v. Corry & Turquand* (1867), 15 W. R. 650.

8636. —Sale—When court may order.—A co. was formed under a deed of settlement, its object & business being the purchase of the exhibition buildings in Hyde Park & the reconstruction thereof on another site, & the forming & maintaining of conservatories, parks, & museums for the illustration & advancement of the arts, sciences, & manufactures & the cultivation of a refined taste among all classes of the community. The co. was subsequently incorporated by statute 40 & 41 Vict. c. cxvii. & empowered to issue debentures, the debenture-stock & the interest thereon being the first charge on the undertaking & property of the co. There had been default, & a receiver & manager had been appointed in a debenture-holder's action :—*Held*: under its special Acts the co. had power to sell its land & undertaking, & therefore it was not a co., like a railway co., in which the public had any rights or interest, & the ct. had jurisdiction to order a sale of the undertaking & property.—*SAUNDERS v. BEVAN* (1912), 107 L. T. 70; 28 T. L. R. 618; 56 Sol. Jo. 666, H. L.; *affg. S. C. sub nom. Re CRYSTAL PALACE CO.*, *FOX v. THE CO.* (1911), 104 L. T. 898, C. A.

SUB-SECT. 11.—WINDING UP.

Compare Part IX., Sect. 15, *ante*.

END OF VOL. X.

